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20 **UNITED STATES DISTRICT COURT**
21 **NORTHERN DISTRICT OF CALIFORNIA**

22 ELLIOT LIBMAN, individually and on behalf
23 of all others similarly situated,

24 Plaintiff,

25 v.

26 APPLE, INC.,

27 Defendant.

28 Case No.

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

1 Plaintiff Elliot Libman (hereinafter “Plaintiff”) brings this action on behalf of himself and
2 all others similarly situated against Defendant Apple, Inc. (hereinafter “Defendant” or “Apple”).
3 Plaintiff makes the following allegations pursuant to the investigation of his counsel and based
4 upon information and belief, except as to the allegations specifically pertaining to himself, which
5 are based on personal knowledge.

6 NATURE OF THE CASE

7 1. Defendant violates state law in connection with its illegal recording of consumers’
8 confidential activity on its consumer mobile applications (“apps”)—a huge and growing treasure
9 trove of data that Apple amasses and uses for its own profit.

10 2. Consumers value their data privacy and increasingly find that their privacy is critical
11 in a virtual and interconnected society. People everywhere are becoming more aware and
12 concerned that large corporations are collecting, recording and exploiting for profit their personal
13 communications and private information.

14 3. Well aware of these justified and growing concerns over privacy, Apple—the
15 world’s largest technology company—has assured and continues to assure its consumers and users
16 that, when it comes to mobile app activity, users are in control of what information they share. For
17 example, Apple’s Advertising & Privacy Policy states on the first page:

18 Apple-delivered advertising helps people discover apps, products, and services
19 while respecting user privacy. Apple’s advertising platform is designed to protect
20 your information and *give you control over how we use your information.*¹

21 (emphasis added).

22 4. Apple purports to offer consumers the option to control what app browsing and
23 activity data Apple collects by adjusting their privacy settings to turn off “Allow Apps to Request
24 to Track” before opening or browsing mobile apps. Apple repeatedly assures its consumers that
25 “Apple requires app developers to ask for permission before they track your activity.” Thus, the
26 necessary implication is that apps that do not ask for permission cannot track your activity.

27 _____
28 ¹ <https://www.apple.com/legal/privacy/data/en/apple-advertising/> (last accessed November 10, 2022).

1 5. Additionally, Apple’s iPhone and iPad Analytics settings make an explicit promise.
2 Apple says that it will “disable [the sharing of] Device Analytics altogether” if a consumer turns
3 off, respectively, “Share iPhone Analytics” or “Share iPad Analytics.”²

4 6. Based on these explicit representations, consumers reviewing Apple’s privacy
5 controls are left with the reasonable impression that Apple will stop collecting and recording all of
6 their app information or activity if “Allow Apps to Request to Track” and/or “Share [Device]
7 Analytics” settings are turned off.

8 7. But Apple’s assurances and promises regarding privacy are utterly false.

9 8. Apple records, tracks, collects and monetizes analytics data—including browsing
10 history and activity information—regardless of what safeguards or “privacy settings” consumers
11 undertake to protect their privacy. Even when consumers follow Apple’s own instructions and turn
12 off “Allow Apps to Request to Track” and/or “Share [Device] Analytics” on their privacy controls,
13 Apple nevertheless continues to record consumers’ app usage, app browsing communications, and
14 personal information in its proprietary Apple apps, including the App Store, Apple Music, Apple
15 TV, Books, and Stocks.

16 9. Security researchers at the software company Mysk found the analytics controls
17 discussed above and other privacy settings had no obvious effect on Apple’s data collection—the
18 tracking remained the same whether iPhone Analytics was switched on or off.³

19 10. Apple’s practices infringe upon consumers’ privacy; intentionally deceive
20 consumers; give Apple and its employees power to learn intimate details about individuals’ lives,
21 interests, and app usage; and make Apple a potential target for “one-stop shopping” by any
22 government, private, or criminal actor who wants to undermine individuals’ privacy, security, or
23 freedom. Through its pervasive and unlawful data tracking and collection business, Apple knows
24

25
26 ² If a consumer has an Apple Watch paired to their iPhone, they must instead turn off the setting for
27 “Share iPhone and Watch analytics” for the same effect. Hereinafter, this setting, across devices,
will be referred to as “Share [Device] Analytics.”

28 ³ <https://gizmodo.com/apple-iphone-analytics-tracking-even-when-off-app-store-1849757558> (last
accessed November 10, 2022).

1 even the most intimate and potentially embarrassing aspects of the user’s app usage—regardless of
2 whether the user accepts Apple’s illusory offer to keep such activities private.

3 11. California privacy laws prohibit unauthorized recording of confidential
4 communications.

5 12. Plaintiff is an individual whose mobile app usage was tracked by Apple during the
6 period after Apple first offered users the ability to turn off “Allow Apps to Request to Track”
7 and/or “Share [Device] Analytics” and the present (the “Class Period”) with his or her “Allow
8 Apps to Request to Track” and/or “Share [Device] Analytics” turned off.

9 13. Apple’s tracking and data collection included detailed data collected by Apple,
10 whereby Apple created and monetized user information without those users’ consent.

11 14. Plaintiff brings state law claims on behalf of other similarly-situated iPhone and
12 iPad users in the United States (the “Class”) arising from Apple’s knowing and unauthorized
13 recording, copying, taking, use, and tracking of consumers’ communications and activity, and its
14 knowing and unauthorized invasion of consumer privacy.

15 **PARTIES**

16 15. Plaintiff Elliot Libman is a resident of New York, New York, and a citizen of New
17 York. Plaintiff Libman currently owns an Apple iPhone 13 that he purchased from Defendant
18 through a T-Mobile store in or around May 2022. Plaintiff Libman regularly accesses iPhone apps
19 including the App Store, Apple Music, Apple TV, Books, and/or Stocks. Plaintiff Libman has
20 turned off “Allow Apps to Request to Track” and “Share iPhone Analytics” on his privacy
21 controls. Despite this, Apple has accessed Plaintiff’s data while “Allow Apps to Request to Track”
22 and “Share iPhone Analytics” were turned off.

23 16. Defendant Apple, Inc. is a California Corporation with its principal place of
24 business in Cupertino, California.

25 **JURISDICTION AND VENUE**

26 17. Jurisdiction is proper in this Court pursuant to the Class Action Fairness Act
27 (“CAFA”), 28 U.S.C. § 1332(d)(2) because this is a class action in which at least one member of
28

1 the class is a citizen of a state different from any Defendant, the amount in controversy exceeds \$5
2 million, exclusive of interest and costs, and the proposed class contains more than 100 members.

3 18. This Court has personal jurisdiction over the Defendant because Defendant
4 maintains its principal place of business in this District and because a substantial part of the events
5 or omissions giving rise to the claims asserted herein occurred in this District.

6 19. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because a substantial
7 part of the events or omissions giving rise to the claims asserted herein occurred in this District and
8 because Defendant maintains its principal place of business in this District.

9 **GENERAL BACKGROUND**

10 20. Apple engages in the same surreptitious tracking practices with respect to consumer
11 use of mobile apps.

12 21. Apple can identify certain “actions” consumers take within an app.

13 22. For example, the App Store harvests information about every action users take
14 while using the app in real time, including what users tapped on, which apps users search for, what
15 ads users see, and how long users looked at a given app and how users found it. The App Store app
16 sends details to Apple about users and their devices as well, including ID numbers, what kind of
17 phone they are using, their screen resolution, their keyboard languages, how they’re connected to
18 the internet—notably, the kind of information commonly used for device fingerprinting.

19 23. Most of the apps that send analytics data share consistent ID numbers, which would
20 allow Apple to track user activity across its services.

21 24. For example, the Stocks app sends Apple users’ lists of watched stocks, the names
22 stocks users viewed or searched for and time stamps for when users did it, as well as a record of
23 any news articles users see in the app.

24 25. These findings are out of line with standard industry practices. For example, in both
25 Google Chrome and Microsoft Edge, security experts have found that the above-described data is
26 not sent when analytics settings are turned off.

1 26. Privacy is one of the main issues that Apple uses to set its products apart from
2 competitors. In fact, Apple emblazoned 40-foot billboards of the iPhone with the simple slogan
3 “Privacy. That’s iPhone.” and ran the ads across the world for months.

4 27. Apple uses this tracked data to, *inter alia*, enhance its targeted advertising
5 algorithms.

6 28. Apple intentionally gives its consumers the impression that they have control over
7 whether, how, and when Apple collects their personal app data. But Apple’s privacy guarantees
8 are completely illusory. Apple collects personal information and communications content from
9 apps, originating from Apple iPhone and iPad users, irrespective of users’ clearly expressed
10 directives to Apple and Apple’s promise to honor those directives.

11 29. The data Apple surreptitiously collects is precisely the type of private, personal
12 information consumers wish and expect to protect when they take the steps Apple sets out for users
13 to control the private information Apple collects. Apple knowingly and intentionally recorded, and
14 continues to record, Plaintiff regardless of Plaintiff’s directives to Apple and no matter how
15 sensitive or personal his online app activities are.

16 30. There is no justification for Apple’s secret, misleading, and unauthorized recording
17 and collection of consumers’ private communications and app activity. Even to the extent Apple
18 claims it aggregates this data for later use, this process would occur only after Apple already
19 recorded, collected, reviewed, and analyzed individual user information. What Apple does with
20 consumers’ individual mobile app information after it has secretly recorded it is cold comfort for
21 those whose privacy Apple has already violated, especially because Apple repeatedly promises not
22 to engage in this very behavior. By secretly breaking its privacy promises, Apple breaches its
23 consumers’ expectations of privacy—expectations that Apple itself has gone to great lengths to
24 create through its false and lofty pronouncements about its concern for user privacy.

25 31. Plaintiff and Class members had a reasonable expectation of privacy that when
26 using Apple apps while having turned off “Allow Apps to Request to Track” and/or “Share
27 [Device] Analytics” Apple would not collect, record, disclose, or otherwise misuse their personal
28 communications and data.

1 32. Plaintiff’s and Class members’ expectation of privacy is deeply enshrined in
2 California’s Constitution. Article I, section 1 of the California Constitution provides: “All people
3 are by nature free and independent and have inalienable rights. Among these are enjoying and
4 defending life and liberty, acquiring, possessing, and protecting property, and pursuing and
5 obtaining safety, happiness, *and privacy*.” (emphasis added).

6 33. The phrase “and privacy” was added in 1972 after voters approved a proposed
7 legislative constitutional amendment designated as Proposition 11. Critically, the argument in favor
8 of Proposition 11 reveals that the legislative intent was to curb businesses’ control over the
9 unauthorized collection and use of consumers’ personal information, stating:

10 The right of privacy is the right to be left alone...It prevents government *and business*
11 *interests* from collecting and stockpiling unnecessary information about us and from
12 misusing information gathered for one purpose in order to serve other purposes or to
13 embarrass us. Fundamental to our privacy is the ability to control circulation of
14 personal information. This is essential to social relationships and personal freedom.⁴

15 34. Consistent with the language and intent of Proposition 11, a number of studies
16 examining the collection of consumers’ personal data confirm that the surreptitious taking of
17 personal, confidential, and private information—as Apple has done and does—violates
18 expectations of privacy that have been established as general social norms. Privacy polls and
19 studies uniformly show that the overwhelming majority of Americans consider one of the most
20 important privacy rights to be the need for an individual’s affirmative consent before a company
21 collects and shares a subscriber’s personal data. Indeed, a recent study by Consumer Reports shows
22 that 92% of Americans believe that internet companies should be required to obtain consent before
23 selling or sharing their data and the same percentage of Americans believe internet companies
24 should be required to provide consumers with a complete list of the information that has been
25 collected about them.⁵ Here, what Apple does is even worse. Consumers explicitly tell Apple they
26 **do not** want their communications monitored, and then Apple goes ahead and does it anyway.

27 ⁴ BALLOT PAMP., PROPOSED STATS. & AMENDS. TO CAL. CONST. WITH ARGUMENTS
28 TO VOTERS, GEN. ELECTION *26 (Nov. 7, 1972) (emphasis added).

⁵ Consumers Less Confident About Healthcare, Data Privacy, and Car Safety, New Survey Finds,
CONSUMER REPORTS (May 11, 2017),

1 35. Apple’s continuous recording of consumers’ communications and massive
2 consumer-data collection efforts is no accident. Apple is the largest technology company in the
3 world. It is estimated that more than 2.2 billion iPhones have been sold as of 2022, and Apple
4 boasts a net worth of over \$2 trillion.

5 36. Much of Apple’s enormous financial success results from its tracking and collection
6 of consumer personal information.

7 37. Apple profits from consumers by acquiring their sensitive and valuable personal
8 information. Through its various unauthorized tracking practices, Apple plants numerous tracking
9 mechanisms on consumers’ devices and apps, which allow Apple to track consumers’ app
10 browsing histories and correlate them with user, device, and browser IDs.

11 38. The information Apple tracks has and had massive economic value during the Class
12 Period. This value is well understood in the e-commerce industry, and personal information is now
13 viewed as a form of currency.

14 39. Professor Paul M. Schwartz noted in the Harvard Law Review:

15 Personal information is an important currency in the new millennium. The monetary
16 value of personal data is large and still growing, and corporate America is moving
17 quickly to profit from the trend. Companies view this information as a corporate
18 asset and have invested heavily in software that facilitates the collection of
consumer information.

19 Paul M. Schwartz, Property, Privacy and Personal Data, 117 HARV. L. REV. 2055, 2056–
20 57 (2004).

21 40. Likewise, in the Wall Street Journal, former fellow at the Open Society Institute
22 (and current principal technologist at the ACLU) Christopher Soghoian noted:

23 The dirty secret of the Web is that the “free” content and services that consumers
24 enjoy come with a hidden price: their own private data. Many of the major online
25 advertising companies are not interested in the data that we knowingly and willingly
26 share. Instead, these parasitic firms covertly track our web-browsing activities,
search behavior and geolocation information. Once collected, this mountain of data
is analyzed to build digital dossiers on millions of consumers, in some cases

27 _____
28 [https://www.consumerreports.org/consumerreports/consumers-less-confident-about-healthcare-
data-privacy-and-car-safety/](https://www.consumerreports.org/consumerreports/consumers-less-confident-about-healthcare-data-privacy-and-car-safety/).

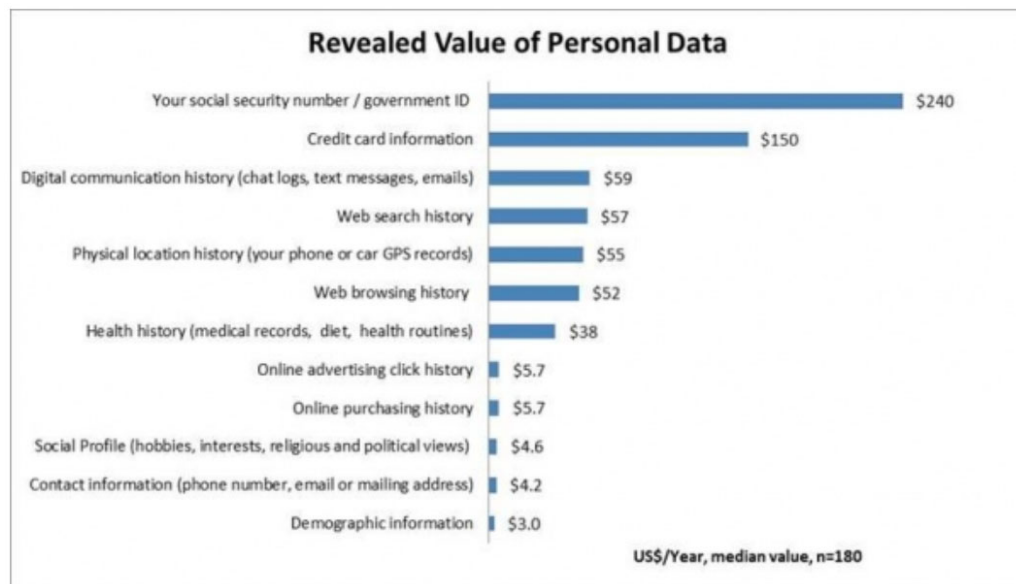
1 identifying us by name, gender, age as well as the medical conditions and political
2 issues we have researched online.

3 Although we now regularly trade our most private information for access to social-
4 networking sites and free content, the terms of this exchange were never clearly
5 communicated to consumers.

6 Julia Angwin, How Much Should People Worry About the Loss of Online Privacy?, THE
7 WALL STREET J. (Nov. 15, 2011),

8 <https://www.wsj.com/articles/SB10001424052970204190704577024262567105738>.

9 41. The cash value of consumers' personal information provided during the Class
10 Period to Apple is quantifiable. For example, in a study authored by Tim Morey, as early as 2011,
11 researchers studied the value that 180 internet consumers placed on keeping personal data secure.⁶
12 Contact information was valued by the study participants at approximately \$4.20 per year.
13 Demographic information was valued at approximately \$3.00 per year. But web browsing histories
14 were valued at a much higher rate: \$52.00 per year. The chart below summarizes the findings:



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24 42. As demonstrated above, user-correlated mobile app-page history has monetary
25 value. Apple's actions—its unauthorized collection and use of Plaintiff's and Class members'
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27 ⁶ Tim Morey, What's Your Personal Data Worth?, DESIGN MIND (Jan. 18, 2011),
28 <https://web.archive.org/web/20131206000037/http://designmind.frogdesign.com/blog/what039syour-personal-data-worth.html>.

1 data—directly caused Plaintiff’s and Class members’ data to be sold without permission and to
2 become less valuable. These actions have unjustly enriched Apple. Plaintiff and Class members
3 retain a stake in the profits Apple garnered from Plaintiff’s and Class members’ personal data,
4 including without limitation their browsing histories, and it is unjust for Apple to retain it.

5 43. User-correlated mobile app-page history also has non-monetary, privacy value. For
6 example, in a recent study by the Pew Research Center, 93% of Americans said it was “important”
7 for them to be “in control of who can get information” about them. Seventy-four percent said it was
8 “very important.” Eighty-seven percent of Americans said it was “important” for them not to have
9 someone watch or listen to them without their permission. Sixty-seven percent said it was “very
10 important.” And ninety percent of Americans said it was “important” that they be able to “control[]
11 what information is collected about [them].” Sixty-five percent said it was very important.

12 44. Likewise, in a 2011 Harris Poll study, seventy-six percent of Americans agreed that
13 online companies control too much of our personal information and know too much about our
14 browsing habits.

15 45. The applicable statutes of limitations have been tolled by Apple’s knowing and
16 active concealment and denial of the facts alleged herein.

17 46. Apple has repeatedly represented that its users could prevent Apple from tracking
18 user app viewing history and activity data by turning off “Allow Apps to Request to Track” and/or
19 “Share [Device] Analytics” from their Apple device’s privacy controls, including in the precise
20 location where users enable or disable these very settings. Nowhere did Apple ever represent that
21 it would continue to track and record user data once these steps were performed, nor has Apple
22 ever disclosed that it will still attempt to collect, aggregate, and analyze user data so that it can
23 continue to track individual consumers even when the user has followed Apple’s instructions on
24 how to use mobile apps privately.

25 47. Accordingly, Plaintiff and the Class could not have reasonably discovered the truth
26 about Apple’s practices until shortly before this class litigation was commenced. Plaintiff only
27 learned of the truth in the weeks leading up to the filing of this Complaint.

CLASS ALLEGATIONS

1
2 48. Plaintiff seeks to represent a class defined as:

3 All individuals who during the Class Period (a) turned off “Allow Apps to Request
4 to Track,” “Share iPhone Analytics,” “Share iPhone & Watch Analytics,” and/or
5 “Share iPad Analytics,” and (b) whose mobile app activity was still tracked by
6 Apple, (c) on an iPhone mobile device.

7 49. Specifically excluded from the Class are Defendant, Defendant’s officers, directors,
8 agents, trustees, parents, children, corporations, trusts, representatives, employees, principals,
9 servants, partners, joint ventures, or entities controlled by Defendant, and their heirs, successors,
10 assigns, or other persons or entities related to or affiliated with Defendant and/or Defendant’s
11 officers and/or directors, the judge assigned to this action, and any member of the judge’s
12 immediate family.

13 50. Plaintiff reserves the right to expand, limit, modify, or amend the class definition,
14 including the addition of one or more subclasses, in connection with his motion for class
15 certification, or at any other time, based on, inter alia, changing circumstances and/or new facts
16 obtained.

17 51. **Numerosity.** On information and belief, hundreds of thousands of consumers fall
18 into the definitions of the Class. Members of the Class can be identified through Defendant’s
19 records, discovery, and other third-party sources.

20 52. **Commonality and Predominance.** Common questions of law and fact exist as to
21 all members of the Class and predominate over any questions affecting only individual members of
22 the Class. These common legal and factual questions include, but are not limited to, the following:

23 (a) Whether Apple represented that the Class could control what
24 communications of user information, app browsing history, and app activity data were recorded,
25 received, or collected by Apple;

26 (b) Whether Apple gave the Class a reasonable expectation of privacy that their
27 communications of user information, app browsing history, and app activity data were not being
28 recorded, received, or collected by Apple while “Allow Apps to Request to Track” and “Share
 [Device] Analytics” were turned off;

1 (c) Whether Apple in fact recorded, received, or collected communications of
2 user information, app browsing history, and app activity from the Class while “Allow Apps to
3 Request to Track” and “Share [Device] Analytics” were turned off;

4 (d) Whether Apple’s practice of recording, receiving, or collecting
5 communications of user information, app browsing history, and app activity violated state privacy
6 laws;

7 (e) Whether Apple’s practice of recording, receiving, or collecting
8 communications of user information, app browsing history, and app activity violated state anti-
9 wiretapping laws;

10 (f) Whether Apple’s practice of recording, receiving, or collecting
11 communications of user information, app browsing history, and app activity violated any other
12 state laws;

13 (g) Whether Plaintiff and the Class are entitled to declaratory and/or injunctive
14 relief to enjoin the unlawful conduct alleged herein; and

15 (h) Whether Plaintiff and the Class have sustained damages as a result of
16 Apple’s conduct, and if so, what is the appropriate measure of damages or restitution.

17 53. **Typicality.** Plaintiff’s claims are typical of the claims of the other members of the
18 Class in that, among other things, all Class members were similarly situated and were comparably
19 injured through Defendant’s wrongful conduct as set forth herein. Further, there are no defenses
20 available to Defendant that are unique to Plaintiff.

21 54. **Adequacy of Representation.** Plaintiff will fairly and adequately protect the
22 interests of the Class. Plaintiff has retained counsel that is highly experienced in complex
23 consumer class action litigation, and Plaintiff intends to vigorously prosecute this action on behalf
24 of the Class. Furthermore, Plaintiff has no interests that are antagonistic to those of the Class.

25 55. **Superiority.** A class action is superior to all other available means for the fair and
26 efficient adjudication of this controversy. The damages or other financial detriment suffered by
27 individual Class members are relatively small compared to the burden and expense of individual
28 litigation of their claims against Defendant. It would thus be virtually impossible for the Class

1 obtain effective redress for the wrongs committed against the members on an individual basis.
2 Furthermore, even if Class members could afford such individualized litigation, the court system
3 could not. Individualized litigation would create the danger of inconsistent or contradictory
4 judgments arising from the same set of facts. Individualized litigation would also increase the
5 delay and expense to all parties and the court system from the issues raised by this action. By
6 contrast, the class action device provides the benefits of adjudication of these issues in a single
7 proceeding, economies of scale, and comprehensive supervision by a single court, and presents no
8 unusual management difficulties under the circumstances.

9 56. Further, Defendant has acted and refused to act on grounds generally applicable to
10 the proposed Class, thereby making appropriate final injunctive and declaratory relief with respect
11 to the Class as a whole.

12 CAUSES OF ACTION

13 COUNT I

14 **Unjust Enrichment (Quasi-Contract Claim for Restitution and Disgorgement) or, 15 alternatively, Breach of Contract**

16 57. Plaintiff incorporates by reference and re-alleges each and every allegation set forth
17 above as though fully set forth herein.

18 58. Plaintiff brings this claim individually and on behalf of members of the Class
19 against Defendant.

20 59. Plaintiff and Class members unwittingly conferred a benefit upon Apple. Apple took
21 and retained valuable personal information belonging to Plaintiff and Class members when it
22 intentionally and comprehensively obtained their personal without their consent, despite
23 representing that Apple would stop collecting Plaintiff and Class members mobile app information
24 or activity if the “Allow Apps to Request to Track” and/or “Share [Device] Analytics” settings are
25 turned off.

26 60. Apple was enriched when it utilized Plaintiff’s and Class members’ personal
27 information stored without consent for its own financial advantage to optimize its advertising
28

1 platform, including by allowing its paying advertisers to target Plaintiff and Class members for
2 lucrative advertisements.

3 61. Apple was enriched when it utilized Plaintiff's and Class members' personal
4 information stored without consent for its own financial advantage to build better services, to
5 maintain and improve Apple's services, to develop new services, and to measure performance, all
6 of which enable Apple to, and which Apple does use, to create operational efficiencies and be
7 competitive in a wide array of industries.

8 62. In exchange for Plaintiff's and Class members' loss of privacy and the financial
9 benefits Apple enjoyed as a result thereof, including, but not limited to, advertising profits, while
10 Plaintiff and Class members received nothing.

11 63. Defendant has knowledge of such benefits.

12 64. It would be inequitable for Apple to retain the benefits it has unjustly received.
13 Therefore, as a result of Apple's actions, Plaintiff and Class members seek an order that Apple
14 disgorge the profits and other benefits it has unjustly obtained.

15 65. Alternatively, to the extent Apple successfully asserts that the Terms of Service
16 form a binding contract that sufficiently defines the parties' rights regarding Apple's use of
17 Plaintiff's and Class members' location information, thereby rendering a claim for unjust
18 enrichment unavailable (which Plaintiff denies in the first instance), then Plaintiff alleges that
19 Apple's conduct constitutes a breach of any such binding contract. For example, Apple's Terms of
20 Service incorporate Apple's Privacy Policies, and in those Privacy Policies, Apple promises that
21 "Apple requires app developers to ask for permission before they track your activity." Apple
22 breaches this contract by furtively allowing Apple apps to track user activity despite not asking for
23 permission to do so.

24 66. To the extent Plaintiff seeks equitable relief, Plaintiff and the members of the Class
25 have suffered an injury in fact resulting in the loss of money and/or property as a proximate result
26 of the violations of law and wrongful conduct of Defendant alleged herein, and they lack an
27 adequate remedy at law to address the unfair conduct at issue here. Legal remedies available to
28 Plaintiff and class members are inadequate because they are not equally prompt and certain and in

1 other ways efficient as equitable relief. Damages are not equally certain as restitution because the
2 standard that governs restitution is different than the standard that governs damages. Hence, the
3 Court may award restitution even if it determines that Plaintiff fails to sufficiently adduce evidence
4 to support an award of damages. Damages and restitution are not the same amount. Unlike
5 damages, restitution is not limited to the amount of money a defendant wrongfully acquired plus
6 the legal rate of interest. Equitable relief, including restitution, entitles the plaintiff to recover all
7 profits from the wrongdoing, even where the original funds taken have grown far greater than the
8 legal rate of interest would recognize. Legal claims for damages are not equally certain as
9 restitution because claims for restitution entail few elements. In short, significant differences in
10 proof and certainty establish that any potential legal claim cannot serve as an adequate remedy at
11 law.

12 **COUNT II**
13 **Violation Of The California Invasion Of Privacy Act (“CIPA”)**
14 **California Penal Code § 632**

15 67. Plaintiff incorporates by reference and re-alleges each and every allegation set forth
16 above as though fully set forth herein.

17 68. Plaintiff brings this claim individually and on behalf of members of the Class
18 against Defendant.

19 69. The California Invasion of Privacy Act is codified at Cal. Penal Code §§ 630 to 638.
20 The Act begins with its statement of purpose:

21 The Legislature hereby declares that advances in science and technology have led to
22 the development of new devices and techniques for the purpose of eavesdropping
23 upon private communications and that the invasion of privacy resulting from the
24 continual and increasing use of such devices and techniques has created a serious
25 threat to the free exercise of personal liberties and cannot be tolerated in a free and
26 civilized society.

27 Cal. Penal Code § 630.

28 70. Cal. Penal Code § 632(a) provides, in pertinent part:

A person who, intentionally and without the consent of all parties to a confidential
communication, uses an electronic amplifying or recording device to eavesdrop
upon or record the confidential communication, whether the communication is
carried on among the parties in the presence of one another or by means of a

1 telegraph, telephone, or other device, except a radio, shall be punished by a fine not
2 exceeding two thousand five hundred dollars

3 71. A defendant must show it had the consent of all parties to a communication.

4 72. Apple maintains its principal place of business in California; designed, contrived
5 and effectuated its scheme to track and record consumer communications while they were
6 browsing apps from their device while “Allow Apps to Request to Track” and/or “Share [Device]
7 Analytics” were turned off; and has adopted California substantive law to govern its relationship
8 with its users.

9 73. At all relevant times, Apple’s tracking and recording of Plaintiff’s communications
10 while using an app with “Allow Apps to Request to Track” and/or “Share [Device] Analytics”
11 turned off was without authorization and consent from the Plaintiff.

12 74. Apple’s mobile applications constitute an “amplifying or recording device” under
13 the CIPA.

14 75. Plaintiff has suffered loss by reason of these violations, including, but not limited to,
15 violation of his rights to privacy and loss of value in their personally identifiable information.

16 76. Pursuant to California Penal Code § 637.2, Plaintiff has been injured by the
17 violations of California Penal Code § 632, and seeks damages for the greater of \$5,000 or three
18 times the amount of actual damages, as well as injunctive relief.

19 **COUNT III**
20 **Invasion Of Privacy**

21 77. Plaintiff incorporates by reference and re-alleges each and every allegation set forth
22 above as though fully set forth herein.

23 78. Plaintiff brings this claim individually and on behalf of members of the Class
24 against Defendant.

25 79. The right to privacy in California’s constitution creates a right of action against
26 private entities such as Apple.

27 80. The principal purpose of this constitutional right was to protect against unnecessary
28 information gathering, use, and dissemination by public and private entities, including Apple.

1 81. To plead a California constitutional privacy claim, a plaintiff must show an invasion
2 of (1) a legally protected privacy interest; (2) where the plaintiff had a reasonable expectation of
3 privacy in the circumstances; and (3) conduct by the defendant constituting a serious invasion of
4 privacy.

5 82. As described herein, Apple has intruded upon the following legally protected
6 privacy interests:

- 7 a. The California Wiretap Act as alleged herein;
- 8 b. A Fourth Amendment right to privacy contained on personal computing
9 devices, including web-browsing history, as explained by the United States
10 Supreme Court in the unanimous decision of *Riley v. California*;
- 11 c. The California Constitution, which guarantees Californians the right to
12 privacy;
- 13 d. Apple’s Privacy Policy and policies referenced therein, and other public
14 promises it made not to track or record Plaintiff’s communications or access
15 their computing devices and apps while “Allow Apps to Request to Track”
16 and/or “Share Device & Watch Analytics” are turned off.

17 83. Plaintiff had a reasonable expectation of privacy under the circumstances in that
18 Plaintiff could not have reasonably expected that Apple would commit acts in violation of state
19 civil and criminal laws; and Apple affirmatively promised consumers it would not track their
20 communications or access their computing devices or apps while they were using an app while in
21 “Allow Apps to Request to Track” and/or “Share [Device] Analytics” were turned off.

22 84. Apple’s actions constituted a serious invasion of privacy in that it:

- 23 a. Invaded a zone of privacy protected by the Fourth Amendment, namely the
24 right to privacy in data contained on personal computing devices, including
25 user data, app activity and app browsing histories;
- 26 b. Violated dozens of state criminal laws on wiretapping and invasion of
27 privacy, including the California Invasion of Privacy Act;

- 1 c. Invaded the privacy rights of millions of Americans without their consent;
2 and
3 d. Constituted the unauthorized taking of valuable information from millions of
4 Americans through deceit.

5 85. Committing criminal acts against millions of Americans constitutes an egregious
6 breach of social norms that is highly offensive.

7 86. The surreptitious and unauthorized tracking of the internet communications of
8 millions of Americans, particularly where, as here, they have taken active (and recommended)
9 measures to ensure their privacy, constitutes an egregious breach of social norms that is highly
10 offensive.

11 87. Apple's intentional intrusion into Plaintiff's internet communications and their
12 computing devices and apps was highly offensive to a reasonable person in that Apple violated
13 state criminal and civil laws designed to protect individual privacy and against theft.

14 88. The taking of personally identifiable information from millions of Americans
15 through deceit is highly offensive behavior.

16 89. Secret monitoring of private app browsing is highly offensive behavior.

17 90. Wiretapping and surreptitious recording of communications is highly offensive
18 behavior.

19 91. Apple lacked a legitimate business interest in tracking consumers while use an app
20 while "Allow Apps to Request to Track" and/or "Share [Device] Analytics" were turned off,
21 without their consent.

22 92. Plaintiff and the Class members have been damaged by Apple's invasion of their
23 privacy and are entitled to just compensation and injunctive relief.

24 93. Plaintiff and the members of the Class have suffered an injury in fact resulting in the
25 loss of money and/or property as a proximate result of the violations of law and wrongful conduct
26 of Defendant alleged herein, and they lack an adequate remedy at law to address the unfair conduct
27 at issue here. Legal remedies available to Plaintiff and class members are inadequate because they
28 are not equally prompt and certain and in other ways efficient as equitable relief. Damages are not

1 equally certain as restitution because the standard that governs restitution is different than the
2 standard that governs damages. Hence, the Court may award restitution even if it determines that
3 Plaintiff fails to sufficiently adduce evidence to support an award of damages. Damages and
4 restitution are not the same amount. Unlike damages, restitution is not limited to the amount of
5 money a defendant wrongfully acquired plus the legal rate of interest. Equitable relief, including
6 restitution, entitles the plaintiff to recover all profits from the wrongdoing, even where the original
7 funds taken have grown far greater than the legal rate of interest would recognize. Legal claims for
8 damages are not equally certain as restitution because claims for restitution entail few elements. In
9 short, significant differences in proof and certainty establish that any potential legal claim cannot
10 serve as an adequate remedy at law.

11
12 **PRAYER FOR RELIEF**

13 WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, seeks judgment
14 against Defendant, as follows:

- 15 a. For an order certifying the Class under Rule 23 of the Federal Rules of Civil
16 Procedure and naming Plaintiff as the representative for the Class and Plaintiff's
17 attorneys as Class Counsel;
- 18 b. For an order declaring that Defendant's conduct violates the laws referenced herein;
- 19 c. For an order finding in favor of Plaintiff and the Class on all counts asserted herein;
- 20 d. For compensatory, statutory, and punitive damages in amounts to be determined by
21 the Court and/or jury;
- 22 e. For prejudgment interest on all amounts awarded;
- 23 f. For an order of restitution and all other forms of equitable monetary relief;
- 24 g. For injunctive relief as the Court may deem proper; and
- 25 h. For an order awarding Plaintiff and the Class their reasonable attorneys' fees and
26 expenses and costs of suit.
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DEMAND FOR TRIAL BY JURY

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff demands a trial by jury of any and all issues in this action so triable of right.

Dated: November 10, 2022

BURSOR & FISHER, P.A.

By: /s/ L. Timothy Fisher
L. Timothy Fisher

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