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

15 KEATON HARVEY, individually and on
16 behalf of all others similarly situated,

17 Plaintiff,

19 vs.

20 APPLE INC., a California corporation,
21 and DOES 1-20, inclusive,

22 Defendants.

No 17-cv-07274-NC

**NOTICE OF MOTION AND
MOTION FOR PRELIMINARY
INJUNCTION AND FOR
EXPEDITED DISCOVERY**

DATE: February 21, 2018

TIME: 1:00pm

COURT: 4

JUDGE: Hon. Nathanael Cousins

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NOTICE OF MOTION

PLEASE TAKE NOTICE that at 1:00 p.m. on February 21, 2018, or as soon thereafter as the matter may be heard in the United States District Court for the Northern District of California, San Jose Division, located at 289 South 1st Street, San Jose, California 95113, before the Honorable Nathanael Cousins, in Courtroom 7, 4th Floor, Plaintiffs will and hereby do move the Court for an Order granting expedited discovery and a preliminary injunction prohibiting Defendant Apple Inc. (“Apple”) from altering or destroying evidence it collects or has collected in connection with the iPhone battery-replacement program Apple announced publicly on or about December 28, 2017, and its policy to recycle replaced batteries.

This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the accompanying Declaration of Dina E. Micheletti in Support of Motion for Expedited Discovery and Preliminary Injunction, any of the evidence on file with the Court and/or may be presented in support of the motion during the hearing, and on such other written and oral argument presented to the Court.

Dated: January 15, 2018

/s/ Jeffrey L. Fazio _____

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TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	<u>PAGE</u>
NOTICE OF MOTION.....	i
I. INTRODUCTION	1
II. SUMMARY OF PERTINENT FACTS	8
III. ARGUMENT	12
A. The Circumstances Presented Here Meet All of the Criteria for Granting the Requested Preliminary Injunction	12
1. Injunctive Relief is Necessary to Prevent the Likelihood of Irreparable Harm	13
2. Plaintiff Will Likely Succeed on the Merits, or, Minimally, Demonstrate Serious Questions Going to the Merits with the Balance of Hardships in Plaintiff’s Favor	14
B. There is Good Cause for Expedited Discovery	18
1. Expedited Discovery Will Ensure That Critical Evidence Is Preserved	19
2. Expedited Discovery Will Aid in the Resolution of Plaintiff’s Requested Injunction	21
3. Conducting a Deposition on an Expedited Basis Is Critical	22
IV. CONCLUSION.....	22

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PAGE

Cases

Alliance for the Wild Rockies v. Cottrell,
632 F.3d 1127 (9th Cir. 2011) 13, 14

American LegalNet, Inc. v. Davis,
673 F. Supp. 2d 1063 (C.D. Cal. 2009) 18, 19

Apple Inc. v. Mobile Star LLC,
2017 WL 4005468 (N.D. Cal. Sept. 12, 2017) 21

Apple Inc. v. Samsung Elecs. Co.,
2011 WL 1938154 (N.D. Cal. May 18, 2011)..... 19, 21

Apple Inc. v. Samsung Elecs. Co.,
888 F. Supp. 2d 976 (N.D. Cal. 2012)..... 20

Bigler-Engler v. Breg, Inc.,
7 Cal. App. 5th 276 (2017) 16

Cabricorn Power Co., Inc. v. Siemens Westinghouse Power Corp.,
220 F.R.D. 429 (W.D. Pa. 2004)..... 14

Collins v. eMachines, Inc.,
202 Cal. App. 4th 249 (2012) 17

In re Countrywide Fin. Corp. Derivative Litig.,
542 F. Supp. 2d 1160 (C.D. Cal. 2008)..... 18

In re: Lenovo Adware Litig.,
2016 WL 6277245 (N.D. Cal. Oct. 27, 2016) 17

Interserve, Inc. v. Fusion Garage PTE, Ltd.,
2010 WL 143665 (N.D. Cal., Jan. 7, 2010) 19

LaSala v. Marfin Popular Bank Public Co., Ltd.,
2009 WL 2449902 (D.N.J. Aug. 7, 2009) 15

NobelBiz, Inc. v. Wesson,
2014 WL 1588715 (S.D. Cal., April 18, 2014)..... 19

Oakland Tribune, Inc. v. Chronicle Publ’g Co.,
762 F.2d 1374 (9th Cir. 1985) 13

Rutledge v. Hewlett-Packard Co.,
238 Cal. App. 4th 1164 (2015),
as modified on denial of reh’g (Aug. 21, 2015)..... 16

SEC v. Bivona,
2016 WL 2996903 (N.D. Cal. May 25, 2016)..... 14

Semitool, Inc. v. Tokyo Electron Am., Inc.,
208 F.R.D. 273 (N.D. Cal. 2002)..... 18

1 *Shutterfly, Inc. v. ForeverArts, Inc.*,
 2012 WL 2911887 (N.D. Cal. July 13, 2012)..... 14

2

3 *Sierra Forest Legacy v. Rey*,
 577 F.3d 1015 (9th Cir. 2009)..... 12

4 *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*,
 47 Cal. 4th 553 (1998)..... 17

5

6 *United States v. Odessa Union Warehouse Co-op*,
 833 F.2d 172 (9th Cir. 1987)..... 13

7 *Warner Construction Corp. v. City of Los Angeles*,
 2 Cal.3d 285, 294 (1970) 16

8

9 *Washington v. Lumber Liquidators, Inc.*
 2015 WL 208992. (N.D. Cal., May 5, 2015)..... 20, 21, 22

10 *Zaccone v. Ford Motor Co.*
 2016 WL 2744837 (M.D. Fla. May 22, 2016) 14

11

12 **Statutes**

13 Cal. Bus. & Prof. Code § 17200 15

14 Cal. Civ. Code § 1709 15

15 Cal. Civ. Code § 1711 15

16 Cal. Civ. Code § 1750 15

17 Cal. Pen. Code § 502 17

18 **Rules**

19 Fed. R. Civ. P. 30(b)(6)..... passim

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1 **I. INTRODUCTION**

2 On December 21, 2017, Plaintiff Keaton Harvey filed the first-filed action in
3 this District against Apple, alleging a battery defect in the iPhone and the
4 corresponding secret modifications Apple made to its operating system (“iOS”), which,
5 while purportedly prolonging battery life, do so at a dramatic cost to device
6 performance.¹ Specifically, for more than five years, Apple has known that the
7 batteries it installs in its iPhones² can cause the devices to behave erratically; shut
8 down suddenly and unexpectedly (even though the batteries were charged enough to
9 last for hours under normal circumstances); and/or lose their charge precipitously, for
10 no apparent reason (“Battery Defect”). In response to reports of battery failures and
11 customer complaints, Apple offered partial recalls (limited to small batches of serial
12 numbers for various models of iPhones), and developed iOS updates, surreptitiously
13 including code that slows down the devices’ performance in an effort to prolong
14 battery life. Further, by slowing down iPhone processors with the iOS update, Apple
15 was able to convince Class³ members to replace their Affected iPhones prematurely
16 because the devices were left unable to perform even their most basic functions.

17 It is indisputable that Apple has surreptitiously modified iOS updates on
18 Affected iPhones for the purpose of throttling phone performance without Class
19 members’ knowledge or informed consent. When Class members updated their iOS
20 software, Apple neither disclosed nor otherwise indicated that their iPhones’
21 performance would be dramatically and detrimentally affected. Apple was ultimately
22 forced to admit that its software slowed iPhone performance after a third-party
23

24 ¹ See Declaration of Dina E. Micheletti in Support of Motion for Preliminary
25 Injunction (“Micheletti Decl.”), Ex. A (operative complaint).

26 ² Including the iPhone 5c, iPhone 6, iPhone 6 Plus, iPhone 6s, iPhone 6s Plus,
27 iPhone 7, and iPhone 7 Plus (collectively, “Affected iPhones”).

28 ³ The proposed “Class” is defined in Plaintiff’s Class Action Complaint as: “All
persons who reside in the United States who (a) own an Affected iPhone or (b) owned
an Affected iPhone and replaced it with a new device.” Dkt. No. 3 ¶ 21.

1 performed testing on Affected iPhones and called upon Apple to answer for its
2 misconduct. Prior to that admission, Apple had reaped the enormous financial
3 benefits of its deceptive behavior by selling Class members replacement iPhones,
4 and/or charging Class members who were savvy enough to demand replacement
5 batteries (as opposed to buying new iPhones) \$79 to replace those batteries.

6 Exactly one week after Plaintiff filed this lawsuit, on December 28, 2017, Apple
7 hastily announced a program by which it would collect and replace the batteries in
8 virtually every Affected iPhone⁴ for the reduced price of \$29—if Apple determined
9 that iPhone “needs battery replacement”—and said that the replacement program
10 would begin in “[e]arly 2018” (“Defective Battery Program”). Two days later, Apple
11 contradicted its own announcement and immediately began conducting its Defective
12 Battery Program, on Saturday, December 30, 2017.

13 The timing of this program is questionable: Apple denied the existence of a
14 problem with the batteries it installed in millions of iPhones for years, then
15 announced the Defective Battery Program one week after Plaintiff Harvey sued it for
16 fraudulently concealing the existence of defective batteries in Affected iPhones. It
17 then accelerated the program and began removing and replacing those batteries and
18 subjecting Affected iPhones to diagnostic tests. As a result, Class members are
19 handing over evidence from their iPhones to Apple, without any assurance that Apple
20 will not dispose of the replaced batteries or selectively use and/or dispose of the
21 information gathered as a means of trying to avoid liability.

22 Regardless of Apple’s intent, Apple is *de facto* engaging in early absent Class
23 member discovery and there is a very real risk that critical evidence Apple has
24

25 _____
26 ⁴ As discussed below, the only difference between the list of Affected iPhones
27 Plaintiff described in his complaint and the list of iPhones included in the
28 announcement of its battery-replacement program is that Apple’s list substitutes the
iPhone 5c with the iPhone SE.

1 collected—and continues to collect—from Class members in connection with the
 2 Defective Battery Program will be lost, altered, and/or destroyed because *Apple’s*
 3 *internal policies call for it to recycle all iPhone batteries,*⁵ *meaning that the*
 4 *evidence Class members expose to Apple’s data grab is destined for*
 5 *destruction and, thus, spoliation.*

6 For that reason, on January 7, 2018, Plaintiff’s counsel sent a letter to Apple’s
 7 counsel to remind it of its duties to preserve evidence and, specifically, how Plaintiff
 8 expects Apple to comply with those duties in the context of this litigation. In his letter,
 9 Plaintiff requested that Apple preserve all information that is potentially relevant to
 10 the claims and defenses in this litigation and all “Tangible Things,” including “all
 11 relevant hardware, including Affected iPhones and/or batteries in Apple’s possession,
 12 custody, or control that have been replaced as a result of the Battery Defect and/or
 13 the effects of Apple’s iOS updates in Affected Phones”⁶ Given the importance of
 14 safeguarding the defective batteries and other data Apple is removing from Class
 15 members’ iPhones in connection with its Defective Battery Program, Plaintiff also
 16 asked Apple to confirm, no later than January 9, 2018, that it would preserve that
 17 data, warning Apple that Plaintiff would seek judicial intervention if he did receive
 18 the requested assurances.⁷

19 Apple has failed to respond to any of the issues Plaintiff’s counsel raised in the
 20 letter.⁸ Since then, however, Plaintiff has discovered that Apple is reportedly
 21 encouraging Class members to bring their iPhones to Apple for early evaluation and
 22

23
 24 ⁵ Apple has a policy of recycling batteries that are replaced. This would include
 25 the defective batteries. *See Micheletti Decl., Ex. E* (“By servicing your Apple batteries
 only through Apple or an Apple authorized service provider, you can be sure they’ll
 be recycled with respect for the earth”).

26 ⁶ Micheletti Decl., Ex. F at 2.

27 ⁷ *See id.* at 4.

28 ⁸ Micheletti Decl., ¶ 7.

1 diagnosis, even though the batteries themselves are reportedly often backordered
2 (and thus cannot be immediately replaced), and even though Apple is reportedly
3 replacing the defective batteries regardless of the results of the diagnostic testing—
4 seemingly rendering the “diagnostic tests” meaningless in the context of the Defective
5 Battery Program, but potentially highly relevant to Apple’s efforts to gather, and then
6 self-select, evidence to support its defenses.

7 Due to the potential magnitude and character of the evidence that Apple
8 appears to be collecting from Class members, which may be destroyed pursuant to
9 Apple’s policy of recycling batteries, and because Apple has failed to offer Plaintiff
10 any assurance that this evidence is being preserved, Plaintiff brings this motion to
11 respectfully request that the Court issue an immediate, narrowly-tailored order
12 requiring Apple to maintain the status quo by preserving relevant evidence gathered
13 in connection with the Defective Battery Program and permitting immediate, focused
14 discovery into that program to determine, *inter alia*, (1) its nature, purpose, and scope
15 (including the kinds of information Apple is collecting from Class members and why);
16 (2) the status of the evidence collected to date and what efforts (if any) have been
17 made to preserve it; and (3) the most appropriate way to safeguard that evidence
18 during the pendency of this litigation, so that the Court may issue a final injunction
19 that is suitably tailored to reflect a more developed record. Specifically, Plaintiff
20 requests an order that:

21 (1) permits Plaintiff to immediately conduct a single, narrowly-tailored
22 deposition pursuant to Federal Rule of Civil Procedure 30(b)(6); and

23 (2) requires Apple to preserve potentially critical evidence by:

24 (a) ordering Apple to preserve and prohibiting Apple from destroying or
25 altering any battery or any iPhone that it obtains in connection with its
26 Defective Battery Program;

27

28

1 (b) requiring Apple to maintain and preserve, without alteration or
2 modification of any kind, each of the iPhones and batteries Apple obtains from
3 Class members in connection with its Defective Battery Program; and

4 (c) requiring Apple to maintain and preserve, without alteration or
5 modification, data and/or information Apple obtains in connection with its
6 Defective Battery Program.

7 This narrowly-tailored relief preserves the status quo, ensures that Apple
8 preserves evidence relevant to this litigation, and provides Plaintiff's counsel with an
9 opportunity to understand fully Apple's preservation policies as they relate to its
10 Defective Battery Program.

11 II. SUMMARY OF PERTINENT FACTS

12 After years of receiving complaints from Class members and other customers
13 that the lithium-ion batteries in their iPhones were acting erratically, draining
14 precipitously, and that their phones were suddenly shutting down even though
15 batteries still had a substantial amount of charge left in them,⁹ Apple consistently
16 denied that it was aware of any problem with iPhone batteries, with the sole
17 exception being small numbers of iPhone 5 devices manufactured in late 2012 and
18 early 2013,¹⁰ and an equally small number of iPhone 6s devices manufactured in

21 ⁹ See, e.g., Lisa Eadiciccio, *Some owners are reporting that the new iPhone 6S*
22 *randomly turns off and has other problems*, Business Insider (Sept. 30, 2015),
<http://www.businessinsider.com/apple-iphone-6s-turns-off-problems-2015-9>.

23 ¹⁰ See, e.g., Michael Rougeau, *Apple Will Replace Your Crummy iPhone 5*
24 *Battery*, TechRadar (Aug. 26, 2014), <http://www.techradar.com/news/phone-and-communications/mobile-phones/apple-will-replace-your-crummy-iphone-5-battery-1262569>. Apple admitted there was a problem with the batteries in iPhone 5s devices
25 as well, but did not conduct a replacement program. See Kate Solomon, *Apple*
26 *concedes that the battery life is dodgy on some iPhone 5s handsets*, TechRadar (Oct.
27 30, 2013), <http://www.techradar.com/news/phone-and-communications/mobile-phones/apple-concedes-that-the-battery-life-is-dodgy-on-some-iphone-5ses-1194863>.

1 September and October 2015, which Apple offered to replace for free.¹¹

2 In 2016, Class members were still complaining about the Battery Defect, and
3 a large and ever-growing number of Class members were also complaining that their
4 iPhones were operating so slowly that they were unable to perform even the most
5 basic functions (such as placing a call or sending a message).¹² As a result, large
6 numbers of Class members prematurely replaced their iPhones—including Plaintiff
7 Harvey, whose iPhone 6 had continually shut down unexpectedly before he updated
8 the iOS, at which point his iPhone 6 began operating so slowly that he replaced it
9 with a new iPhone for more than \$1,000.¹³ Again, however, Apple denied being aware
10 of any problem beyond the few iPhone 5 and iPhone 6s devices that were the subject
11 of the above-described limited programs.¹⁴

12 That changed on December 20, 2017, when independent laboratory testing
13 forced Apple to admit what Class members suspected for years, but were unable to
14 prove: that Apple had surreptitiously modified iOS software in a manner that slowed
15

16 ¹¹ *iPhone 6s Program for Unexpected Shutdown Issues*, Apple (Nov. 30, 2016),
17 <https://www.apple.com/support/iphone6s-unexpectedshutdown/>.

18 ¹² See, e.g., Official Apple Support Communities, iOS 10 painfully slow on
19 iPhone 6 (Sept. 16, 2016), <https://discussions.apple.com/thread/7669667>; Official
20 Apple Support Communities, iOS 10.2 draining battery FAST! (Dec. 13, 2016),
<https://discussions.apple.com/thread/7784905?start=105&tstart=0>.

21 ¹³ Micheletti Decl., Ex. A ¶ 9.

22 ¹⁴ See, e.g., Luke Dormehl, *Apple denies it will launch battery-replacement*
23 *program for iPhone 6*, Cult of Mac (Jan. 17, 2017),
<https://www.cultofmac.com/462814/iphone-6-random-shutdown/>. In light of the fact
24 that consumers in this country and others also reported that the batteries in their
25 iPhones were exploding and catching fire, Apple's response was surprising. See, e.g.,
Chris Matyszczyk, *Man Blames Third-Degree Burns on Exploding iPhone*, C/Net
26 (March 1, 2015), [https://www.cnet.com/news/man-blames-3rd-degree-burns-on-](https://www.cnet.com/news/man-blames-3rd-degree-burns-on-exploding-iphone-at-wake/)
[exploding-iphone-at-wake/](https://www.cnet.com/news/man-blames-3rd-degree-burns-on-exploding-iphone-at-wake/); Gordon Kelly, *Apple Warned iPhones Have a Serious*
27 *Problem*, Forbes (Dec. 2, 2016),
[https://www.forbes.com/sites/gordonkelly/2016/12/02/china-iphone-battery-warning-](https://www.forbes.com/sites/gordonkelly/2016/12/02/china-iphone-battery-warning-to-apple/#424a3cce222)
[to-apple/#424a3cce222](https://www.forbes.com/sites/gordonkelly/2016/12/02/china-iphone-battery-warning-to-apple/#424a3cce222).

1 processing speeds to a crawl (the “Throttling Software”). While Apple has, thus far,
2 only admitted to having used iOS to slow iPhones as of January 17, Plaintiff alleges
3 the evidence shows the practice began much earlier than that.¹⁵

4 On December 21, 2017, Plaintiff Harvey brought this action individually and
5 on behalf of a nationwide Class of current and former owners of Affected iPhones,
6 alleging that Apple used the Throttling Software to (a) mask the existence, nature,
7 and scope of the Battery Defect by causing Affected iPhones to process data more
8 slowly instead of suddenly shutting down; and (b) increase the sales of new iPhones
9 by causing owners of the now slow, barely-functional Affected iPhones to replace
10 those devices sooner than they would have if Apple had not surreptitiously
11 implemented the Throttling Software.¹⁶

12 On December 28, 2017, one week after this lawsuit was filed and as the public
13 was loudly denouncing Apple’s admission that it had used Throttling Software, Apple
14 announced the Defective Battery Program by which it would replace the batteries in
15 each of the devices Plaintiff Harvey identified as Affected iPhones in his complaint,¹⁷
16 and that it would charge Class members \$29 instead of the usual \$79 for the
17 replacement.¹⁸

19 ¹⁵ See, e.g., Micheletti Decl., ¶ 3 n. 2 & Ex. B; Jordan McMahon, *Apple had Way*
20 *Better Options than Slowing Down Your iPhone*, Wired (Dec. 21, 2017),
21 <https://www.wired.com/story/apple-iphone-battery-slow-down/>;
22 <https://www.wired.com/story/apple-iphone-battery-slow-down/>; Nicole Karlis, *Apple*
23 *half-apologizes for intentionally slowing old phones*, Salon (Dec. 29, 2017),
[https://www.salon.com/2017/12/29/apple-half-apologizes-for-intentionally-slowng-](https://www.salon.com/2017/12/29/apple-half-apologizes-for-intentionally-slowng-old-phones/)
[old-phones/](https://www.salon.com/2017/12/29/apple-half-apologizes-for-intentionally-slowng-old-phones/); see also, e.g., , Micheletti Decl., Ex. A ¶¶ 10, 13, 17.

24 ¹⁶ See Micheletti Decl., Ex. A ¶¶ 5.b, 10-19.

25 ¹⁷ With one difference: Apple’s list of devices includes the iPhone SE rather
26 than the iPhone 5c (*i.e.*, the iPhone SE, iPhone 6, iPhone 6 Plus, iPhone 6s, iPhone 6s
27 Plus, iPhone 7, iPhone 7 Plus). Compare Micheletti Decl., Ex. A ¶ 5.b with Micheletti
28 Decl., Ex. C at 1.

¹⁸ See Micheletti Decl., Ex. C at 2.

1 Apple claims that it initiated the Defective Battery Program for Class
 2 members' benefit.¹⁹ In reality, the Defective Battery Program enables Apple to
 3 remove defective batteries from Class members' iPhones and to obtain information
 4 about the devices' batteries.²⁰ Because Apple recycles iPhone batteries, participation
 5 in the Defective Battery Program could lead to the destruction of what may be some
 6 of the most critical evidence in this litigation.²¹

7 The spoliation concern was heightened when Apple refused to respond to
 8 Plaintiff's request for assurance that it would preserve such evidence.²² Plaintiff's
 9 concerns were further heightened when additional details of the Defective Battery
 10 Program were revealed. Namely, before telling Class members that their batteries
 11 will not be replaced until the supply is replenished, Apple reportedly subjects their
 12 iPhones to diagnostic testing (during which Apple personnel reportedly record
 13 information obtained from those devices)—notwithstanding that Apple is reportedly
 14 removing and replacing the batteries *regardless of the results of that testing*.²³

15 Absent appropriate safeguards, the Defective Battery Program allows Apple to
 16 collect—and possibly alter, lose, or destroy—hardware and information that could be

18 ¹⁹ *See id.*

19 ²⁰ *See, e.g.,* Micheletti Decl., ¶ 9 & Ex. G.

20 ²¹ *See* Micheletti Decl. ¶ 5 & Ex. E.

21 ²² *See* Micheletti Decl. ¶¶ 6-7 & Ex. F.

22 ²³ *See, e.g.,* *Apple will Replace the Battery in Your iPhone 6 or Later Even if it*
 23 *Passes a Genius Bar Diagnostic Test*. MacRumors (Jan 2, 2018),
<https://forums.macrumors.com/threads/apple-will-replace-the-battery-in-your-iphone-6-or-later-even-if-it-passes-a-genius-bar-diagnostic-test.2098675>. According
 24 to this report,

25 Apple can run a diagnostic on an iPhone's battery remotely—you
 26 don't need to visit an Apple Store. To initiate the battery
 27 diagnostic/replacement process, contact Apple Support by phone,
 28 online chat, email, or Twitter. Alternatively, you can schedule a
 Genius Bar appointment at an Apple Store with the Apple
 Support app. You can also inquire about a battery replacement
 with select Apple Authorized Service Providers.

Id. at 1.

1 vital to the prosecution of Class members' claims in this litigation. Again, ***Apple's***
2 ***policy is to recycle iPhone batteries.***

3 Accordingly, Plaintiff brings this motion for two principal reasons. First,
4 Plaintiff seeks a preliminary injunction requiring Apple to preserve all such
5 hardware and information until the Court has an opportunity to decide the most
6 efficient way for Apple to safeguard and produce evidence that is critical to the issues
7 in this litigation and to prevent its intentional or inadvertent alteration and
8 destruction. Second, to support Plaintiff's preliminary injunction request, Plaintiff
9 seeks a single Rule 30(b)(6) deposition on an expedited basis to obtain a more
10 complete picture of the kinds of evidence Apple acquires from Class members through
11 its Defective Battery Program, and the most efficient and least burdensome way to
12 preserve that evidence.

13 **III. ARGUMENT**

14 **A. The Circumstances Presented Here Meet All of the Criteria for** 15 **Granting the Requested Preliminary Injunction Motion**

16
17 Apple's decision to immediately embark on the Defective Battery Program
18 within one week of being sued, after previously allowing Class Members to either buy
19 replacement iPhones and/or pay \$50 more for those batteries for at least a year (if
20 Apple's time line is to be believed) or much longer (as Plaintiff has alleged), and its
21 refusal to confirm that it will comply with fundamental obligations to preserve critical
22 evidence pertaining to the issues in this litigation (while at the same time advertising
23 that it recycles replaced batteries) demonstrate that a preliminary injunction is
24 necessary to ensure the preservation of evidence relevant to this nationwide class
25 action. To obtain a preliminary injunction, a party must demonstrate: (1) that he is
26 likely to succeed on the merits; (2) the likelihood of suffering irreparable harm in the
27 absence of preliminary relief; (3) the balance of equities tips in the movant's favor;

28

1 and (4) an injunction is in the public interest. *Sierra Forest Legacy v. Rey*, 577 F.3d
2 1015, 1021 (9th Cir. 2009).

3 “While the test ‘requires the plaintiff to make a showing on all four prongs,’ the
4 showing need not be equally strong” under each prong. *Alliance for the Wild Rockies*
5 *v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). Instead, the factors are analyzed
6 on a sliding scale: “serious questions going to the merits, and a balance of hardship
7 that tips sharply toward the plaintiff can support issuance of a preliminary
8 injunction, so long as the plaintiff also shows that there is a likelihood of irreparable
9 injury and that the injunction is in the public interest.” *Id.* at 1131.

10 The Ninth Circuit has held that a party seeking a preliminary injunction must
11 show: (1) a combination of probable success on the merits and the possibility of
12 irreparable injury; or (2) that serious questions are raised and the balance of
13 hardships tips in the moving party’s favor. *United States v. Odessa Union Warehouse*
14 *Co-op*, 833 F.2d 172, 174 (9th Cir. 1987). “These two formulations represent two
15 points on a sliding scale in which the required degree of irreparable harm increases
16 as the probability of success decreases.” *Id.* (citing *Oakland Tribune, Inc. v. Chronicle*
17 *Publ’g Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985)).

18
19 **1. Injunctive Relief Is Necessary to Prevent the Likelihood
of Irreparable Harm**

20 As explained above, each time that Apple replaces a battery in an Affected
21 iPhone under its Defective Battery Program, Apple obtains highly relevant evidence
22 from Class members. This evidence includes the defective batteries, themselves, as
23 well as data obtained from the Affected iPhones.²⁴ As explained above, Plaintiff has
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26 ²⁴ See *iPhone Battery & Power Repair*, Apple,
27 <https://support.apple.com/iphone/repair/battery-power> (last accessed Jan. 15, 2018)
28 (“We’ll test your iPhone to see if it has a battery issue or a different power issue. Your repair fees depend on the diagnosis and if the issue is covered under warranty or AppleCare+.”).

1 asked Apple to agree to retain all of the batteries and information through the
2 pendency of this litigation; however, not only has Apple declined to agree to do so,
3 Apple's stated policy is to *recycle* iPhone batteries that it replaces.

4 Thus, without the requested injunction requiring Apple to preserve the
5 batteries and other data it obtains from Class members' iPhones through its Defective
6 Battery Program, there exists the very real and imminent likelihood that evidence
7 necessary to prove Class members' claims will be destroyed, causing irreparable harm
8 to Plaintiff and, correspondingly, the other Class members. *See, e.g., SEC v. Bivona*,
9 2016 WL 2996903, at *2 (N.D. Cal. May 25, 2016) ("preliminary injunction will
10 preserve the assets, preventing the 'irreparable harm' of those assets being
11 dissipated. . . preventing the 'irreparable harm' of evidence being destroyed or
12 concealed"); *Shutterfly, Inc. v. ForeverArts, Inc.*, No. CR 12-3671, 2012 WL 2911887,
13 at *3 (N.D. Cal. July 13, 2012) (recognizing that irreparable harm is likely to result
14 if evidence is destroyed).

15
16 **2. Plaintiff Will Likely Succeed on the Merits, or, Minimally,
17 Has Demonstrated Serious Questions Going to the Merits
with the Balance of Hardships in Plaintiff's Favor**

18 To satisfy the "likelihood of success on the merits" prong of the preliminary
19 injunction analysis, a plaintiff can demonstrate that he is likely to succeed on the
20 merits; alternatively, a preliminary injunction is also "appropriate when a plaintiff
21 demonstrates . . . that serious questions going to the merits were raised and the
22 balance of hardships tips sharply in the plaintiff's favor." *Alliance for the Wild
23 Rockies*, 632 F.3d at 1134-35. This standard is relaxed, however, in the context of an
24 injunction requiring the preservation of evidence, where likelihood of success in the
25 litigation on the merits is not a relevant consideration. *Capricorn Power Co., Inc. v.
26 Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 432-33 (W.D. Pa. 2004); *Zaccone
27 v. Ford Motor Co.*, 2016 WL 2744837, at *1 (M.D. Fla. May 22, 2016). When
28 evaluating whether to issue an order for preservation of discovery materials, the

1 Court should consider (1) the concern for maintenance of the evidence in the absence
2 of an order; (2) irreparable harm in the absence of an order; and (3) the capability of
3 the party to maintain the evidence. *LaSala v. Marfin Popular Bank Public Co., Ltd.*,
4 2009 WL 2449902, at *2 (D.N.J. Aug. 7, 2009).

5 Here, Apple itself has already provided the very evidence that unequivocally
6 demonstrates the likelihood of success on the merits: its *admission* that it used iOS
7 updates to throttle Affected iPhones, without telling Class members about the
8 Battery Defect or that the Throttling Software would affect iPhone performance—an
9 admission Apple made only after an independent third-party published a blog
10 post indicating that a change in iOS was throttling iPhone performance.²⁵

11 The claims underlying Plaintiff's preliminary injunction request are based on
12 common law fraudulent concealment principles (codified at Cal. Civ. Code §§ 1709-
13 1711) and two consumer-protection statutes: California's Consumers Legal Remedies
14 Act ("CLRA"), Cal. Civ. Code § 1750, *et seq.*, and Unfair Competition Law ("UCL"),
15 Cal. Bus. & Prof. Code § 17200, *et seq.* In short, Apple has brazenly represented that
16 each new iteration of the iPhone is the latest and greatest smartphone, with specific
17 emphasis on the iPhone's faster processors and purportedly longer battery life, to
18 persuade consumers to buy the iPhone over less expensive smartphones sold by its
19 competitors and to replace their old iPhones with new ones.²⁶ Apple knew that these
20
21

22 ²⁵ Will Oremus, *What's Wrong with Apple "Slowing Down" Older iPhones*,
23 Slate.com (Dec. 20, 2017),
24 http://www.slate.com/articles/technology/technology/2017/12/what_s_wrong_with_apple_slowing_down_older_iphones.html; John Poole, *iPhone Performance and Battery Age*, Primate Labs (Dec. 18, 2017), <http://www.geekbench.com/blog/2017/12/iphone-performance-and-battery-age>.
25

26 ²⁶ See Catherine Rampell, *Cracking the Apple Trap*, NY Times Magazine (Oct.
27 29, 2013), <http://www.nytimes.com/2013/11/03/magazine/why-apple-wants-to-bust-your-iphone.html>.
28

1 representations were false when it made them,²⁷ but they served to perpetuate its
2 concealment of the Battery Defect from each and every purchaser of Affected iPhones,
3 who had no access to the information Apple possessed about the Battery Defect.
4 Apple used the Throttling Software for similar purposes: By reducing the speeds of
5 the processors (which it touts as the fastest on the planet when introducing each new
6 model), Apple not only masked the existence of the Battery Defect, it forced
7 consumers to replace their Affected iPhones prematurely as a result of their
8 inordinately slow performance.

9 Apple's fraudulent concealment of the Battery Defect and the Throttling
10 Software is clearly actionable. *See, e.g., Bigler-Engler v. Breg, Inc.*, 7 Cal. App. 5th
11 276, 311 (2017) ("In *transactions* which do not involve fiduciary or confidential
12 relations, a cause of action for non-disclosure of material facts may arise in at least
13 three instances: (1) the defendant makes representations but does not disclose facts
14 which materially qualify the facts disclosed, or which render his disclosure likely to
15 mislead; (2) the facts are known or accessible only to defendant, and defendant knows
16 they are not known to or reasonably discoverable by the plaintiff; (3) the defendant
17 actively conceals discovery from the plaintiff") (quoting *Warner Construction Corp. v.*
18 *City of Los Angeles*, 2 Cal.3d 285, 294 (1970)).

19 The same conduct also violates the CLRA and the UCL. *See, e.g., Rutledge v.*
20 *Hewlett-Packard Co.*, 238 Cal. App. 4th 1164, 1174 (2015), *as modified on denial of*
21 *reh'g* (Aug. 21, 2015) ("The defective microchips were material, because they
22 corrupted floppy disks, a necessary component in the functioning of computers at the

23
24 ²⁷ Ivana Kottasová, *Apple: Yes, we're slowing down older iPhones*, CNN Tech
25 (Dec. 21, 2017), <http://money.cnn.com/2017/12/21/technology/apple-slows-down-old-iphones/index.html>;
26 Will Oremus, *What's Wrong with Apple "Slowing Down" Older iPhones*,
27 Slate.com (Dec. 20, 2017),
28 http://www.slate.com/articles/technology/technology/2017/12/what_s_wrong_with_apple_slowing_down_older_iphones.html;
John Poole, *iPhone Performance and Battery Age*, Primate Labs (Dec. 18, 2017), <http://www.geekbench.com/blog/2017/12/iphone-performance-and-battery-age/>

1 time. The court held that the defendant failed to disclose and actively concealed the
2 fact of this faulty microchip from consumers in violation of the CLRA and the UCL”)
3 (discussing *Collins v. eMachines, Inc.*, 202 Cal. App. 4th 249, 258 (2012)); *In re:*
4 *Lenovo Adware Litig.*, 2016 WL 6277245, at *11-14 (N.D. Cal. Oct. 27, 2016)
5 (discussing liability for fraudulent concealment and violations of the CLRA and UCL
6 by loading malicious software on computers).²⁸ Accordingly, Plaintiff has more than
7 demonstrated that he is likely to succeed on the merits of his claims.

8 At the very least, there can be no doubt that Plaintiff has raised serious
9 questions going to the merits of his claims. In addition, the balance of hardships tips
10 sharply in Plaintiff’s favor. Whatever else it may be doing, Apple’s Defective Battery
11 Program effectively enables Apple to engage in massive absent Class member
12 discovery, where Class members are not represented by counsel or even aware that
13 they are giving Apple information and hardware that Apple can potentially use to
14 defend itself in this lawsuit, and without any obvious safeguards to protect that
15 information and hardware so that Class counsel can inspect it. To the contrary, as
16 set forth above, Apple’s policy is to recycle the very batteries at issue, here, and Apple
17 ignored Plaintiff’s efforts to secure an agreement to safeguard it. Under these
18 circumstances, the balance of hardships that flows from the potential destruction of
19 valuable evidence unwittingly handed over by Class members to Apple do not just
20 cause the scale to tip in Plaintiff’s favor, they put a brick on the scale in Plaintiff’s
21 favor. Thus, the minimally-invasive injunction that Plaintiff requests (preserving
22 evidence) should be granted. *See Alliance for the Wild*, 632 F.3d at 1135 (preliminary
23 injunction may issue if court finds that plaintiff has presented “serious questions
24

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26 ²⁸ Apple’s conduct also violates California Penal Code section 502, which is
27 actionable under the UCL’s “unlawful” prong. *See, e.g., Stop Youth Addiction, Inc. v.*
28 *Lucky Stores, Inc.*, 47 Cal. 4th 553, 572 (1998) (holding that a private party can state
a UCL claim based on an alleged violation of a penal code provision, notwithstanding
the absence of a private right of action to enforce the penal code directly).

1 going to the merits” of plaintiff’s claims, and that the balance of hardships tilts
2 sharply toward the plaintiff).

3 **B. There is Good Cause for Expedited Discovery**

4 Although additional discovery is not necessary to rule on Plaintiff’s
5 preliminary injunction motion (as Apple’s policy to recycle iPhone batteries has, and
6 will, continue to potentially destroy relevant evidence), the proposed 30(b)(6)
7 deposition may reveal additional categories of documents that may need to be
8 preserved that is part of an existing evidence destruction policy, or ways to tailor an
9 existing injunction to minimize cost to Apple.

10 Accordingly, with a temporary injunction in place, the Court should grant
11 Plaintiff leave to conduct a single Rule 30(b)(6) deposition concerning the Defective
12 Battery Program on an expedited basis during the pendency of this motion to enable
13 Plaintiff to determine, *inter alia*, (1) its nature, purpose, and scope (including the
14 kinds of information Apple is collecting from Class members and why); (2) the status
15 of the evidence collected to date and what efforts (if any) have been made to preserve
16 it; and (3) the most appropriate way to safeguard that evidence during the pendency
17 of this litigation. This additional information will enable the Court to fine tune a
18 final injunction that is suitably tailored to reflect a more developed record, so as to
19 minimize undue burden on Apple while ensuring that that Plaintiff and his experts
20 have equal access to this evidence during the pendency of this litigation.

21 Before a party may obtain leave to conduct discovery prior to completing a
22 Rule 26(f) conference, that party must demonstrate that there is good cause for such
23 an order. *See, e.g., In re Countrywide Fin. Corp. Derivative Litig.*, 542 F. Supp. 2d 1160,
24 1179 (C.D. Cal. 2008); *American LegalNet, Inc. v. Davis*, 673 F. Supp. 2d 1063, 1066
25 (C.D. Cal. 2009). “Good cause exists ‘where the need for expedited discovery, in
26 consideration of the administration of justice, outweighs the prejudice to the responding
27 party.’” *In re Countrywide*, 542 F. Supp. 2d at 1179 (quoting *Semitool, Inc. v. Tokyo*
28 *Electron Am., Inc.*, 208 F.R.D. 273, 276(N.D. Cal. 2002)).

1 Among the factors commonly considered in determining the
2 reasonableness of expedited discovery are: (1) whether a preliminary
3 injunction is pending; (2) the breadth of the discovery requests; (3) the
4 purpose for requesting the expedited discovery; (4) the burden on the
5 defendants to comply with the requests; and (5) how far in advance of the
6 typical discovery process the request was made.

7 *American LegalNet, Inc.*, 673 F. Supp. 2d at 1067.

8 A preliminary injunction motion is not a prerequisite to demonstrating good
9 cause for expedited discovery. “[C]ourts have found that expedited discovery may be
10 justified to allow a plaintiff to determine whether to *seek* an early injunction.” *NobelBiz,*
11 *Inc. v. Wesson*, 2014 WL 1588715, at *15 (S.D. Cal., April 18, 2014) (citing *Interserve,*
12 *Inc. v. Fusion Garage PTE, Ltd.*, 2010 WL 143665, at *2 (N.D. Cal., Jan. 7, 2010))
13 (emphasis added). *See also Apple Inc. v. Samsung Elecs. Co.*, 2011 WL 1938154, at *1-
14 2 (N.D. Cal. May 18, 2011) (discussing same). Each of the above-described factors
15 weighs in favor of expedited discovery here.

16 **1. Expedited Discovery Will Ensure That Critical Evidence Is
17 Preserved While Imposing a Minimal Burden on Apple**

18 A deposition of a witness designated by Apple pursuant to Rule 30(b)(6) will
19 enable Plaintiff to develop a more complete factual record regarding the Defective
20 Battery Program, the evidence that is collected by Apple pursuant to that program,
21 and what evidence (if any) has been, or will be, altered or destroyed without judicial
22 intervention. Because Apple has *admitted* that it recycles batteries that it replaces
23 and has refused Plaintiff’s request to confirm that it will adhere to its obligations to
24 preserve evidence, a deposition is crucial to determine how many batteries Apple or
25 its affiliates have already destroyed (if any), and whether any are being preserved by
26
27
28

1 Apple for testing or pursuant to its ongoing obligations pursuant to this and other
2 materially identical pending litigation across the United States.²⁹

3 By the requested Rule 30(b)(6) deposition, Plaintiff's counsel will also have an
4 opportunity to ascertain the purposes for which Apple decided to conduct testing
5 required pursuant to the program, what kinds of hardware and information Apple
6 collects during that program, and how to preserve the integrity of that evidence in a
7 manner that is minimally burdensome. And when the discovery is concluded, the
8 parties will be in a better position to address the scope of any injunction; determine
9 whether it should be made permanent; and, if so, assess whether any changes need
10 to be made to it. See Micheletti Decl. ¶¶ 15-16.

11 The burden of submitting to a single deposition is *de minimis*, particularly
12 since the Defective Battery Program was conceived of and implemented less than one
13 month ago, meaning all personnel with knowledge of that program almost certainly
14 still work for Apple and are, therefore, easy to locate. Similarly, any documents
15 necessary to prepare a 30(b)(6) witness are equally new and, therefore, available.
16 Moreover, Apple has recently announced that it has run out of replacement batteries
17 for many versions of Affected iPhones and does not anticipate having a sufficient
18 supply for some of those devices for two weeks or more (or, in the case of the iPhone
19 6 Plus, several months), hence, while the Defective Battery Program will continue
20 (and Class members will be asked to submit their devices for diagnostics), it will not
21
22

23
24 ²⁹ It is axiomatic that all parties have a duty to “preserve property for another’s
25 use as evidence in pending or reasonably foreseeable litigation.” *Apple Inc. v.*
26 *Samsung Elecs. Co.*, 888 F. Supp. 2d 976, 989 (N.D. Cal. 2012). See also *Washington*
27 *v. Lumber Liquidators, Inc.*, 2015 WL 208992, at *2. (N.D. Cal., May 5, 2015) (because
28 plaintiff seeks the “development of a factual record in support of [his] preliminary
injunction, which seeks to preserve the status quo, the purpose for which discovery is
sought weighs in favor of expedited discovery.”).

1 fully resume for all Affected iPhones devices until late March or early April 2018.³⁰
2 This temporary, partial lull in the program is the ideal time to find out what can be
3 done to ensure what, if any, additional appropriate safeguards must be put in place
4 before it fully ramps up again. In the meantime, the preliminary injunction will
5 ensure that any evidence gathered in the interim will be preserved.

6 While the burden on Apple is slight, the benefit to Class members is great, in
7 that the information Plaintiff obtains by way of this discovery may further inform the
8 Court and the parties about additional evidence that may need to be preserved. The
9 narrow scope of information sought counsels in favor of granting Plaintiff's request.
10 *Washington*, 2015 WL 2089992, at *2 ("the breadth of Plaintiffs' requested discovery
11 is appropriately tailored in light of the purpose for which the information is sought.
12 Contrary to Defendant's characterization, Plaintiffs' request is not an open-ended
13 'fishing expedition.' . . . Rather, Plaintiffs merely seek to depose two individuals").
14 In light of the importance of preserving evidence at this critical juncture, the need for
15 expedited discovery clearly outweighs any claim of undue burden or prejudice Apple
16 might raise.

17
18 **2. Pendency of a Motion for Preliminary Injunction Favors Expedited Discovery.**

19 As discussed above, a preliminary injunction motion is not a prerequisite to
20 granting leave to conduct expedited discovery. *Apple Inc. v. Samsung Elecs. Co.*, 2011
21 WL 1938154 at *2 ("While Apple has not yet filed a motion for preliminary injunction,
22 courts have found that expedited discovery may be justified to allow a plaintiff to
23 determine whether to seek an early injunction"). Nonetheless, all courts agree that
24 the existence of a preliminary injunction motion may establish good cause for
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26 ³⁰ See Micheletti Decl. ¶ 12 & Ex. H; James Vincent, *Apple won't replace your*
27 *old iPhone 6 Plus battery until March because of short supplies*, The Verge (Jan. 11,
28 2018), <https://www.theverge.com/2018/1/11/16878412/iphone-slowdown-battery-replacement-wait-times-6-plus-supply-shortage>

1 expedited discovery. *Id.* See also *Washington*, 2015 WL 2089992, at *2 (“the Court
2 notes that the pendency of Plaintiffs’ motion for a preliminary injunction supports
3 their request for expedited discovery”); *Apple Inc. v. Mobile Star LLC*, 2017 WL
4 4005468, at *4 (N.D. Cal. Sept. 12, 2017) (allowing Apple to take a second Rule
5 30(b)(6) deposition after granting expedited discovery: “my purpose in
6 allowing expedited discovery was so that Apple could secure enough discovery to
7 support its motion for a Preliminary Injunction, not to be ready for trial”).

8 9 **3. Conducting a Deposition On an Expedited Basis Is Critical.**

10 Rules 26 and 30 of the Federal Rules of Civil Procedure allow a party to
11 commence discovery any time after the initial case management conference. After
12 Plaintiff Harvey filed this action on December 21, 2017, however, at least twelve other
13 apparently related class actions have been filed in this judicial district, alone. *See*,
14 *e.g.*, Dkt. No. 16 (Admin. Mot. to Relate Cases). And, because a motion to transfer
15 those and other related cases is pending before the JPML, any initial case
16 management conference will likely be delayed.

17 Nonetheless, “a district judge should not automatically stay discovery,
18 postpone rulings on pending motions, or generally suspend further rulings upon a
19 parties’ motion to the MDL Panel for transfer and consolidation.” *Washington*, 2015
20 WL 2089992, at *3 (quotations omitted). The JPML transfer motion will take months
21 to resolve. Meanwhile, Apple will continue to conduct its Defective Battery Program
22 and, regardless of the outcome of the MDL motion, evidence will be at risk of loss
23 and/or alteration. Thus, there is every reason to grant Plaintiff leave to conduct the
24 requested deposition—particularly in light of the fact that the deposition will not
25 occur that far in advance of the typical discovery process.

26 **IV. CONCLUSION**

27 Apple’s publicly-available statements demonstrate that it is likely presently
28 disposing of evidence that is highly relevant to Plaintiff’s claims, and the potential

1 claims of millions of other Class members in this litigation. The Court should issue
 2 a narrow injunction that preserves the status quo, and prevents Apple from
 3 destroying additional evidence relevant to Plaintiff's claims. A Rule 30(b)(6)
 4 deposition of Apple's corporate representative will provide necessary, additional
 5 evidence as to whether the injunction should be expanded to preserve any additional
 6 evidence that may be part of a destruction policy, or ways in which to tailor the
 7 preliminary injunction to minimize expense while still preserving evidence necessary
 8 to support Plaintiff's claims. Since the Plaintiff merely wants to preserve the status
 9 quo, ensure that Apple suspends its policy of recycling batteries, and ensure that
 10 necessary evidence is preserved, the Court should grant Plaintiff's narrowly-tailored
 11 motion.

12 DATED: January 15, 2018

13 */s/ Jeffrey L. Fazio*

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