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Toronto

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

(Court Seal)

MICHAEL FERRACCI

Plaintiff

and

**APPLE INC., APPLE VALUE SERVICES, LLC
and APPLE CANADA INC.**

Defendants

Proceeding under the *Class Proceedings Act*, 1992

STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service in this court office, **WITHIN TWENTY DAYS** after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES,

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LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date _____ Issued by _____
Local Registrar

Address of court office: Superior Court of Justice
330 University Avenue
Toronto ON M5G 1R7

TO: Apple Inc.
1 Apple Park Way
Cupertino CA 95014
United States of America

AND TO: Apple Value Services, LLC
4701 Cox Rd. Ste 285
Glen Allen VA 23060 – 6808
United States of America

AND TO: Apple Canada Inc.
120 Bremner Boulevard, Suite 1600
Toronto ON M5J 0A8

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CLAIM

1. The plaintiff, Michael Ferracci, on his own behalf and on behalf of all Class Members seeks:

- (a) an order certifying this action as a class proceeding and appointing the plaintiff as the representative plaintiff;
- (b) a declaration that the defendants made certain representations regarding the stored value on Apple Gift Cards that were false, and that those representations were made negligently;
- (c) with respect to the defendants' agreements with Class Members:
 - (i) a declaration that the defendants acted in bad faith under the terms of the Class Members' Apple Gift Cards; and
 - (ii) a declaration that the terms of the Apple Gift Cards that purport to shield the defendants from all liability are unconscionable and unenforceable; or
 - (iii) in the alternative to paragraphs (i) and (ii), a declaration that the agreements with the defendants are voidable and unenforceable;
- (d) a declaration that the defendants engaged in conduct contrary to Part VI of the *Competition Act*;

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- (e) a declaration that the defendants engaged in unfair practices contrary to Part III of the *Consumer Protection Act* and the equivalent parts and provisions in the Equivalent Consumer Protection Statutes;
- (f) a declaration that it is not in the interests of justice to require that notice be given pursuant to section 18(15) of the *Consumer Protection Act* (and pursuant to any parallel provisions of the Equivalent Consumer Protection Statutes), and waiving any such notice requirements;
- (g) statutory damages pursuant to the *Competition Act*, the *Consumer Protection Act* and the Equivalent Consumer Protection Statutes in an amount to be determined by this Honourable Court;
- (h) general damages for negligence, breach of contract including breach of the duty of good faith, and conduct that is contrary to the *Consumer Protection Act*, Equivalent Consumer Protection Statutes, and the *Competition Act*, in the amount of \$100,000,000;
- (i) in the alternative to paragraph (h):
 - (i) restitution for unjust enrichment in an amount equivalent to the purchase price of the Apple Gift Cards; or
 - (ii) disgorgement of the defendants' profits from the Class Members' Apple Gift Card purchases;

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- (j) a constructive trust and tracing or following order in respect of the value of all funds received by the defendants from the Class for purchases of Apple Gift Cards;
- (k) a reference to decide any issues not decided at the trial of the common issues;
- (l) punitive, aggravated, and exemplary damages in the amount of \$25,000,000;
- (m) pre-judgment and post-judgement interest on the amounts payable as set out above in equity or otherwise at common law, or alternatively pursuant to sections 128 and 129 of the *Courts of Justice Act*, RSO 1990, c C.43, compounded annually;
- (n) costs of this action pursuant to the *Class Proceedings Act, 1992*, SO 1992, c 6, or alternatively, on a full or substantial indemnity basis together with applicable HST thereon;
- (o) the costs of administration of a plan of distribution of the recovery in this action and notice pursuant to section 26(9) of the *Class Proceedings Act, 1992*, SO 1992, c 6 plus applicable taxes; and
- (p) such further and other relief as may be required by the *Class Proceedings Act, 1992*, SO 1992, c 6 or as this Honourable Court may deem just.

A. DEFINED TERMS

2. In this statement of claim, in addition to the terms that are defined elsewhere herein, the following terms have the following meanings:

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- (a) “**Apple**” means, collectively, the defendants Apple Inc., Apple Value Services, LLC, and Apple Canada Inc.;
- (b) “**Apple Gift Card(s)**” means iTunes, App Store and Apple Music gift cards and codes issued and managed by the defendant Apple Value Services, LLC;
- (c) “**CJA**” means the *Courts of Justice Act*, RSO 1990, c C.43;
- (d) “**Class**” or “**Class Members**” means, collectively: “All persons in the Canada who purchased one or more Apple Gift Cards, provided the redemption codes to people unknown to them who sought the codes under false pretenses, and were not refunded the value of the Apple Gift Cards by Apple, during the Class Period”;
- (e) “**Class Period**” means the period of time between January 1, 2016 and the certification of this lawsuit as a class proceeding;
- (f) “**Competition Act**” means the *Competition Act*, RSC, 1985, c C-34, as amended;
- (g) “**Consumer Protection Act**” means the *Consumer Protection Act, 2002*, SO 2002, c 30, Sched A, as amended;
- (h) “**CPA**” means the *Class Proceedings Act, 1992*, SO 1992, c 6;
- (i) “**Equivalent Consumer Protection Statutes**” means the *Business Practices and Consumer Protection Act*, SBC 2004, c 2, the *Fair Trading Act*, RSA 2000, c F-2, the *Consumer Protection and Business Practices Act*, SS 2014, c C-30.2, the *Business Practices Act*, CCSM, c B120, the *Consumer Protection and Business*

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Practices Act, SNL 2009, c C-31.1, the *Consumer Protection Act*, RSNS 1989, c 92 and the *Business Practices Act*, RSPEI 1988, c B-7, the *Consumer Protection Act*, CQLR, c P-40.1, all as amended; and

- (j) “**Representations**” includes the representations described at paragraphs 33-34, below.

B. NATURE OF THE ACTION

3. Every year, Canadians lose millions of dollars to scammers. Scammers commonly ask their victims to make payments via gift cards.

4. Between 2017 and 2019, the Canadian Anti-Fraud Centre received reports of frauds from thousands of Canadians who collectively lost between \$6 million and \$7 million each year through scams involving gift cards, gift certificates, payment cards, and prepaid card transfers. During the same period, the Centre reports that Canadians lost more than \$48.5 million in scams in which the payment method was not recorded.

5. Frauds are underreported.

6. This is an action by a purchaser of Apple Gift Cards, on behalf of himself and other purchasers, who lost the stored value of the cards in ubiquitous gift card scams.

7. Apple Gift Cards are made available by the defendants to be used exclusively as currency on their platforms. The defendants are aware that Apple Gift Cards are also a wildly popular currency for fraudsters.

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8. Fraudsters can profit from the scams in one of two ways. They can sell the redemption codes to other users at a discount. Alternatively, they can make purchases of, or in, apps that they control. In the latter case, a scammer who makes purchases with the stored value of an Apple Gift Card in his or her own app will receive 70% of the value, which Apple transfers to the scammer within approximately 30-60 days.

9. In either case, Apple retains its 30% commission.

10. Apple profits from gift card scams by representing to purchasers that there is no recourse to obtain a refund of their stolen money. In fact, Apple has the information, sophistication, and control to hold and reverse transfers to fraudsters, and to flag suspicious transactions.

11. Furthermore, Apple retains up to 30% of these stolen funds as a commission when the fraudsters redeem their value through Apple's exclusive and tightly-controlled payment system. These commissions are the direct and foreseeable proceeds of fraudulent activity, and yet Apple retains them for itself, while falsely telling the victims that their losses are untraceable.

C. THE DEFENDANTS

12. The defendant Apple Inc. is a technology company incorporated under the laws of the State of Delaware and headquartered in Cupertino, California.

13. The defendant Apple Canada Inc. is Apple Inc.'s Canadian subsidiary. It is incorporated under the laws of the Province of Ontario and is headquartered in Toronto.

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14. The defendant Apple Value Services, LLC issues and manages Apple Gift Cards. The company is incorporated under the laws of the State of Virginia, and is also headquartered in Cupertino, California.

15. The business of each of the defendants is inextricably interwoven with that of the other and each is the agent of the other for the purposes of the sale and/or distribution of Apple Gift Cards in Canada and for the purposes of the breaches described hereinafter.

D. APPLE GIFT CARDS

16. Apple operates an online marketplace called the App Store.

17. The App Store offers software applications (“**apps**”). Some apps are free, while others must be purchased, offer in-app purchases, and/or require a paid subscription.

18. Before an app is made available on the App Store, Apple must review and approve the app.

19. Apple routinely rejects apps on the basis of privacy concerns or bugs. Apple also uses its review process to identify apps that may be used to facilitate illegal activities. It reserves the right to reject any app used for illegal purposes, and to suspend approved apps suspected of facilitating illegal activities.

20. Accordingly, Apple has knowledge of the design of all apps on the App Store.

21. Apple also sells services through the iTunes Store, Apple Books, Apple Music, Apple Arcade, among others (together with App Store purchases, “**Apple Services**”).

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22. Apple has complete control over the marketplace for Apple Services and full information on the transactions conducted therein.

23. Each user who wishes to access Apple Services and each app or content developer (“**Vendor**”) who wishes to offer Apple Services through Apple’s platforms must register for an account, called an “**Apple ID**”.

24. In order to obtain an Apple ID, a user must provide his or her email address, billing information, and date of birth. Apple verifies the user via telephone call or email to the registered email address.

25. Apple Gift Cards are stored-value vouchers which can be purchased and used by Apple users toward the purchase of Apple Services. Apple sells Apple Gift Cards online from Apple itself and offline through independent third-party retailers, such as grocery stores and drug stores.

26. Each Apple Gift Card sold offline has a unique redemption code on the back which, once revealed, can be used to load its value to the user’s Apple ID. In order to access the value of an Apple Gift Card, the user must have an Apple ID to which the value is loaded.

27. After a user purchases Apple Services, Apple pays funds to the Vendor, less a 30% commission. Apple retains the funds until a threshold amount is owed to the Vendor. Once that threshold is met, Apple transfers the funds electronically to the Vendor within 30 days of the end of that month. This effectively leaves Apple in possession of the funds for at least 30-60 days.

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28. In order to receive payment, the Vendor must have an Apple ID. Apple has sufficient details about each Vendor's identity and banking information to make the transfer.

29. From a user's purchase and redemption to the payment of Vendors, Apple has abundant information about each Apple Gift Card transaction. In particular:

- (a) Apple knows which Apple Gift Cards are sold, where, and in what amounts;
- (b) for offline sales, the retailer must communicate with Apple to activate each Apple Gift Card;
- (c) the stored value must be loaded to an Apple ID, and Apple knows the Apple ID to which an Apple Gift Card's value has been loaded;
- (d) Apple knows where, on its platforms, stored value from each Apple ID is spent;
- (e) Apple pays Vendors for purchases made by customers, and therefore knows the identity and banking information of the ultimate recipients of the value; and
- (f) Apple can use an Apple Gift Card's unique redemption code to determine which Vendor(s) ultimately received the associated value.

30. Apple's terms of service for users and Vendors entitle Apple to void stored value if it suspects fraud in connection with the Apple Gift Card or Apple ID.

31. Apple Gift Cards are a popular tool for fraudsters to scam members of the public, and Apple knows this.

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32. Apple devotes a webpage to these scams, which states the following:

A string of scams are taking place asking people to make payments over the phone for things such as taxes, hospital bills, bail money, debt collection, and utility bills. The scams are committed using many methods, including gift cards. As the fraudsters are sometimes requesting codes from App Store & iTunes Gift Cards or Apple Store Gift Cards, we want to make sure our customers are aware of these scams.

Regardless of the reason for payment, the scam follows a certain formula: The victim receives a call instilling panic and urgency to make a payment by purchasing App Store & iTunes Gift Cards or Apple Store Gift Cards from the nearest retailer (convenience store, electronics retailer, etc.). After the cards have been purchased, the victim is asked to pay by sharing the code(s) on the back of the card with the caller over the phone.

It's important to know that App Store & iTunes Gift Cards can be used ONLY to purchase goods and services from the iTunes Store, App Store, Apple Books, for an Apple Music subscription, or for iCloud storage. Apple Store Gift Cards can be redeemed ONLY on the Apple Online Store and at Apple Retail Stores. If you're approached to use the cards for any other payment, you could very likely be the target of a scam and should immediately report it to your local police department as well as the Canada Revenue Agency.¹

33. On the webpage, Apple represents that “Once those numbers are provided to the scammers, the funds on the card will likely be spent before you are able to contact Apple or law enforcement.”

34. Further, when the purchaser of an Apple Gift Card contacts Apple to report a scam, Apple’s customer service representatives follow a standardized protocol or script. Pursuant to the protocol, a representative records the redemption code for the Apple Gift Card and, if the system indicates that it has been redeemed, the representative represents to the victim that there is nothing Apple can do to refund the value.

¹ <https://support.apple.com/en-ca/itunes-gift-card-scams>

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35. The Representations are false, and they convey the impression that payments made from the stored value on Apple Gift Cards are untraceable and/or irretrievable.

36. In fact, when Apple becomes aware of a redemption code that has been sent to a scammer, Apple can identify (i) the Apple ID that redeemed the code, (ii) the value loaded to that Apple ID, (iii) the Apple Services purchased by that Apple ID, (iv) the financial details of the Vendor associated with those Apple Services, and (v) whether Apple has transferred funds to that Vendor in respect of the purchase(s).

37. Through the Representations, Apple conceals from victims that it can identify the Apple ID that redeemed the Apple Gift Card(s) and that there is a time window in which Apple can stop (i) the owner of the Apple ID from making purchases with the value, and (ii) payments from Apple to the Vendor from whom purchases have been made.

38. Apple publishes Apple Gift Cards' terms online. Apple Gift Cards direct purchasers to the online terms and conditions in small text, which is not visible to the purchasers until after the cards are purchased and activated.

39. In the Apple Gift Cards' terms, Apple preserves its rights to monitor for suspicious transactions, deactivate credit, and suspend customer accounts:

Use of Account Balance: Store Credit can be loaded into your account by redeeming physical or digital gift cards into your Account balance or by adding funds to your Account balance through the Services.

You agree to not use Store Credit in any manner that is misleading, deceptive, unfair, or otherwise harmful to Issuer, Apple or its customers. We reserve the right, without notice to you, to void or deactivate Store Credit (including a portion of your Account balance) without a refund, suspend or terminate

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customer accounts, suspend or terminate the ability to use the Services, cancel or limit orders and bill alternative forms of payment if we suspect Store Credit was obtained, used, or applied to an Apple ID fraudulently, unlawfully, or otherwise in violation of these terms and conditions. ...

Risk of Loss: Neither Issuer nor Apple is responsible for lost or stolen Store Credit or Content Codes. Risk of loss and title for Store Credit passes to the purchaser in Virginia upon electronic transmission to the recipient.

Apple reserves the right to close accounts and request alternative forms of payment if Store Credit or a Content Code is fraudulently obtained or used on the Service.

40. By virtue of Apple's sophistication and the information it has about each step in every Apple Gift Cards transaction, Apple is capable of flagging suspicious Apple Gift Cards purchases, identifying the Apple ID(s) to which value from those purchases is redeemed, tracing the destination of that value, and identifying other Apple IDs that transfer value to the same destination.

41. Apple can and does void and deactivate stored value from Apple Gift Cards and suspend or terminate accounts associated with suspicious or fraudulent activity. When Apple deactivates an account it suspects of fraud, it confiscates the funds associated with the account and makes no attempt to return the funds to the victims from whom the funds were illegally obtained.

42. It is not in Apple's interest to return funds to victims. By virtue of Apple's 30% commission, these scams are profitable for Apple.

43. Apple concealed and continues to conceal its ability to identify suspicious transactions and track, freeze, and recover value from Apple Gift Cards.

E. THE PLAINTIFF

44. The plaintiff, Michael Ferracci, is a resident of Ontario.

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45. On or about October 4, 2019, the plaintiff received a string of emails from an imposter purporting to be his employer. His employer was abroad at the time.

46. The emails directed the plaintiff to purchase 10 Apple Gift Cards, each in the amount of \$100, and to send each card's unique redemption code by reply.

47. The plaintiff did not realize at the time that the sender was an imposter. He complied with the direction, and purchased the cards at Shoppers Drug Mart.

48. The imposter requested additional Apple Gift Cards, which the plaintiff attempted to purchase. Before the transaction was complete, however, the store manager at Shoppers Drug Mart advised the plaintiff that the transaction was unusual and that he should call his employer to confirm the instruction by phone.

49. Immediately upon discovering the scam, the plaintiff contacted an Apple customer support representative who told him that this type of fraud is common, and that Apple routinely receives requests from its customers to reverse such transactions.

50. Apple was able to intercept seven of the transfers and return \$700 to the plaintiff. Apple did not return the \$300 balance.

51. It is within Apple's exclusive knowledge whether the \$300 was actually irretrievable, or whether Apple kept the amount as its commission on the plaintiff's Apple Gift Card purchases.

52. The plaintiff seeks to represent the Class.

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F. LEGAL DUTIES OWED TO THE PLAINTIFF AND CLASS MEMBERS

53. Apple owes the plaintiff and Class Members contractual and other duties at common law and statutory duties under the *Consumer Protection Act* and Equivalent Consumer Protection Legislation.

54. Apple has breached these duties causing the plaintiff and Class Members to suffer damages for which Apple is liable.

(i) Breach of contract and the duty of good faith

55. Apple's terms indicate that it takes frauds seriously. It retains the rights to void credits and terminate accounts.

56. It is an implied term of the agreement that Apple will exercise these rights to protect Apple Gift Card purchasers from frauds conducted and facilitated through Apple's platforms.

57. It is a further implied term that Apple will not turn a blind eye to fraudulent activity involving its Apple Gift Cards or derive a benefit from activity related to its Apple Gift Cards that it knows or ought reasonably to know is fraudulent.

58. Apple purports in its terms to limit its own liability for Apple Gift Cards that are lost, stolen, or used without permission. Apple, however, cannot disclaim liability for loss or damage resulting from scams that it intentionally or recklessly perpetuates or facilitates.

59. Apple is aware that scams begin with the scammer "instilling panic and urgency to make a payment". It understands that victims are in a position of vulnerability when they purchase Apple Gift Cards based on the scammers' false pretences. Victims have little time to review Apple's

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terms online, and no opportunity or bargaining power whatsoever to negotiate the Apple Gift Card terms.

60. Any attempt by Apple to disclaim liability for loss or damage resulting from Apple Gift Card scams is unconscionable and unenforceable in light of its role in those scams.

61. On its website about Canadian Apple Gift Cards scams, Apple prominently directs victims to contact their local police department and the Canada Revenue Agency, neither of which can reasonably track, stop, or reverse the payment(s), or identify the recipient(s). All of the power to do any of these things resides with Apple.

62. Only at the end of the webpage, after representing that “the funds on the card will likely be spent before you are able to contact Apple”, does it say that “If you have additional questions, or if you’ve been a victim of a scam involving App Store & iTunes Gift Cards or Apple Store Gift Cards, you can contact Apple Support.”

63. As Apple Gift Card purchasers, the plaintiff and Class Members are in a position of vulnerability in relation to Apple. There is extreme information asymmetry with respect to transactions on Apple’s platforms and the transfer of stored value from Apple Gift Cards.

64. From the purchase of Apple Gift Cards to the payment of scammers, Apple is in complete control of the cards’ stored value. When presented with a card’s unique redemption code, Apple knows the Apple ID to which the value was loaded, which purchases were made by that Apple ID, and the ultimate recipient of the funds.

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65. Furthermore, Apple constantly monitors its platforms for fraudulent and suspicious activity. Through its constant monitoring and as a result of reports of fraudulent activity reported to it by victims, Apple has detailed and accurate knowledge of which transactions are, or are likely to have been, the results of fraudulent activity by third-party scammers.

66. Apple has the exclusive ability to prevent payments to scammers and to return funds to their victims.

67. As a result, Apple owes the plaintiff and Class Members a duty to act in good faith and to honour its statutory and contractual obligations.

68. Apple breached its duty of good faith by conveying the impression that Apple does not and cannot know where value from Apple Gift Cards is directed, and that Apple cannot stop payments, freeze value, and return funds to the victims.

69. To the extent that Apple relies on its terms to seize proceeds of fraud from scammers, for itself, and not to protect purchasers or return funds to victims of scams, this is also a breach of its duty of good faith.

70. Apple misdirects victims to agencies knowing that it alone can assist victims, and further that time is of the essence in preventing payments to scammers.

71. Apple's performance in these circumstances is abusive, unfair, or dishonest.

72. In the alternative, Apple knew or ought to have known that its agreements with victims were the result of the scammers' false pretences and the victims' unilateral mistake. The

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agreements are therefore defective, and the plaintiff and Class Members are entitled to the return of their mistaken payments.

(ii) Negligence

73. Apple markets and sells Apple Gift Cards as a currency for exclusive use on its platforms. Apple knows that the products are frequently used to defraud Canadians.

74. Apple is in a position to protect purchasers from these scams, and in a position to hold and reverse transfers made on its platform. Due to Apple's proximity to purchasers of Apple Gift Cards, the foreseeability of purchasers' losses, its extensive control over its infrastructure, and its high degree of sophistication as the world's largest information technology company, Apple owes a duty to the plaintiff and Class Members to do so.

75. Apple breached its duty to the Class by, *inter alia*, developing a platform and form of payment that facilitate scams.

76. Given the information it has and its extensive resources as the world's largest information technology company, Apple is in a unique position to identify and flag suspicious transactions, and to hold funds and return them to victims.

77. Further, the Representations mislead victims into believing that once a scammer obtains an Apple Gift Card's redemption code, or redeems the card, Apple is unable to track or retrieve the value of that card. Apple profits from the Representation by retaining its commission on funds paid to scammers. Apple knows that there is a delay between purchases on its platform and the ultimate payment of funds to Vendors.

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78. The plaintiff and Class Members suffered damages as a result of Apple's negligent design of its platforms, and negligent performance of its services.

(iii) Breach of the Consumer Protection Act, Equivalent Consumer Protection Legislation, and the Competition Act

79. The Representations are false, misleading and/or deceptive.

80. Further and in the alternative, the Representations are unconscionable, including because:

(a) the Representations are likely to mislead victims, and victims rely on them to their detriment;

(b) Apple knows that the scams rely on victims being motivated by "panic and urgency", that victims are often unlikely to report frauds, and therefore that victims are not reasonably able to protect their interests; and

(c) the Representations insulate a transaction that is:

(i) excessively one-sided in favour of someone other than the victim; and

(ii) so adverse to the victim as to be inequitable.

81. The plaintiff relies on sections 14-15 of the *Consumer Protection Act*, and equivalent provisions in Equivalent Consumer Protection Legislation.

82. In making the Representations, Apple knowingly or recklessly protects its commission-based interest in the proceeds of these scams, contrary to section 52(1) of the *Competition Act*.

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83. To the extent that the *Consumer Protection Act* or Equivalent Consumer Protection Legislation require the plaintiff and Class Members to give notice to the defendants, the plaintiff pleads that it is in the interests of justice to waive this requirement.

(iv) Equitable relief

a. Restitution for unjust enrichment

84. Scammers demand the purchase of Apple Gift Cards under false pretences, and victims make the purchases by mistake. The victims' donative intent is defective.

85. The plaintiff relies on the doctrine of money had and received with respect to the entire purchase of Apple Gift Cards by the plaintiff and each Class Member.

86. In the alternative, to the extent that Apple retains its 30% commission on purchases made under false pretense and for illegal purposes, Apple retains a benefit which corresponds with the deprivation of the plaintiff and Class Members.

87. For the reasons described above, the terms of the Class Members' Apple Gift Cards are tainted by illegality and/or are unconscionable, or alternatively the agreements were formed by an unconscionable unilateral mistake. There is, accordingly, no juristic reason for the defendants' enrichment.

b. Tracing and following of value

88. Apple knows what it does with the value of its commissions on Apple Gift Cards. Apple knows where this value is located and of any transfers of value between the defendants and their related companies.

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89. The plaintiff seeks a tracing or following of the value of the Class Members' Apple Gift Cards and, to the extent value has passed between the defendants or companies in their control, a following of that value.

90. The plaintiff seeks a constructive trust impressed on that value on the basis of the allegations herein.

c. Disgorgement of profits

91. In the alternative to compensation for breach of contract or negligence, this is an exceptional case where disgorgement is an appropriate remedy for the defendants' breaches.

92. On these facts, expectation damages are an inadequate remedy, and disgorgement of proceeds retained by Apple would serve a compensatory purpose.

G. AGGRAVATED, PUNITIVE AND EXEMPLARY DAMAGES

93. Apple's conduct as pleaded above is unlawful, high-handed and carried out in bad faith.

94. The conduct described herein aids scammers, and facilitates wide-spread frauds that bilk Canadians out of millions of dollars. Apple keeps 30%.

95. Apple knows or ought reasonably to know that Apple Gift Cards are a currency of choice for fraudsters. Apple is facilitating or, at the very least, turning a blind eye to the frauds in order to make a profit.

96. Apple's conduct constitutes a profit-motivated disregard for the rights and interests of Class Members who were and are vulnerable to the actions, decisions and power of Apple.

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H. SERVICE

97. This originating process may be served without court order outside Ontario because the claim is:

- (a) in respect of real or personal property in Ontario (Rule 17.02(a) of the *Rules of Civil Procedure*);
- (b) in respect of a tort committed in Ontario (Rule 17.02(g) of the *Rules of Civil Procedure*); and,
- (c) brought against a person ordinarily resident or carrying on business in Ontario (Rule 17.02 (p) of the *Rules of Civil Procedure*).

August 7, 2020

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MICHAEL FERRACCI
Plaintiff

-and-

APPLE INC., et al
Defendants

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT TORONTO
Proceeding under the *Class Proceedings Act*, 1992

STATEMENT OF CLAIM

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