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15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION
18

19 KATE MCLELLAN, TERESA BLACK, and
20 DAVID URBAN, Individually and on Behalf
of All Others Similarly Situated,
21
22 Plaintiffs,
23 v.
24 FITBIT, INC.,
25 Defendant.

Case No. 16-cv-36
CLASS ACTION
CLASS ACTION COMPLAINT
DEMAND FOR JURY TRIAL

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INTRODUCTION

1
2 1. In widespread national advertising—including, for example, commercials run
3 repeatedly during Major League Baseball’s nationally-televised 2015 World Series¹—defendant
4 Fitbit, Inc. (“Fitbit”) touted the purported ability of its wrist-based “activity trackers” to
5 accurately record a wearer’s heart rate during intense physical activity. To perform this
6 function, Fitbit equipped its “Charge HR”² and “Surge” fitness watches (the “PurePulse
7 Trackers”) with an LED-based technology called “PurePulse™”.

8 2. Fitbit’s representation is repeated in and echoed throughout its advertising of the
9 PurePulse Trackers, which employs such descriptive slogans as “Every Beat Counts” and “Know
10 Your Heart.” But the representation is false. Far from “counting every beat,” the PurePulse
11 Trackers *do not* and *cannot* consistently and accurately record wearers’ heart rates during the
12 intense physical activity for which Fitbit expressly markets them.

13 3. Plaintiffs and many consumers like them have experienced—and testing
14 confirms—that the PurePulse Trackers consistently mis-record heart rates by a very significant
15 margin, particularly during exercise (described herein as the “Heart Rate Defect”).

16 4. This failure did not keep Fitbit from heavily promoting the heart rate monitoring
17 feature of the PurePulse Trackers and from profiting handsomely from it. In so doing, Fitbit
18 defrauded the public and cheated its customers, including Plaintiffs.

19 5. The heart rate monitoring function of the PurePulse Trackers is a material—
20 indeed, in some cases, vital—feature of the product. Not only are accurate heart readings
21 important for all of those engaging in fitness, they are critical to the health and well-being of
22 those Class members whose medical conditions require them to maintain (or not to exceed) a
23 certain heart rate.

24 6. On behalf of all those who purchased the Fitbit PurePulse Trackers, Plaintiffs
25 Kate McLellan, Teresa Black, and David Urban bring this action on behalf of themselves and all

26
27 ¹ Available at <https://www.youtube.com/watch?v=vpdHMyvkJxw> (last viewed December 1,
2015).

28 ² According to reports, in March 2016, Fitbit will be replacing the Charge HR with the “Blaze”
model, which employs the same PurePulse technology.

1 those similarly situated to seek redress through this proposed class action in the form of
2 injunctive relief, damages, restitution, and all other relief this Court deems equitable.

3 7. While Fitbit purports to bind all purchasers of its products to an arbitration
4 agreement and class action ban, its method of doing so fails as a matter of law and, in itself,
5 constitutes an unfair and deceptive trade practice.

6 8. Fitbit sells the PurePulse Trackers through its own website and through many
7 third party online and brick and mortar stores. While Fitbit's own website requires purchasers to
8 agree to be bound by the arbitration clause and class action ban, third party websites and brick
9 and mortar stores do not require any such agreement in advance or at the time of purchase, or
10 give *any* indication that such agreement will later be required.

11 9. Instead, Fitbit includes *inside* the box an instruction that requires purchasers
12 (post-purchase) to visit its website and register the PurePulse Tracker online. Such registration
13 is required for the PurePulse Trackers to work. In an affidavit submitted in other litigation,
14 Fitbit admitted that “[a] Fitbit user cannot use their [PurePulse Trackers] as intended until the
15 user has set up an [online] account. In fact, the Charge HR cannot even be used as a watch until
16 the device is first paired to a Fitbit account, which requires the user to agree to the Terms of
17 Service.” (*Brickman v. Fitbit, Inc.*, No. 3:15-cv-2077, Doc. 41 at ¶4 (N.D. Cal. Sept. 30, 2015)).

18 10. Remarkably, Fitbit purports to bind anyone who even visits its website to its
19 arbitration agreement, whether they purchase or register any product at all.³ Indeed, if the reader
20 of this Complaint visits the link provided in the footnote below, she or he is now deemed by
21 Fitbit to have agreed to arbitration and a class action ban.

22 11. Fitbit's attempt to bind customers who bought PurePulse Trackers through third
23 party online and brick and mortar stores to an arbitration clause and class action ban post-
24 purchase when they register the product—which is required to make the product function as

25 ³ The Terms of Service provide: “You must accept these Terms to create a Fitbit account and to
26 use the Fitbit Service. If you do not have an account, you accept these Terms by
27 visiting www.fitbit.com or using any part of the Fitbit Service. IF YOU DO NOT ACCEPT
28 THESE TERMS, DO NOT CREATE AN ACCOUNT, VISIT WWW.FITBIT.COM OR USE
THE FITBIT SERVICE.” Available at <https://www.fitbit.com/au/terms> (last visited December
21, 2015). Of course, by the time one reads the Terms of Service, he or she has already visited
Fitbit.com and, per Fitbit, already surrendered his or her Constitutional right to a jury trial.

1 intended—is unconscionable, invalid, and unenforceable. It is also an unfair and deceptive trade
2 practice in its own right.

3 **JURISDICTION AND VENUE**

4 12. Jurisdiction is proper in this Court pursuant to the Class Action Fairness Act, 28
5 U.S.C. § 1332(d), because many members of the proposed Plaintiff Class, including some named
6 plaintiffs, are citizens of states different from Fitbit’s home states, and the aggregate amount in
7 controversy exceeds \$5,000,000.00, exclusive of interest and costs.

8 13. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because (1) the only
9 defendant in this action resides in this District and (2) a substantial part of the events and
10 omissions giving rise to Plaintiffs’ claims occurred in this District—specifically, Fitbit designed
11 and marketed its product from its headquarters in San Francisco, California, and some Class
12 members reside in and purchased their PurePulse Trackers in this District.

13 **INTRADISTRICT ASSIGNMENT**

14 Pursuant to Local Rule 3-2(c), this civil action should be assigned to the San Francisco
15 Division, because a substantial part of the events or omissions giving rise to the claim occurred in
16 the county of San Francisco, where Fitbit is headquartered.

17 **PARTIES**

18 ***Plaintiffs***

19 14. Plaintiff KATE MCLELLAN is a California citizen and resident domiciled in
20 Murrieta, California. She holds a PhD in rehabilitation science and currently performs research
21 for a clinical research group. In early 2015, Plaintiff McLellan was in the market for a heart rate
22 monitor to help her track her fitness goals. At that time, she saw Fitbit’s advertisements on
23 Hulu, which depicted users receiving consistent, real-time, accurate heart rate readings from
24 their PurePulse Trackers. Relying on those representations, Plaintiff McLellan purchased a
25 Charge HR at Sports Chalet in Temecula, California on February 27, 2015, for \$161.94 after tax.
26 At no point before or during the purchase of her Charge HR was Plaintiff McLellan provided
27 with or required to agree to an arbitration clause or class action ban, nor was she put on notice
28 that she would be required to agree to an arbitration clause or class action ban for her Charge HR

1 to function as intended. Shortly after purchasing her PurePulse Tracker, she noticed that it was
2 not consistently delivering accurate heart rate readings, particularly during exercise. She
3 confirmed this by comparing the real time heart rate readings from her Charge HR with those on
4 stationary cardiovascular exercise machines. After re-reviewing the product manuals, Plaintiff
5 McLellan called Fitbit and was directed to reboot her Charge HR. She did so to no avail. When
6 her Charge HR continued to deliver inaccurate heart readings, Plaintiff McLellan initiated an
7 online chat with a Fitbit representative, who denied her a refund on her defective PurePulse
8 Tracker. Had Fitbit disclosed that the PurePulse Trackers cannot consistently deliver accurate
9 heart rate readings, even during exercise, Plaintiff McLellan would not have purchased her
10 Charge HR or would have paid significantly less for it. Plaintiff McLellan is now stuck with a
11 PurePulse Tracker that cannot perform the precise task for which she purchased it and which
12 does not function as Fitbit expressly promised and warranted.

13 15. Plaintiff TERESA BLACK is Colorado citizen and resident domiciled in Grand
14 Junction, Colorado. Plaintiff Black saw Fitbit's advertisements touting the heart rate
15 functionality of the PurePulse Trackers. Relying on those representations, she told her husband
16 that she wanted a Charge HR, and her husband bought one for her from REI.com on May 25,
17 2015. At no point before or during the purchase of her Charge HR was Plaintiff Black provided
18 with or required to agree to an arbitration clause or class action ban, nor was she put on notice
19 that she would be required to agree to an arbitration clause or class action ban for her Charge HR
20 to function as intended. Shortly after that purchase, Plaintiff Black noticed that her Charge HR
21 was not consistently delivering accurate heart rate readings, particularly during exercise. At an
22 intense part of a personal training session in mid-June 2015, Plaintiff Black's personal trainer
23 manually recorded her heart rate, which was 160 beats per minute ("bpm"). In stark contrast, her
24 Charge HR indicated her heart rate was only 82 bpm. Plaintiff Black was approaching the
25 maximum recommended heart rate for her age, and if she had continued to rely on her inaccurate
26 PurePulse Tracker, she may well have exceeded it, thereby jeopardizing her health and safety.
27 Had Fitbit disclosed that the PurePulse Trackers cannot consistently deliver accurate heart rate
28 readings, even during exercise, Plaintiff Black would not have purchased her Charge HR or

1 would have paid significantly less for it. Plaintiff Black is now stuck with a PurePulse Tracker
2 that cannot perform the precise task for which she purchased it and which does not function as
3 Fitbit expressly promised and warranted.

4 16. Plaintiff DAVID URBAN is a Wisconsin citizen and resident domiciled in
5 Hudson, Wisconsin. Plaintiff Urban is a fitness enthusiast who signed up for his first marathon
6 in mid-2015. Given his father's history with heart disease, Plaintiff Urban's doctor
7 recommended that he keep his heart rate from exceeding approximately 160 bpm. As a result,
8 Plaintiff Urban sought an accurate heart rate monitor for his exercise and training. At the
9 recommendation of his friends, Plaintiff Urban purchased a Surge at a Target store in Hudson,
10 Wisconsin on October 9, 2015, for \$248.82.⁴ At no point before or during the purchase of his
11 Surge was Plaintiff Urban provided with or required to agree to an arbitration clause or class
12 action ban, nor was he put on notice that he would be required to agree to an arbitration clause or
13 class action ban for his Surge to function as intended. Soon after purchasing the Surge, Plaintiff
14 Urban noticed the heart rate function did not work. Even at high intensities it never displayed a
15 reading over 125 bpm. Plaintiff Urban then cross referenced his Surge against his chest strap-
16 based triathlon monitor and found that the PurePulse Tracker consistently under recorded his
17 heart rate at high intensities, often by as much as 15-25 bpm. In order to train effectively and
18 safely, Plaintiff Urban needs to accurately record his heart rate during exercise so that he can
19 reach, but not exceed, certain intensity levels. He cannot trust his Surge to deliver those accurate
20 readings. Had Fitbit disclosed that the PurePulse Trackers cannot consistently deliver accurate
21 heart rate readings, even during exercise, Plaintiff Urban would not have purchased his Surge or
22 would have paid significantly less for it. Plaintiff Urban is now stuck with a PurePulse Tracker
23 that cannot perform the precise task for which he purchased it and which does not function as
24 Fitbit expressly promised and warranted.

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⁴ Plaintiff Urban later exchanged the Surge he purchased in Hudson, Wisconsin, for a larger
version of the same model at another Target store in Madison, Wisconsin.

1 motivated. And for those with certain health conditions, monitoring one's heart rate can be
2 essential to staying safe. Traditionally, however, accurate heart rate monitoring required a chest
3 strap, which can be uncomfortable, distracting, difficult to clean, and may not work with dry
4 skin.

5 21. Fitbit attempted to circumvent these problems with its wrist-based PurePulse
6 technology, which it expressly contrasts with "uncomfortable" chest straps.

7 22. Per Fitbit's promotional materials, PurePulse uses LED lights to detect changes in
8 capillary blood volume. It then applies "finely tuned algorithms" to "measure heart rate
9 automatically and continuously" and allow users to "accurately track workout intensity."⁶

10 23. Unsurprisingly, the feature is the centerpiece of Fitbit's promotional efforts. The
11 widely-circulated advertisements include slogans like: "The Difference Between Good and
12 Great...Is Heart"; "For Better Fitness, Start with Heart"; "Get More Benefits with Every Beat—
13 Without An Uncomfortable Chest Strap"; "Every Beat Counts"; and "Know Your Heart."

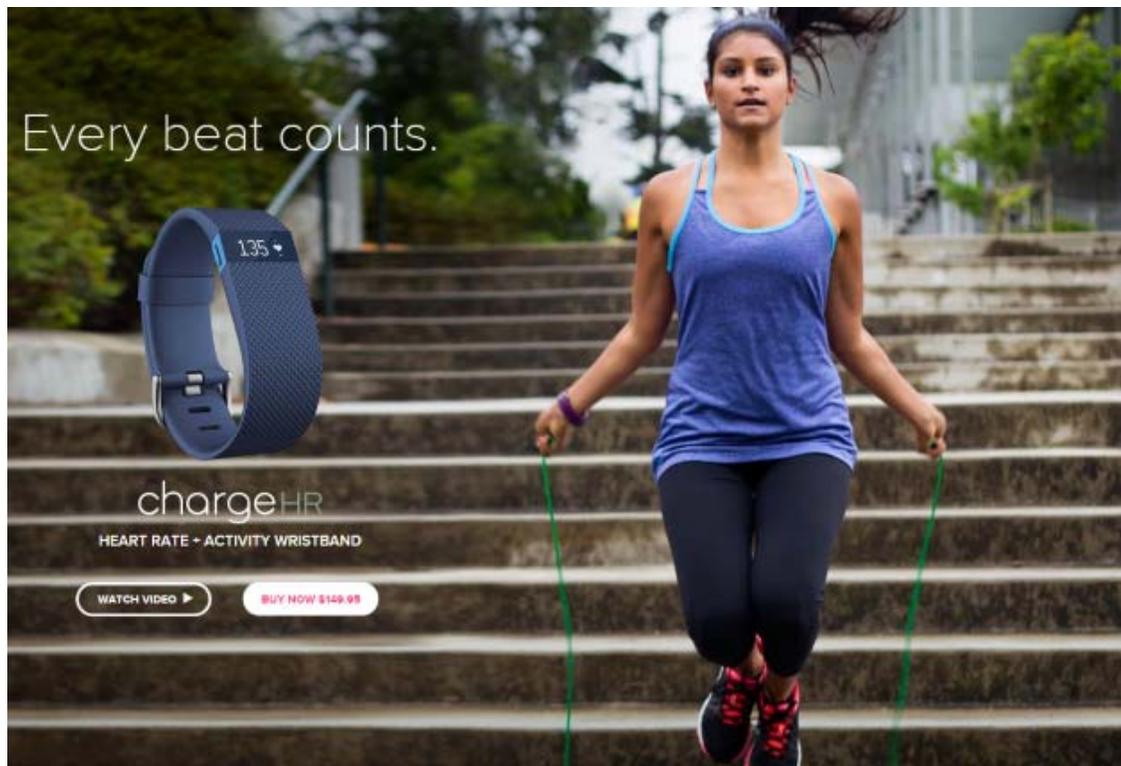
14 24. These representations feature in an extensive and widespread advertising
15 campaign. As noted, the "Know Your Heart" commercial, for example, appeared prominently
16 throughout Major League Baseball's nationally-televised 2015 World Series, which averaged
17 14.7 million viewers per game.

18 25. Importantly, these advertisements and product descriptions do not state or even
19 remotely suggest that the PurePulse technology works only at low or resting heart rates. To the
20 contrary, Fitbit expressly markets the PurePulse Trackers for activity and fitness, and depicts
21 them in use during high-intensity workouts.

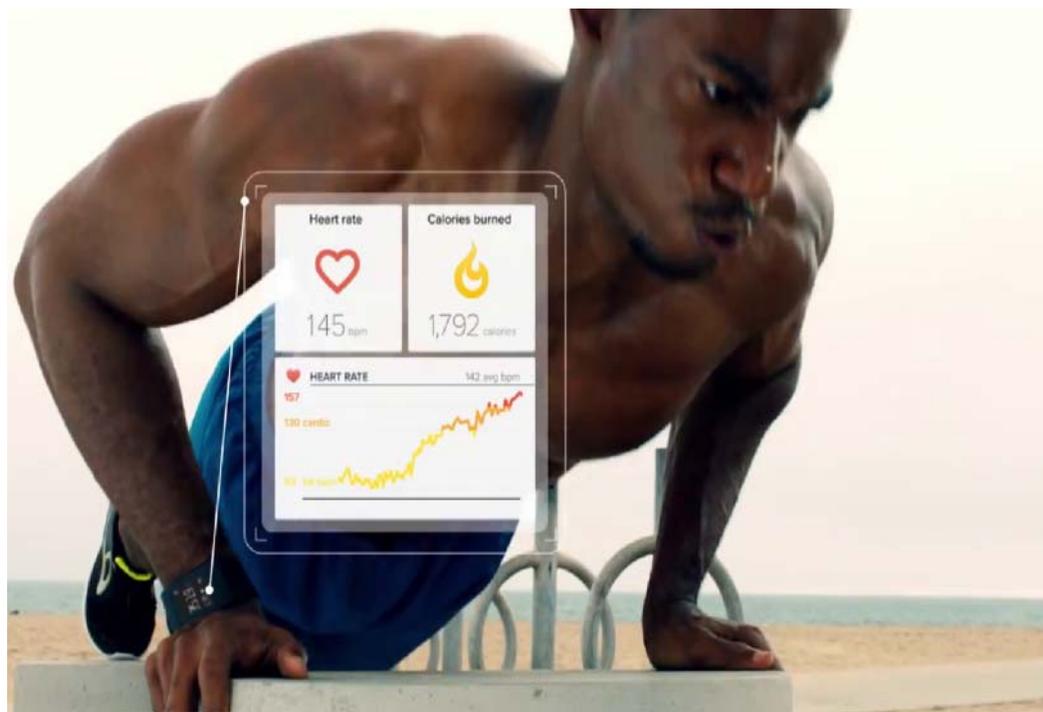
22 26. The following advertisement, for example, depicts a user wearing a Charge HR
23 and jumping rope. That, combined with the elevated heart rate shown on the featured device—
24 135 beats per minute—and the tag line's promise that "Every beat counts," indicates that the
25 product accurately records every beat, even during high intensity exercise.

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28 ⁶ http://help.fitbit.com/articles/en_US/Help_article/Heart-rate-FAQs#How.

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27. Similarly, the following commercial screenshots purport to show the PurePulse Trackers delivering real time, elevated heart rate readings during strenuous activity:



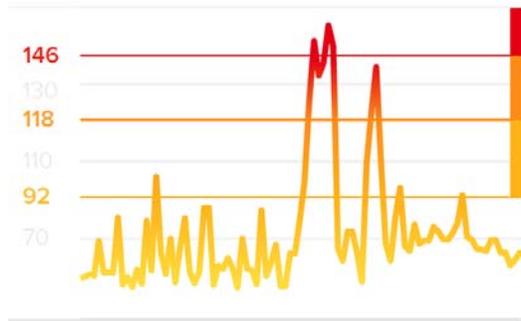
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28. In addition, the following promotional materials tote the PurePulse Trackers' ability to monitor "real time heart rate" at intensity, and to "track[] your heart rate all day and during exercise."

Surge 101

Heart rate



Surge tracks your heart rate all day and during exercise.

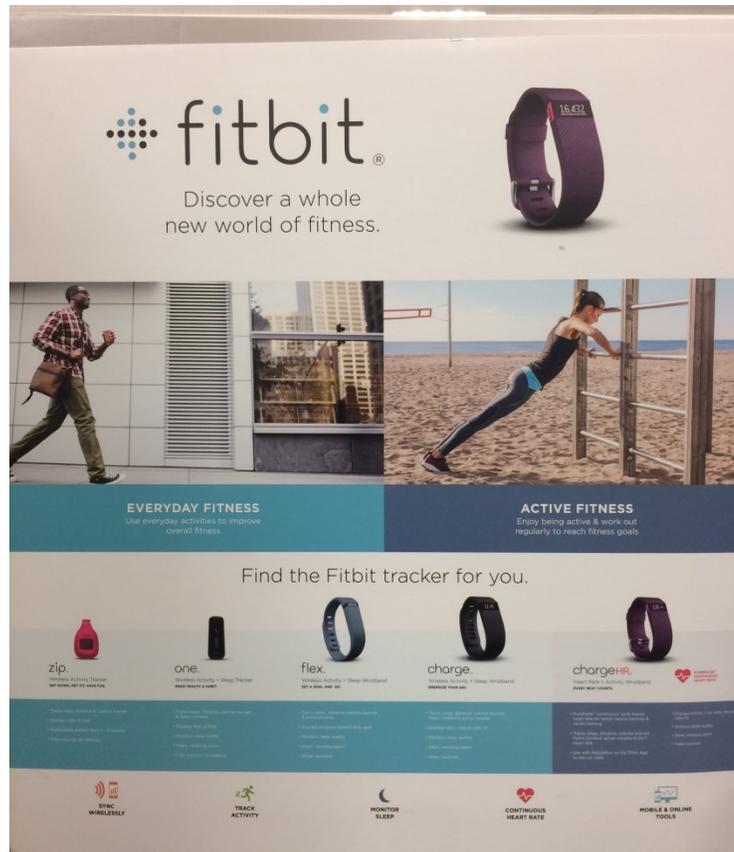
See your heart rate on display. When you exercise, the heart icon shows which zone you are in.

-  In Peak zone
-  In Cardio zone
-  In Fat Burn zone

29. Fitbit's representations are also present at many points of sale. Some Best Buy locations, for example, maintain a full comparative display with an interactive touchscreen and video feature, as shown below.



30. Some Target sites feature a similar, though lower tech, display:



31. In sum, Fitbit's representations regarding the ability of the PurePulse Trackers to consistently record accurate heart rates, even during exercise, are unambiguous and widespread.

II. The PurePulse Trackers Fail to Consistently Record Accurate Heart Rate As Promised and Warranted.

32. Unfortunately, the PurePulse Trackers do not work, and their heart rate readings are wildly inaccurate.

33. Plaintiff Black, for example, observed that her Charge HR under recorded her heart rate while exercising with her personal trainer. Shortly after a high-intensity routine, they compared her Charge HR's heart reading with a manual heart rate test, and found the PurePulse Tracker significantly under recorded her heart rate.

34. Plaintiff McLellan had the same problem. She cross referenced the heart rate readings from her Charge HR with the readings from a stationary cardiovascular machine. Again, the readings from her PurePulse Tracker were too low.

1 35. Plaintiff Urban had the same problem, which he verified by checking his Surge
2 against his chest strap heart rate monitor.

3 36. Scores of customer complaints confirm these are not isolated incidents. The
4 following, for example, is a non-exhaustive sampling of complaints about the PurePulse
5 Trackers drawn from user reviews on Amazon.com:

- 6 • “The HR technology is not accurate. It's close enough below 100bpm. But 100+ and it's
7 consistently off by 30-50%. I tested this multiple times against my chest strap and other
8 monitors in the gym.”
- 9 • “The FitBit is regularly lower than the Polar [chest strap monitor] or cannot capture a
10 reading at all.”
- 11 • “Workouts I know I've kept my heart rate in the 140-170 range, Fitbit says an average of
12 100 bpm and a max of 120. I've measure it against a chest strap as well as machines at the
13 gym. It's just not accurate, simple as that. Huge disappointment. Not to mention it
14 randomly stops tracking heart rate during the workout...”
- 15 • “I checked the HR accuracy of the new fitbit Charge by using it along with my Zephyr
16 HRM which is worn on the chest and I have used for several years now. The accuracy of
17 the fitbit swung wildly even when I switched the HR controls of the Charge from ‘auto’ to
18 ‘on’. It could be off by as much as 20 BPM! That's fricken robbing me of my workout!”
- 19 • “I followed all the directions very closely as far as placement, etc, but there is a 30
20 beat/min difference between the fitbit and my Timex HR chest strap HR monitor with the
21 discrepancy increasing as my heart rate increased.”
- 22 • “[A]s soon as my HR got above 120 [the Charge HR] either shuts down or just sits on
23 120. On a couple different occasions I wore my Polar at the same time. Polar had my
24 highest heart rate at 160 BPM while the charge hr had me resting at 75.”
- 25 • “Paid extra money for HR function and it's useless....If accuracy is important to you, this
26 isn't for you.”
- 27 • “If you are buying the HR version you are essentially just buying a more expensive
28 Charge that has two green lights on the back and has a nicer strap because the heart rate
function is useless.”
- “While working out, the heart rate jumps around for no reason. I have tried many different
positions and modified the tightness. Nothing seems to help....What good is tracking your
heart rate when it's mostly wrong[?]”
- “I am a 82 year old with a resting heart rate of 50 BPM just trying to stay in good basic
shape using a stationary bike and rowing machine. I do 30-60 minute sessions at about
100-110 BPM... When I am working the exercise machines the reading is far short of my
actual heart rate. I have tried all the suggestions here and on the Fitbit site. No luck. I am

1 reminded of the proverbial broken clock which is 100% accurate twice a day.”

2 37. Expert analysis has further corroborated the inability of the PurePulse Trackers to
3 perform as promised and warranted. A board-certified cardiologist tested the PurePulse Trackers
4 against an electrocardiogram (“ECG”), the gold standard of heart rate monitoring, on a number
5 of subjects at various exercising intensities.

6 38. The results were as expected: the PurePulse Trackers consistently mis-recorded
7 the heart rates by a significant degree. At intensities over 110 bpm, the Heart Rate Trackers
8 often failed to record any heart rate at all. And even when they did record heart rates, the Heart
9 Rate Trackers were inaccurate by an average of 24.34 bpm, with some readings off by as much
10 as 75 bpm. With those margins of error, the Heart Rate Trackers are effectively worthless as
11 heart rate monitoring devices.

12 39. Interestingly, Fitbit even *admitted* informally to some Class members that the
13 monitor is inaccurate during high-intensity workouts.

14 40. As such, the PurePulse Trackers fail to perform the precise task for which they
15 are expressly marketed, and Class members are deprived of the clear benefit of the bargain.

16 **III. Fitbit Attempted to Keep Class Members Out of Court Through An Unconscionable**
17 **Post-Purchase Agreement, Which Class Members Were Required to Accept in**
18 **Order to Render Operational the PurePulse Trackers They Already Purchased.**

19 41. Plaintiffs and Class members did not sacrifice their constitutional rights to a jury
20 trial, their right to join a class action, or any substantive statutory rights when they purchased
21 their PurePulse Trackers. No agreement to so limit their rights was requested by anyone or
22 represented to be necessary to complete the purchase transactions, nor was there any indication
23 at the point of sale or on the product packaging that such an agreement would be necessary to
24 render their PurePulse Trackers operational.

25 42. Only *after* purchasing their PurePulse Trackers were Plaintiffs and Class
26 members informed that in order to render their PurePulse Trackers functional, they must first
27 register and create an online account through Fitbit.com and, in doing so, purportedly bind
28 themselves to an adhesive arbitration clause and class action ban.

1 43. Fitbit’s Vice President for Customer Support, Jay Kershner, recently conceded
2 under oath that because the PurePulse Trackers are “wireless-enabled wearable devices . . . [a]
3 Fitbit user cannot use their [PurePulse Trackers] as intended until the user has set up an [online]
4 account. In fact, the Charge HR cannot even be used as a watch until the device is first paired to
5 a Fitbit account, which requires the user to agree to the Terms of Service.” (*Brickman v. Fitbit,*
6 *Inc.*, No. 3:15-cv-2077, Doc. 41 at ¶4 (N.D. Cal. Sept. 30, 2015)).⁷

7 44. Agreeing to those Terms of Service, in turn, comes at a high and hidden cost.
8 The Terms of Service contain a section entitled “Dispute Resolution” which, among other things,
9 purports to:

- 10 a. eliminate the consumer’s constitutional rights to a jury trial by designating
11 binding arbitration as the only forum for dispute resolution (with a one-sided exception allowing
12 Fitbit to utilize the courts to prosecute intellectual property claims);
- 13 b. prohibit class actions; and
- 14 c. impose an extra-judicial, one-year statute of limitations on every one of the
15 Class members’ potential causes of action relating to use of the PurePulse Trackers.

16 45. Notably, the Terms of Service purport to govern not just the services offered
17 through the online account, but also any conceivable grievance that might arise from use of the
18 PurePulse Trackers themselves, regardless of whether that use implicates the wireless service.

19 46. Even more remarkably, Fitbit claims that the Terms of Service bind anyone who
20 so much as visits Fitbit’s website, even if they do not register for an account.

21 47. This unilateral and unconscionable attempt to curtail Class members’
22 constitutional and statutory rights is buried near the end of a long document and, unlike the
23 preceding section, is not highlighted or emphasized in any way.

24 48. Moreover, while the Dispute Resolution section contains an inconspicuous
25 provision outlining a limited procedure for opting out of the arbitration agreement, no such opt-

26 _____
27 ⁷ As defined below, the proposed Class definition excludes those who purchased their PurePulse
28 Trackers directly from Fitbit.com. Upon information and belief, those consumers were the only
ones even informed of Fitbit’s Terms of Service prior to finalizing their PurePulse Tracker
purchases.

1 out possibility exists for the class action waiver, the one-year statute of limitation, or the clauses
2 governing selection of law and forum.

3 49. To reiterate, there is no mention on the product packaging or anywhere else at the
4 point of sale that the PurePulse Trackers will work as intended only after setting up an online
5 account or, critically, that such an account will be governed by Terms of Service including the
6 unconscionable provisions detailed above.

7 50. Those post-purchase clauses are therefore invalid and unenforceable as a matter
8 of law to Plaintiffs and Class members.

9 **CLASS ACTION ALLEGATIONS**

10 51. Plaintiffs bring this lawsuit as a class action on their own behalf and on behalf of
11 all other persons similarly situated as members of the proposed Class, pursuant to Federal Rules
12 of Civil Procedure 23(a) and (b)(3), and/or (b)(1), (b)(2), and/or (c)(4). This action satisfies the
13 numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of
14 those provisions.

15 52. The proposed Classes are defined as:

16 **Nationwide Class**

17 All persons or entities in the United States who purchased a Fitbit
18 PurePulse Tracker, as defined herein, excluding those who
19 purchased their PurePulse Trackers directly from Fitbit on
Fitbit.com and who did not opt out of the arbitration agreement.

20 **California Subclass**

21 All persons or entities in the California who purchased a Fitbit
22 Heart Rate Fitness Watch, as defined herein, excluding those who
23 purchased their PurePulse Trackers directly from Fitbit on
Fitbit.com and who did not opt out of the arbitration agreement.

24 **Colorado Subclass**

25 All persons or entities in the Colorado who purchased a Fitbit Heart
26 Rate Fitness Watch, as defined herein, excluding those who
27 purchased their PurePulse Trackers directly from Fitbit on
Fitbit.com and who did not opt out of the arbitration agreement.

28 **Wisconsin Subclass**

All persons or entities in the Wisconsin who purchased a Fitbit
Heart Rate Fitness Watch, as defined herein, excluding those who

1 purchased their PurePulse Trackers directly from Fitbit on
2 Fitbit.com and who did not opt out of the arbitration agreement.

3 53. Excluded from the Nationwide Class and Subclasses (the “Classes”) are:

4 (A) Fitbit, any entity or division in which Fitbit has a controlling interest, and their legal
5 representatives, officers, directors, assigns, and successors; (B) the Judge to whom this case is
6 assigned and the Judge’s staff; (C) governmental entities; and (D) those persons who have
7 suffered personal injuries or emotional distress as a result of the facts alleged herein. Plaintiffs
8 reserve the right to amend the Class definitions if discovery and further investigation reveal that
9 any Class should be expanded, divided into additional subclasses, or modified in any other way.

10 **Numerosity and Ascertainability**

11 54. Although the exact number of Class members is uncertain, the size of the Classes
12 can be estimated with reasonable precision, and the number is great enough that joinder is
13 impracticable.

14 55. Fitbit sold 3,866,000 units in the first quarter of 2015.⁸ Analysts suggest that
15 most of these sales were generated by the Charge HR,⁹ and Fitbit attributes 78% of its first
16 quarter revenue to the Charge HR and Surge together. The number of Class members is
17 therefore likely in the millions, and the disposition the Class members’ claims in a single action
18 will provide substantial benefits to all parties and to the Court. Class members are readily
19 identifiable from information and records in possession, custody, or control of Fitbit, the Class
20 members, and the PurePulse Tracker retailers.

21 **Typicality**

22 56. The claims of the representative Plaintiffs are typical of the claims of the Classes
23 in that the representative Plaintiffs, like all Class members, purchased a PurePulse Tracker
24 designed, manufactured, and distributed by Fitbit. The representative Plaintiffs, like all Class
25 members, were damaged by Fitbit’s misconduct in that they have suffered actual damages as a
26 result of their purchase of the PurePulse Trackers. Furthermore, the factual bases of Fitbit’s

27 ⁸ <https://www.sec.gov/Archives/edgar/data/1447599/000119312515209758/d875679ds1a.htm>.

28 ⁹ <http://venturebeat.com/2015/08/05/fitbits-first-earnings-since-ipo-reveals-400m-in-revenue-and-4-5m-wearables-sold-in-q2/>

1 misconduct are common to all Plaintiffs and represent a common thread of misconduct resulting
2 in injury to all Class members.

3 **Adequate Representation**

4 57. Plaintiffs are members of the Classes and will fairly and adequately represent and
5 protect the interests of the Classes. Plaintiffs have retained counsel with substantial experience
6 in prosecuting consumer class actions, including actions involving defective products.

7 58. Plaintiffs and their counsel are committed to vigorously prosecuting this action on
8 behalf of the Classes and have the financial resources to do so. Neither Plaintiffs nor their
9 counsel have interests adverse to those of the Classes.

10 **Predominance of Common Issues**

11 59. There are numerous issues of law and fact common to Plaintiffs and Class
12 members that predominate over any issue affecting only individual Class members. Resolving
13 these common issues will advance resolution of the litigation as to all Class members. These
14 common legal and factual issues include:

15 a. whether the PurePulse Trackers fail to consistently deliver accurate heart
16 rate monitoring, as advertised and warranted;

17 b. whether Fitbit knew or should have known that the PurePulse Trackers do
18 not consistently deliver accurate heart rate monitoring;

19 c. whether the inability of the PurePulse Trackers to consistently record
20 accurate heart rates constitutes a material fact that reasonable consumers would have considered
21 important in deciding whether to purchase a PurePulse Tracker or pay an increased price for
22 them;

23 d. whether Fitbit's concealment of the Heart Rate Defect in the PurePulse
24 Trackers induced reasonable consumers to act to their detriment by purchasing a PurePulse
25 Tracker;

26 e. whether Fitbit made material misrepresentations regarding PurePulse
27 Trackers;

1 f. whether Fitbit had a duty to disclose the true nature of the PurePulse
2 Trackers to Plaintiffs and Class members;

3 g. whether Fitbit omitted and failed to disclose material facts about the
4 PurePulse Trackers;

5 h. whether Plaintiffs and Class members are entitled to a declaratory
6 judgment;

7 i. whether Plaintiffs and Class members are entitled to equitable relief,
8 including, but not limited to, a preliminary and/or permanent injunction, and /or rescission;

9 j. whether Plaintiffs and Class members are entitled to restitution and/or
10 disgorgement and the amount of such;

11 k. whether Plaintiffs and Class members are entitled to actual damages and
12 the amount of such; and

13 l. whether Plaintiffs and Class members are entitled to punitive or exemplary
14 damages and the amount of such.

15 **Superiority**

16 60. Plaintiffs and Class members all suffered—and will continue to suffer—harm and
17 damages as a result of Fitbit’s uniformly unlawful and wrongful conduct. A class action is
18 superior to other available methods for the fair and efficient adjudication of this controversy.

19 61. Absent a class action, most Class members would likely find the cost of litigating
20 their claims prohibitively high and would have no effective remedy at law. Because of the
21 relatively small size of the individual Class members’ claims, it is likely that few, if any, Class
22 members could afford to seek legal redress for Fitbit’s misconduct. Absent a class action, Class
23 members’ damages will go uncompensated, and Fitbit’s misconduct will continue without
24 remedy.

25 62. Class treatment of common questions of law and fact would also be a superior
26 method to multiple individual actions or piecemeal litigation in that class treatment will conserve
27 the resources of the courts and the litigants, and will promote consistency and efficiency of
28 adjudication.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

**Violation of California’s Consumers Legal Remedies Act (“CLRA”),
Cal. Civ. Code § 1750, *et seq.***

69. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

70. This claim is brought on behalf of the Nationwide Class and California Subclass to seek injunctive relief as well as monetary damages against Fitbit under California’s Consumers Legal Remedies Act (“CLRA”), Cal. Civ. Code § 1750, *et seq.*

71. Fitbit is a “person” as defined by the CLRA. Cal. Civ. Code § 1761(c).

72. Plaintiffs and Class members are “consumers” within the meaning of the CLRA, as defined by Cal. Civ. Code § 1761(d), who purchased one or more PurePulse Trackers.

73. The CLRA prohibits “unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer[.]” Cal. Civ. Code § 1770(a).

74. Fitbit engaged in unfair or deceptive trade practices that violated Cal. Civ. Code § 1770(a), as described above and below, by, among other things, failing to disclose the defective nature of the PurePulse Trackers, representing that the PurePulse Trackers had characteristics and benefits that they do not have (e.g., the ability to consistently record accurate heart rates, even during high-intensity exercise), representing that the PurePulse Trackers were of a particular standard, quality, or grade when they were of another, and advertising PurePulse Trackers with the intent not to sell them as advertised. *See* Cal. Civ. Code §§ 1770(a)(5), (a)(7), (a)(9).

75. Fitbit knew, should have known, or was reckless in not knowing that its products did not have the qualities, characteristics, and functions it represented, warranted, and advertised them to have.

76. Fitbit’s unfair and deceptive acts or practices occurred repeatedly in Fitbit’s course of trade or business, were material, were capable of deceiving a substantial portion of the purchasing public, and imposed a safety risk to Plaintiffs and Class members.

1 77. Fitbit was under a duty to Plaintiffs and Class members to disclose the deceptive
2 and defective nature of the PurePulse Trackers because:

3 a. The defect in the PurePulse Trackers presents a safety hazard because
4 Class members' could jeopardize their health by relying on the inaccurate heart rate readings and
5 potentially achieving dangerous heart rates;

6 b. Fitbit was in a superior position to know the true state of facts about the
7 Heart Rate Defect in the PurePulse Trackers;

8 c. Plaintiffs and Class members could not reasonably have been expected to
9 learn or discover that the PurePulse Trackers contained the Heart Rate Defect; and

10 d. Fitbit knew that Plaintiffs and Class members could not reasonably have
11 been expected to learn or discover the defect in the PurePulse Trackers.

12 78. In failing to disclose the defective nature of the PurePulse Trackers, Fitbit
13 knowingly and intentionally concealed material facts and breached its duty not to do so.

14 79. The facts that were misrepresented, concealed or not disclosed by Fitbit to
15 Plaintiffs and Class members are material in that a reasonable consumer would have considered
16 them to be important in deciding whether or not to purchase a PurePulse Tracker. Had Plaintiffs
17 and other Class members known about the true nature and quality of the PurePulse Trackers,
18 they would not have purchased a PurePulse Tracker or would have paid significantly less than
19 they did for their PurePulse Trackers.

20 80. Plaintiffs and Class members are reasonable consumers who expect that their
21 PurePulse Trackers will consistently record accurate heart rates, as represented.

22 81. As a result of Fitbit's conduct and unfair or deceptive acts or practices, Plaintiffs
23 and Class members suffered actual damages in that the PurePulse Trackers do not function as
24 represented and are not worth the amount paid and Fitbit has deprived Plaintiffs and Class
25 members the benefit of the bargain.

26 82. Plaintiffs and the Class seek an order enjoining Defendant's unfair or deceptive
27 acts or practices, equitable relief, an award of attorneys' fees and costs under Cal. Civ. Code
28 § 1780(e), and any other just and proper relief available under the CLRA.

1 record accurate heart rate, even during exercise, when in fact they cannot. The Heart Rate
2 Defect also presents a safety hazard as it can jeopardize the health and safety of users who rely
3 on the inaccurate heart rate readings and unknowingly achieve dangerous heart rates.

4 90. Fitbit committed fraudulent business acts and practices in violation of Cal. Bus. &
5 Prof. Code § 17200, *et seq.*, when it affirmatively and knowingly misrepresented that the
6 PurePulse Trackers consistently record accurate heart rates, even during high-intensity exercise,
7 when in fact they do not. Fitbit's representations and concealment of the Heart Rate Defect are
8 likely to mislead the public with regard to the true defective nature of the PurePulse Trackers.

9 91. Fitbit also disseminated unfair, deceptive, untrue and/or misleading advertising in
10 violation of Cal. Bus. & Prof. Code § 17200, *et seq.* and § 17500, *et seq.* when it distributed
11 advertisements falsely representing that the PurePulse Trackers consistently record accurate
12 heart rates, even at high intensity, when in fact they do not.

13 92. Fitbit's unfair or deceptive acts or practices occurred repeatedly in the course of
14 Fitbit's trade or business, and were capable of deceiving a substantial portion of the purchasing
15 public.

16 93. As a direct and proximate result of Fitbit's unfair and deceptive practices,
17 Plaintiffs and Class members suffered and will continue to suffer actual damages.

18 94. As a result of its unfair and deceptive conduct, Fitbit has been unjustly enriched
19 and should be required to disgorge its unjust profits and make restitution to Plaintiffs and Class
20 members pursuant to Cal. Bus. & Prof. Code §§ 17203 and 17204.

21 95. Plaintiffs and the Class further seek an order enjoining Fitbit's unfair or deceptive
22 acts or practices, and an award of attorneys' fees and costs under Cal. Code of Civ. Proc. §
23 1021.5.

24 **THIRD CLAIM FOR RELIEF**
25 **Violation of California's Unfair Competition Law,**
26 **Cal. Bus. & Prof. Code § 17200, *et seq.* – Based On the Post-Purchase "Terms of Service"**

27 96. Plaintiffs hereby incorporate by reference the allegations contained in the
28 preceding paragraphs of this Complaint.

1 97. Plaintiffs bring this cause of action for themselves and on behalf of the
2 Nationwide Class and California Subclass.

3 98. California Business & Professions Code § 17200 prohibits acts of “unfair
4 competition,” including any “unlawful, unfair or fraudulent business act or practice” and “unfair,
5 deceptive, untrue or misleading advertising.”

6 99. Fitbit’s conduct related to the post-purchase Terms of Service—unilaterally
7 imposing Terms of Service in a post-purchase agreement that included an arbitration clause with
8 a one-sided exception, forum selection clause, choice of law provision, class action ban, and
9 claim period limitation—constitutes an additional violation of the statute’s unfair and fraudulent
10 prongs.

11 100. Specifically, Fitbit committed unfair and fraudulent business acts and practices in
12 violation of Cal. Bus. & Prof. Code § 17200, *et seq.*, by concealing and failing to alert Plaintiffs
13 and Class members at the point of sale either expressly, or by reference to the Terms of Service,
14 that in order to make full use of the PurePulse Trackers—and, indeed, even to render them
15 operable—they would be required to register for an online account, and that the account would
16 be accompanied by click wrap terms of service which purport to significantly curtail the Class
17 members’ legal rights.

18 101. Fitbit further advanced this unfair and fraudulent business act and practice by
19 attempting to compel arbitration and preclude class action litigation based on the unconscionable
20 post-purchase agreement. Indeed, in this case, Fitbit instructed Plaintiffs’ counsel that “Ms.
21 McLellan cannot litigate her claim and cannot represent a class,” despite the fact that she never
22 was presented with or agreed to any such “agreement” prior to purchasing her PurePulse
23 Tracker.

24 102. Fitbit’s unfair or deceptive acts or practices occurred repeatedly in the course of
25 Fitbit’s trade or business, and were capable of deceiving a substantial portion of the purchasing
26 public.

27 103. As a direct and proximate result of Fitbit’s unfair and deceptive practices,
28 Plaintiffs and Class members suffered and will continue to suffer actual damages.

1 112. Fitbit also had a duty to disclose, rather than conceal and suppress, the full scope
2 and extent of the Heart Rate Defect because:

3 a. Fitbit had exclusive knowledge of the Heart Rate Defect in the PurePulse
4 Trackers and concealment thereof;

5 b. The details regarding the Heart Rate Defect in the PurePulse Trackers and
6 concealment thereof were known and/or accessible only to Fitbit;

7 c. Fitbit knew Plaintiffs and Class members did not know about the Heart
8 Rate Defect in the PurePulse Trackers and concealment thereof; and

9 d. Fitbit made general representations about the qualities of the PurePulse
10 Trackers, including statements about their performance and abilities that were misleading,
11 deceptive, and incomplete without the disclosure of the fact that the PurePulse Trackers could not
12 consistently record accurate heart rates, particularly during exercise.

13 113. Fitbit's actions constitute "actual fraud" within the meaning of Cal. Civ. Code §
14 1572 because Fitbit did the following with the intent to deceive Plaintiffs and Class member and
15 to induce them to enter into their contracts:

16 a. Suggested that the PurePulse Trackers can consistently record accurate
17 heart rates, even at high intensities, even though it knew this to be not true;

18 b. Positively asserted that the PurePulse Trackers can consistently record
19 accurate heart rates, even at high intensities, in a manner not warranted by the information
20 available to Fitbit;

21 c. Suppressed the true nature of the Heart Rate Defect from Plaintiffs and
22 Class members; and

23 d. Promised it would deliver PurePulse Trackers that consistently record
24 accurate heart rates, even at high intensities, with no intention of so doing.

25 114. Fitbit's actions, listed above, also constituted "deceit" as defined by Cal. Civ.
26 Code § 1710 because Fitbit willfully deceived Plaintiffs and Class members with intent to induce
27 them to alter their positions to their detriment by purchasing defective PurePulse Trackers.
28

1 115. Fitbit's fraud and concealment was also uniform across all Class members; Fitbit
2 concealed from everyone the true nature of the Heart Rate Defect in the PurePulse Trackers.

3 116. Fitbit's misrepresentations and omissions were material in that they would affect
4 a reasonable consumer's decision to purchase a PurePulse Tracker. Consumers paid a premium
5 for the PurePulse Trackers precisely because they purportedly offered continuous, accurate heart
6 rate readings.

7 117. Fitbit's intentionally deceptive conduct induced Plaintiffs and Class members to
8 purchase the PurePulse Trackers and resulted in harm and damage to them.

9 118. Plaintiffs believed and relied upon Fitbit's misrepresentations and concealment of
10 the true facts. Class members are presumed to have believed and relied upon Fitbit's
11 misrepresentations and concealment of the true facts because those facts are material to a
12 reasonable consumer's decision to purchase the PurePulse Trackers.

13 119. As a result of Fitbit's inducements, Plaintiffs and Class members sustained actual
14 damages including but not limited to receiving a product that performs as promised and not
15 receiving the benefit of the bargain of their PurePulse Tracker purchases. If Plaintiffs and Class
16 members had known about the Heart Rate Defect, they would not have purchased the PurePulse
17 Trackers or would have paid significantly less for them. Fitbit is therefore liable to Plaintiffs and
18 Class members in an amount to be proven at trial.

19 120. Fitbit's conduct was systematic, repetitious, knowing, intentional, and malicious,
20 and demonstrated a lack of care and reckless disregard for Plaintiffs' and Class members' rights
21 and interests. Fitbit's conduct thus warrants an assessment of punitive damages under Cal. Civ.
22 Code § 3294 and other applicable states' laws, consistent with the actual harm it has caused, the
23 reprehensibility of its conduct, and the need to punish and deter such conduct.

24 **FIFTH CLAIM FOR RELIEF**
25 **Fraud in the Inducement**

26 121. Plaintiffs hereby incorporate by reference the allegations contained in the
27 preceding paragraphs of this Complaint.
28

1 122. Plaintiffs bring this cause of action for themselves and on behalf of the
2 Nationwide Class and all the Subclasses.

3 123. Fitbit's fraud and false affirmations of fact, described herein, induced Plaintiffs
4 and Class members to purchase the PurePulse Trackers and thereby enter into a contract with
5 Fitbit.

6 124. As described above, Fitbit had a duty to disclose the Heart Rate Defect in the
7 PurePulse Trackers to Plaintiffs and Class members.

8 125. As described above, Fitbit's actions constituted actual fraud and deceit as defined
9 by Cal. Civ. Code §§ 1572 and 1710.

10 126. Plaintiffs justifiably relied to their detriment on the truth and completeness of
11 Fitbit's material representations regarding the PurePulse Trackers. Class members are presumed
12 to have relied upon Fitbit's misrepresentations and concealment of the true facts because those
13 facts are material to a reasonable consumer's decision to purchase the PurePulse Trackers.

14 127. Fitbit's fraud and concealment was also uniform across all Class members; Fitbit
15 concealed from everyone the true nature of the Heart Rate Defect in the PurePulse Trackers.

16 128. Plaintiffs and Class members would not have agreed to purchase their PurePulse
17 Trackers, or would have paid less for them, if they had not been deceived by Fitbit.

18 129. As a result of Fitbit's inducements, Plaintiffs and Class members sustained actual
19 damages including but not limited to not receiving a product that performs as promised and not
20 receiving the benefit of the bargain of their PurePulse Tracker purchases.

21 130. Fitbit's conduct was systematic, repetitious, knowing, intentional, and malicious,
22 and demonstrated a lack of care and reckless disregard for Plaintiffs' and Class members' rights
23 and interests. Fitbit's conduct thus warrants an assessment of punitive damages under Cal. Civ.
24 Code § 3294 and other applicable states' laws, consistent with the actual harm it has caused, the
25 reprehensibility of its conduct, and the need to punish and deter such conduct.
26
27
28

SIXTH CLAIM FOR RELIEF
Unjust Enrichment

1
2
3 131. Plaintiffs hereby incorporate by reference the allegations contained in the
4 preceding paragraphs of this Complaint.

5 132. Plaintiffs bring this cause of action for themselves and on behalf of the
6 Nationwide Class and all the Subclasses.

7 133. Fitbit has been unjustly enriched in that it sold the PurePulse Trackers with
8 defective heart rate monitors that do not consistently record accurate heart rates as represented.

9 134. When purchasing their PurePulse Trackers, Plaintiffs and Class members
10 reasonably believed that the PurePulse Trackers would perform as advertised and as warranted
11 and would consistently record accurate heart rates, even during high-intensity exercise.

12 135. Plaintiffs and Class members received less than what they paid for in that the
13 PurePulse Trackers do not consistently record accurate heart rates as represented and therefore
14 do not deliver as promised.

15 136. Plaintiffs and Class members conferred a benefit on Fitbit by purchasing, and
16 paying a premium for, the PurePulse Trackers. Had Plaintiffs and Class members known about
17 the Heart Rate Defect, they would not have purchased the PurePulse Trackers or would have
18 paid significantly less for them.

19 137. Fitbit should therefore be required to disgorge all profits, benefits, and other such
20 compensation it obtained through its wrongful conduct.

21 **SEVENTH CLAIM FOR RELIEF**
22 **Revocation of Acceptance**
23 **Cal. Com. Code § 2608**

24 138. Plaintiffs hereby incorporate by reference the allegations contained in the
25 preceding paragraphs of this Complaint.

26 139. Plaintiffs bring this cause of action for themselves and on behalf of the
27 Nationwide Class and the California Subclass.

28 140. Plaintiffs and Class members revoke their acceptance of the PurePulse Trackers.

1 c. Charge HR “is an advanced heart rate and activity-tracking wristband, built
2 for all-day activity, *workouts* and beyond.” (emphasis added).

3 150. Such statements became the basis of the bargain for Plaintiffs and other Class
4 members because such statements are among the facts a reasonable consumer would consider
5 material in the purchase of a heart rate monitoring fitness product.

6 151. Fitbit breached this express warranty by delivering PurePulse Trackers that do not
7 deliver as promised and fail to consistently record accurate heart rates, especially during
8 exercise.

9 152. As a result of the foregoing breaches of express warranty, Plaintiffs and other
10 Class members have been damaged in that they purchased PurePulse Trackers that could not
11 perform as warranted and did not receive the benefit of the bargain of their PurePulse Tracker
12 purchases.

13 153. Plaintiffs and Class members seek all damages permitted by law in an amount to
14 be proven at trial.

15 **NINTH CLAIM FOR RELIEF**

16 **Violation of Magnuson-Moss Act, 15 U.S.C. §§ 2301, et seq. – Implied Warranty**

17 154. Plaintiffs hereby incorporate by reference the allegations contained in the
18 preceding paragraphs of this Complaint.

19 155. Plaintiffs bring this cause of action for themselves and on behalf of the
20 Nationwide Class and all the Subclasses.

21 156. The PurePulse Trackers are “consumer products” within the meaning of the
22 Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(1).

23 157. Plaintiffs and Class members are “consumers” within the meaning of the
24 Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(3), because they are persons entitled under
25 applicable state law to enforce against the warrantor the obligations of its express and implied
26 warranties.

27 158. Fitbit is a “supplier” and “warrantor” within the meaning of the Magnuson-Moss
28 Warranty Act, 15 U.S.C. § 2301(4)-(5).

1 159. Section 2310(d)(1) of Chapter 15 of the United States Code provides a cause of
2 action for any consumer who is damaged by the failure of a warrantor to comply with a written
3 or implied warranty.

4 160. Fitbit provided Plaintiffs and the other Class members with an implied warranty
5 of merchantability in connection with the purchase or lease of the PurePulse Trackers is an
6 “implied warranty” within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. §
7 2301(7). As a part of the implied warranty of merchantability, Fitbit warranted that the
8 PurePulse Trackers would pass without objection in the trade as designed, manufactured, and
9 marketed, and were adequately labeled.

10 161. Fitbit breached these implied warranties, as described in more detail above, and
11 are therefore liable to Plaintiffs and the Class pursuant to 15 U.S.C. § 2310(d)(1).

12 162. Any efforts to limit the implied warranties in a manner that would exclude
13 coverage of the PurePulse Trackers is unconscionable, and any such effort to disclaim, or
14 otherwise limit, liability for the PurePulse Trackers is null and void.

15 163. Plaintiffs and the other Class members have had sufficient direct dealings with
16 either Fitbit or its agents to establish privity of contract.

17 164. Nonetheless, privity is not required here because Plaintiffs and other Class
18 members are intended third-party beneficiaries of contracts between Fitbit and its retailers, and
19 specifically, of the implied warranties. The retailers were not intended to be the ultimate
20 consumers of the PurePulse Trackers and have no rights under the warranty agreements provided
21 with the PurePulse Trackers; the warranty agreements were designed for and intended to benefit
22 consumers.

23 165. Pursuant to 15 U.S.C. § 2310(e), Plaintiffs are entitled to bring this class action
24 and are not required to give Fitbit notice and an opportunity to cure until such time as the Court
25 determines the representative capacity of Plaintiffs pursuant to Rule 23 of the Federal Rules of
26 Civil Procedure.

27 166. Furthermore, to the extent such notice is required, it has been provided through
28 the letter sent to Fitbit by Plaintiffs’ counsel on November 16, 2015 (Ex. A), described herein, as

1 well as through complaints lodged by Plaintiff McLellan and other Class members. Fitbit
2 refused to remedy its wrongs after receiving these notifications and any further notice would be
3 futile.

4 167. Plaintiffs' individual claims place into controversy an amount equal to or
5 exceeding \$25.00. The amount in controversy of this entire action exceeds the sum of
6 \$50,000.00, exclusive of interest and costs, computed on the basis of all claims to be determined
7 in this lawsuit. Plaintiffs, individually and on behalf of the other Class members, seek all
8 damages permitted by law, including diminution in value of their vehicles, in an amount to be
9 proven at trial.

10 168. In addition, pursuant to 15 U.S.C. § 2310(d)(2), Plaintiffs and the other Class
11 members are entitled to recover a sum equal to the aggregate amount of costs and expenses
12 (including attorneys' fees based on actual time expended) determined by the Court to have
13 reasonably been incurred by Plaintiffs and the other Class members in connection with the
14 commencement and prosecution of this action.

15 169. Further, Plaintiffs and the Class are also entitled to equitable relief under 15
16 U.S.C. § 2310(d)(1).

17 **TENTH CLAIM FOR RELIEF**
18 **Violation of the Song-Beverly Consumer Warranty Act for Breach of the Implied Warranty**
19 **of Merchantability**
20 **Cal. Civ. Code §§ 1791.1 & 1792**

21 170. Plaintiffs hereby incorporate by reference the allegations contained in the
22 preceding paragraphs of this Complaint.

23 171. Plaintiffs bring this cause of action for themselves and on behalf of the
24 Nationwide Class and the California Subclass.

25 172. Plaintiffs and members of the Class are "buyers" within the meaning of Cal. Civ.
26 Code § 1791(b).

27 173. The PurePulse Trackers are "consumer goods" within the meaning of Cal. Civ.
28 Code § 1791(a).

1 174. Fitbit is a “manufacturer” of the PurePulse Trackers within the meaning Cal. Civ.
2 Code § 1791(j).

3 175. Fitbit impliedly warranted to Plaintiffs and Class members that its PurePulse
4 Trackers were “merchantable” within the meaning of Cal. Civ. Code §§ 1791.1(a) and 1792;
5 however, the PurePulse Trackers do not have the quality that a buyer would reasonably expect,
6 and were therefore not merchantable.

7 176. Cal. Civ. Code § 1791.1(a) states:

8 “Implied warranty of merchantability” or “implied warranty that
9 goods are merchantable” means that the consumer goods meet each
of the following:

- 10 (1) Pass without objection in the trade under the contract
11 description.
12 (2) Are fit for the ordinary purposes for which such goods are
used.
13 (3) Are adequately contained, packaged, and labeled.
14 (4) Conform to the promises or affirmations of fact made on the
15 container or label.

16 177. The PurePulse Trackers would not pass without objection in the trade because
17 they do not perform as warranted because they do not provide consistent, accurate heart rate
18 readings, even during exercise.

19 178. Similarly, the PurePulse Trackers’ inability to consistently record accurate heart
20 rates renders them unfit for the ordinary purpose of a heart rate monitor.

21 179. The PurePulse Trackers are not adequately labeled because the labeling
22 represents that they consistently record accurate heart rates, which they do not do.

23 180. For the same reason, the PurePulse Trackers do not conform to the promises or
24 affirmations of fact made on the container or label.

25 181. Fitbit thus breached the implied warranty of merchantability.

26 182. As a direct and proximate result of Fitbit’s breach of the implied warranty of
27 merchantability, Plaintiffs and the other Class members did not receive the benefit of their
28 bargain and received goods with a defect that substantially impairs their value to Plaintiffs and

1 Class members. Plaintiffs and Class members were damaged as a result of the defect in the
2 PurePulse Trackers, the products' malfunctioning, and the nonuse of their PurePulse Trackers.

3 183. Notice of breach is not required because Plaintiffs and the other Class members
4 did not purchase their PurePulse Trackers directly from Fitbit.

5 184. Nevertheless, Plaintiffs notified Fitbit of its breach via a November 16, 2015,
6 letter to its general counsel.

7 185. Pursuant to Cal. Civ. Code §§ 1791.1(d) & 1794, Plaintiffs and Class members
8 are entitled to damages and other legal and equitable relief including, at their election, the
9 purchase price of their PurePulse Trackers or the overpayment or diminution in value of their
10 PurePulse Trackers.

11 186. Pursuant to Cal. Civ. Code § 1794, Plaintiffs and the other Class members are
12 entitled to costs and attorneys' fees.

13 **ELEVENTH CLAIM FOR RELIEF**
14 **Violation of the Colorado Consumer Protection Act**
15 **Colo. Rev. Stat. §§ 6-1-101, *et. seq.***

16 187. Plaintiff Black hereby incorporates by reference the allegations contained in the
17 preceding paragraphs of this Complaint.

18 188. As described above, California law applies to the claims of all Plaintiffs and Class
19 members. In the alternative, Plaintiff Black brings this cause of action for herself and on behalf
20 of the Colorado Subclass.

21 189. Colorado's Consumer Protection Act (the "CCPA") prohibits a person from
22 engaging in a "deceptive trade practice," which includes knowingly making "a false
23 representation as to the source, sponsorship, approval, or certification of goods," or "a false
24 representation as to the characteristics, ingredients, uses, benefits, alterations, or quantities of
25 goods." Colo. Rev. Stat. § 6-1-105(1)(b),(e). The CCPA further prohibits "represent[ing] that
26 goods ... are of a particular standard, quality, or grade ... if he knows or should know that they
27 are of another," and "advertis[ing] goods ... with intent not to sell them as advertised." Colo.
28 Rev. Stat. § 6-1-105(1)(g), (i).

1 190. Fitbit is a “person” as defined by § 6-1-102(6) of the CCPA. Col. Rev. Stat. § 6-
2 1-101, *et seq.*

3 191. Plaintiff Black and Colorado Subclass members are “consumers” under the
4 CCPA.

5 192. In the course of business, Fitbit wilfully misrepresented and failed to disclose the
6 Heart Rate Defect in the PurePulse Trackers. Fitbit therefore engaged in unlawful trade
7 practices proscribed by the CCPA, including representing that the PurePulse Trackers have
8 characteristics, uses, benefits, and qualities which they do not have; representing that PurePulse
9 Trackers are of a particular standard and quality when they are not; advertising the PurePulse
10 Trackers with the intent not to sell them as advertised; and otherwise engaging in conduct likely
11 to deceive.

12 193. Plaintiff Black and Colorado Subclass members were deceived by Fitbit’s failure
13 to disclose the Heart Rate Defect in the PurePulse Trackers.

14 194. Plaintiff Black and Colorado Subclass members reasonably relied upon Fitbit’s
15 false and misleading misrepresentations and had no way of knowing that the representations
16 were false and misleading before purchasing their PurePulse Trackers.

17 195. Fitbit intentionally and knowing misrepresented material facts regarding the Heart
18 Rate Defect in the PurePulse Trackers with an intent to mislead Plaintiff Black and Colorado
19 Subclass members.

20 196. Fitbit knew, should have known, or was reckless in not knowing that its products
21 did not have the qualities, characteristics, and functions it represented, warranted, and advertised
22 them to have.

23 197. Fitbit’s actions as set forth above occurred in the conduct of trade or commerce.

24 198. Fitbit’s conduct proximately caused injuries to Plaintiff Black and Colorado
25 Subclass members

26 199. Plaintiff Black and Colorado Subclass members were injured as a direct and
27 natural consequence result of Fitbit’s conduct in that they purchased PurePulse Trackers they
28

1 would have not otherwise purchased, or would have paid significantly less for, and did not
2 receive the benefit of their bargain.

3 200. Pursuant to Col. Rev. Stat. § 6-1-113, Plaintiff Black and the Colorado Subclass
4 seek monetary relief against Fitbit measured as the greater of (a) actual damages in an amount to
5 be determined at trial and the discretionary trebling of such damages, or (b) statutory damages in
6 the amount of \$500 for each Colorado Subclass member.

7 201. Plaintiff Black and Colorado Subclass members also seek an order enjoining
8 Fitbit's unfair, unlawful, and/or deceptive practices, declaratory relief, attorneys' fees, and any
9 other just and proper relief available under the CCPA.

10 **TWELFTH CLAIM FOR RELIEF**
11 **Violation of the Wisconsin Deceptive Trade Practices Act**
12 **Wis. Stat. § 110.18**

13 202. Plaintiff Urban hereby incorporates by reference the allegations contained in the
14 preceding paragraphs of this Complaint.

15 203. As described above, California law applies to the claims of all Plaintiffs and Class
16 members. In the alternative, Plaintiff Urban brings this cause of action for himself and on behalf
17 of the Wisconsin Subclass.

18 204. The Wisconsin Deceptive Trade Practices Act ("Wisconsin DTPA") prohibits a
19 "representation or statement of fact which is untrue, deceptive or misleading." Wis. Stat.
20 § 100.18(1).

21 205. Fitbit is a "person, firm, corporation or association" within the meaning of the
22 Wisconsin DTPA. Wis. Stat. § 100.18(1).

23 206. Plaintiff Urban and the Wisconsin Subclass members, or their spouses, purchased
24 PurePulse Trackers and are members of "the public" within the meaning of the Wisconsin
25 DTPA. Wis. Stat. § 100.18(1).

26 207. In the course of its business, Fitbit engaged in unfair and deceptive acts and
27 practices that violated the Wisconsin DTPA, including misrepresenting the nature of the
28 PurePulse Trackers and concealing and suppressing information about the Heart Rate Defect in

1 the PurePulse Trackers with intent that others rely upon such concealment, suppression, or
2 omission, in connection with their PurePulse Tracker purchases.

3 208. Fitbit intentionally and knowingly misrepresented material facts regarding the
4 Heart Rate Defect in the PurePulse Trackers with an intent to mislead Plaintiff Urban and
5 Wisconsin Subclass members.

6 209. Fitbit's unfair or deceptive acts or practices were likely to and did in fact deceive
7 reasonable consumers, including Plaintiff Urban, and are presumed to have deceived Wisconsin
8 Subclass members.

9 210. Fitbit knew, should have known, or was reckless in not knowing that its products
10 did not have the qualities, characteristics, and functions it represented, warranted, and advertised
11 them to have.

12 211. Fitbit had an ongoing duty to refrain from unfair and deceptive trade practices.

13 212. Fitbit's violations affect the public interest and present a continuing risk to
14 Plaintiff Urban, Wisconsin Subclass members, and the public.

15 213. Plaintiff Urban and the Wisconsin Subclass suffered ascertainable loss caused by
16 Fitbit's misrepresentations and its concealment of and failure to disclose material information
17 regarding the Heart Rate Defect in the PurePulse Trackers.

18 214. Plaintiff Urban and Wisconsin Subclass members were injured as a direct and
19 proximate result of Fitbit's conduct in that they purchased PurePulse Trackers they would have
20 not otherwise purchased, or would have paid significantly less for, and did not receive the
21 benefit of their bargain.

22 215. Plaintiff Urban and the Wisconsin Subclass seek monetary relief and other relief
23 provide for under Wis. Stat. § 100.18(11)(b)(2), including treble damages, because Fitbit
24 committed its deceptive and unfair practices knowingly and/or intentionally.

25 216. Plaintiff Urban and the Wisconsin Subclass also seek court costs and attorneys'
26 fees under Wis. Stat. § 100.18(11)(b)(2).

27 **PRAYER FOR RELIEF**

28 Plaintiffs, individually and on behalf of all others similarly situated, request the Court to

1 enter judgment against Fitbit, as follows:

2 A. an order certifying an appropriate Class and/or Subclasses, designating Plaintiffs
3 as Class Representatives, and designating their counsel of record jointly as Class Counsel;

4 B. an order enjoining Fitbit from engaging in further deceptive distribution and sales
5 practices with respect to the PurePulse Trackers;

6 C. a declaration that Fitbit is financially responsible for notifying all Class members
7 about the true nature of the PurePulse Trackers;

8 D. an order requiring Fitbit to notify the Class that the PurePulse Trackers are
9 defective and cannot consistently record accurate heart rates;

10 E. an order permitting Plaintiffs and Class members to elect to affirm their contracts
11 or alternatively demand rescission and seek damages;

12 F. a declaration that the Fitbit must disgorge, for the benefit of Plaintiffs and Class
13 members, all or part of the ill-gotten profits received from the sale or lease of the PurePulse
14 Trackers, and make full restitution to Plaintiffs and Class members;

15 G. Restitution in the amount of monies paid by Plaintiffs and Class members for the
16 PurePulse Trackers;

17 H. an award to Plaintiffs and Class members of compensatory, exemplary, punitive,
18 and statutory penalties and damages as allowed by law, including interest, in an amount to be
19 proven at trial;

20 I. an award of attorneys' fees and costs, as allowed by law;

21 J. an award of pre-judgment and post-judgment interest, as provided by law;

22 K. leave to amend this Complaint to conform to the evidence produced at trial; and

23 L. such other relief as may be appropriate under the circumstances.

24 **DEMAND FOR JURY TRIAL**

25 Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiffs, individual and on behalf of
26 the Class, demand a trial by jury of any and all issues in this action so triable of right.

1 Dated: January 5, 2015

Respectfully submitted,

2 LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

3
4 By:



5 Jonathan Selbin

6 Jonathan D. Selbin (State Bar No. 170222)

jselbin@lchb.com

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9 Elizabeth J. Cabraser (SBN 083151)

Kevin R. Budner (SBN 287271)

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14
15 Robert Klonoff (Pro Hac Vice Anticipated)

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Portland, OR 97225

Telephone: (503) 291-1570

16
17
18 *Attorneys for Plaintiffs*

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

DEFENDANTS

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Contains various legal categories and sub-categories with checkboxes.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District, 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Brief description of cause:

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ >\$5,000,000.00 CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

Handwritten signature of the attorney.

05/4+

(Place an "X" in One Box Only)

() SAN FRANCISCO/OAKLAND () SAN JOSE () EUREKA

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

EXHIBIT A

**Lieff
Cabraser
Heimann &
Bernstein**
Attorneys at Law

Lieff Cabraser Heimann & Bernstein, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
t 212.355.9500
f 212.355.9592

November 16, 2015

Jonathan D. Selbin
Partner
jselbin@lchb.com

VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED

Mr. Andy Missan, VP and General Counsel
Fitbit, Inc.
405 Howard Street, Suite 550
San Francisco, CA 94105

Registered Agent
CT Corporation
818 West Seventh Street, Suite 930
Los Angeles, CA 90017

RE: Notice Concerning Deceptive Practice under the California Consumer
Legal Remedies Act

Dear Mr. Missan:

Together with my co-counsel Robert Klonoff, I write on behalf of our client Kate Mclellan to provide written notice pursuant to the California Consumer Legal Remedies Act, California Civil Code Section 1750 *et seq.* (the “CLRA”), and specifically, Sections 1782(a)(1) and (2). On behalf of herself and all others similarly situated (the “Proposed Class”), Ms. Mclellan hereby notifies you that Fitbit, Inc. (“Fitbit”) is alleged to have violated the CLRA and engaged in unfair, deceptive, fraudulent, and other unlawful conduct by falsely advertising its Fitbit “Charge HR” and “Surge” models, which employ the same PurePulse™ technology (the “Fitbit PurePulse Models”), as detailed below. This letter also serves to provide any required notice that Fitbit has breached express and/or implied warranties with respect to the Fitbit PurePulse Models.

Ms. Mclellan purchased her Fitbit Charge HR on February 27, 2015, at Sports Chalet in Temecula, California. The watch retailed for \$149.95 and cost her \$161.94 after tax.

Fitbit has engaged—and is engaged—in an extensive and widespread advertising campaign in which it expressly represents and markets the Fitbit PurePulse Models based upon their purported ability to accurately record heart rates, even during high intensity workouts. For example, Fitbit represents to consumers that the heart rate monitors “measure heart rate automatically and continuously” and allow users to “accurately track workout intensity.”

Andy Missan
November 16, 2015
Page 2

Similarly, Fitbit advertises the Fitbit PurePulse Models with slogans such as: “The Difference Between Good and Great...Is Heart”; “For Better Fitness, Start with Heart”; “Get More Benefits with Every Beat—Without An Uncomfortable Chest Strap”; and “Every Beat Counts.” Importantly, those advertisements depict users utilizing the heart rate function of their watches in a variety of high intensity exercises. Fitbit charges a premium for the heart rate function, as demonstrated by the \$20 price differential between the Charge and Charge HR which are distinguished only by the PurePulse technology.

In fact, as Ms. Mclellan and many other purchasers of the Fitbit PurePulse Models have discovered, the heart rate monitor feature Fitbit advertises the Fitbit PurePulse Models as having—and for which it charges a price premium—fails to accurately record heart rates, particularly during high intensity exercise. Ms. Mclellan has observed this inaccuracy during a wide range of activities and exercises. Upon informing Fitbit of these problems, Ms. Mclellan was instructed to reboot her Fitbit PurePulse Model and to heed user manual instructions. She did both, to no effect.

Upon information and belief, this defect is well known to Fitbit, as it has received scores of complaints regarding the inability of the Fitbit PurePulse Models to accurately measure heart rates, and has conceded to at least some complainants that the heart rate monitors are accurate only at rest. Accordingly, it appears Fitbit knowingly manufactured and sold, and continues to sell, the PurePulse Models with a known defect and that do not function as expressly represented and warranted. Fitbit thus misrepresented the nature and characteristics of the Fitbit PurePulse Models and knowingly omitted and failed to disclose the presence of the defect to Ms. Mclellan and the Proposed Class.

Fitbit’s conduct as summarized here constitutes a violation of Cal. Civ. Code §1770(a); specifically, Fitbit violated—and continues to violate—the CLRA by, among other things:

1. Representing through advertising, warranties, and other express representations, that the Fitbit PurePulse Models had characteristics, benefits, or uses that they did not have;
2. Falsely representing that the Fitbit PurePulse Models are of a particular standard, quality, and/or grade when they are of another;
3. Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve;
4. Advertising the Fitbit PurePulse Models with the intent not to sell them as advertised;
5. Failing to disclose that the Fitbit PurePulse Models have a defect, which is a material fact, the omission of which tends to mislead or deceive the

Andy Missan
November 16, 2015
Page 3

consumer, and a fact that could not reasonably be known by the consumer;

6. Failing to disclose the Fitbit PurePulse Models' defect with the intent that consumers rely on the concealment or omission in connection with their decisions to purchase the subject heart rate watches;
7. Failing to properly repair the Fitbit PurePulse Models to correct or eliminate the defect; and
8. Other unfair or deceptive conduct or practices in trade or commerce with respect to the marketing, advertising, sale and warranty/customer service of the Fitbit PurePulse Models.

Fitbit's conduct also violates California's Unfair Competition Law, California Business and Professions Code Section 17200, and constitutes common law fraud, fraudulent inducement to contract, and breach of express and implied warranties.

Ms. Mcllellan and the Proposed Class have all suffered actual damages as a result of this conduct, including but not limited to, the original cost of the Fitbit PurePulse Models and/or the premium paid for them. Notably, for many purchasers who use their Fitbit PurePulse Models to monitor heart rate for medical and/or health reasons, the failure of the Fitbit PurePulse Models to accurately measure heart rate poses a health and safety risk as well.

Ms. Mcllellan and the Proposed Class hereby demand that within thirty (30) days of receiving this letter, Fitbit agree to (1) cease all false and misleading statements and advertising of the heart rate monitoring feature of the Fitbit PurePulse Models and (2) offer all Proposed Class members the option to either return their Fitbit PurePulse Models for a full refund or, alternatively, to retain the watches and receive a refund of the difference in price between the Fitbit PurePulse Models and those models without the heart rate monitoring feature. Unless Fitbit agrees to do so within the thirty-day timeframe, we intend to bring claims for damages as permitted by Cal. Civ. Code § 1782(d) in addition to our claims of equitable, injunctive, and other relief available under applicable law, and for attorneys' fees.

Finally, a note regarding forced arbitration, class action bans, and limitations on statutes of limitation. Any attempt by Fitbit to prohibit Ms. Mcllellan and Proposed Class members from vindicating their substantive statutory rights under California law, and their constitutional rights to a jury trial and to petition for redress, through post-purchase imposition of an undisclosed arbitration clause, class action ban, and claim period limitation, is legally invalid and unenforceable as a matter of law. Whatever the enforceability of such clauses on consumers who purchased their Fitbit PurePulse Models *directly* from Fitbit's website, Proposed Class members—including Ms. Mcllellan—who did not purchase their watches directly from Fitbit but instead through third party vendors (either in-person or on-line) did *not* agree to arbitrate at the time they purchased their Fitbit PurePulse Models. Nothing on any of the presale marketing or displays available at such vendors, nor the product packaging itself,

Andy Missan
November 16, 2015
Page 4

disclosed or directed these Proposed Class members to any terms of service including such provisions. Nor were Proposed Class members provided any advance notice that a post-purchase agreement to such terms would be necessary to enable them to “use their activity tracker as intended” or to activate the devices’ most basic functions, a fact your Vice President for Customer Support attested to under oath. (See Ex. A hereto). Those post-purchase clauses are therefore invalid and unenforceable as to Ms. McLellan and Proposed Class members, and may themselves evidence and constitute an unfair and deceptive business practice and fraudulent scheme to defraud consumers and/or deceive them into waiving their rights.

We sincerely hope to confer with you to resolve these violations without the need for litigation. I invite you to contact me to discuss this demand at any time. I can be reached at (212) 355-9500 or jselbin@lchb.com. I look forward to hearing from you.

Very truly yours,



Jonathan D. Selbin

JDS/krb

cc: Robert Klonoff
Elizabeth Cabraser
Kevin Budner

1280554.4

EXHIBIT A

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5 ERIN M. BOSMAN (CA SBN 204987)
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6 JULIE Y. PARK (CA SBN 259929)
JuliePark@mofo.com
7 MORRISON & FOERSTER LLP
12531 High Bluff Drive
8 San Diego, California 92130-2040
9 Telephone: 858.720.5100
Facsimile: 858.720.5125

10
11 Attorneys for Defendant
FITBIT, INC.

12
13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15

16 JAMES P. BRICKMAN, individually and as a
representative of all others similarly situated,

17 Plaintiff,

18 v.

19 FITBIT, INC.,

20 Defendant.
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Case No. 3:15-cv-2077-JD

**DECLARATION OF ERIN M. BOSMAN
IN SUPPORT OF DEFENDANT
FITBIT, INC.'S MOTION TO COMPEL
ARBITRATION AND DISMISS
LITIGATION**

Date: November 4, 2015
Time: 10:00 a.m.
Ctrm: 11, 19th Floor

The Honorable James Donato

Date Action Filed: May 8, 2015

1 I, ERIN M. BOSMAN, hereby declare as follows:

2 1. I am an attorney admitted to practice in the State of California and am a member
3 of good standing in the state bar. I am a partner with the law firm of Morrison & Foerster LLP,
4 and counsel of record for Defendant Fitbit, Inc. ("Fitbit") in the above captioned action.
5 Statements made in this Declaration are based on my personal knowledge, and I could and would
6 so testify if called as a witness in this matter.

7 2. Before this Motion to Compel Arbitration was filed, I informed Plaintiff Mallick's
8 counsel at Dworken & Bernstein Co. L.P.A. via correspondence that claims relating to the Fitbit
9 Charge HR™ ("Charge HR") were subject to arbitration.

10 3. I explained to Plaintiff's counsel that Fitbit would file a motion to compel
11 arbitration if Plaintiff's counsel did not agree to arbitrate Ms. Mallick's dispute relating to the
12 Charge HR. In addition, I explained to Plaintiff's Counsel that Ms. Mallick assented to the class
13 action waiver in Fitbit's Terms of Service.

14 4. Attached as Exhibit 1 is a true and correct copy of the letter sent to Dworken &
15 Bernstein Co., L.P.A., on September 8, 2015, notifying Plaintiff's Counsel that Fitbit's records
16 indicate that Ms. Mallick agreed to the Terms of Service, including the following two provisions:
17 (1) "You and Fitbit agree to resolve any Disputes through final and binding arbitration, except as
18 set forth under Exceptions to Agreement to Arbitrate below" and (2) "You may only resolve
19 Disputes with Fitbit on an individual basis and may not bring a claim as a plaintiff or a class
20 member in a class, consolidate, or representative action. Class arbitrations, class action, private
21 attorney general action, and consolidation with other arbitrations aren't allowed under our
22 agreement."

23
24 I declare under penalty of perjury that the foregoing is true and correct. Executed this
25 30th day of September, 2015, in San Francisco, California.

26
27 s/ Erin M. Bosman
Erin M. Bosman

EXHIBIT B

MORRISON | FOERSTER

12531 HIGH BLUFF DRIVE
SAN DIEGO, CALIFORNIA
92130-2040

TELEPHONE: 858.720.5100
FACSIMILE: 858.720.5125

WWW.MOFO.COM

MORRISON & FOERSTER LLP
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HONG KONG, LONDON, LOS ANGELES,
NEW YORK, NORTHERN VIRGINIA,
PALO ALTO, SACRAMENTO, SAN DIEGO,
SAN FRANCISCO, SHANGHAI, SINGAPORE,
TOKYO, WASHINGTON, D.C.

December 16, 2015

Writer's Direct Contact

+1 (858) 720.5178

EBosman@mofocom

Via E-Mail and U.S. Mail

Jonathan D. Selbin
Lieff Cabraser Heimann & Bernstein
250 Hudson Street, 8th Floor
New York, NY 10013-1413

Re: Fitbit's Response to Mclellan CLRA Demand Letter

Dear Mr. Selbin:

We represent Fitbit, Inc., and write in response to your November 16, 2015 letter to Fitbit's General Counsel Andy Missan, on behalf of Kate Mclellan (attached hereto as Exhibit A).

As you are aware from Erin Bosman's letter to Frank Bartela of September 8, 2015 (which is attached to your November 16 letter), the Fitbit Terms of Service include an agreement to arbitrate, as well as a class action waiver. Accordingly, your desire to resolve Ms. Mclellan's grievance without litigation is well-placed. In fact, Ms. Mclellan cannot litigate her claim and cannot represent a class. Instead, any dispute she has with Fitbit is subject to arbitration.

In your letter, you contend that the post-purchase agreement to arbitrate is invalid and unenforceable. That is incorrect. On November 10, 2015, the Honorable James Donato heard these very issues in *Brickman v. Fitbit, Inc.* and found that Fitbit's arbitration agreement was valid and enforceable.

In *Brickman*, the plaintiff, Stephanie Mallick, had purchased a Charge HR product in January 2015. Accordingly, she had been presented with, and accepted, the Terms of Service including the arbitration agreement and class action waiver. Nevertheless, she argued that because the agreement was presented to her after purchase, there was no consideration.

Ninth Circuit precedent holds otherwise. See *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104 (9th Cir. 2002). *Circuit City* holds that the defendant's reciprocal "promise to submit to arbitration and to forego the option of a judicial forum for a specified class of claims constitutes sufficient consideration.

MORRISON | FOERSTER

Jonathan D. Selbin
December 16, 2015
Page Two

Judge Donato agreed. In response to plaintiff's contention that the arbitration clause was unenforceable, he stated that "I don't think you have a leg to stand on." He went on to explain: "The arbitration clause here is bilateral. It has a 30-day opt-out. It has Fitbit paying – picking up the tab up to \$75,000, and waiving attorneys' fees – all of that under current Ninth Circuit law says that's perfectly fine." (*Brickman v. Fitbit, Inc.*, No. 3:15-cv-2077-JD, Hearing Tr. (N.D. Cal. Nov. 10, 2015), at 6:17-7:2.)

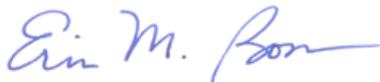
Your client is in the exact same position as Ms. Mallick. In fact, all Charge HR and Surge users are bound by the arbitration agreement and class action waiver, and will be compelled to individually arbitrate similar claims—or any other claims for that matter—against Fitbit.

Fitbit also has strong defenses on the merits of your client's claims, but addresses here only the threshold issue of arbitration and reserves the right to raise these defenses in the appropriate forum.

Should your client wish to have her grievances heard despite their lack of merit, she is welcome to initiate arbitration against Fitbit in accordance with the Terms of Service she agreed to. Please let us know if this is how she would like to proceed. We would be happy to work with you to facilitate the process, including Fitbit's payment of arbitration fees as specified in the Terms of Service, assuming that your client's individual claim is less than \$75,000.

Please let us know if you have any questions or would like to discuss the matter further.

Sincerely,



Erin M. Bosman

Attachment

cc: William L. Stern
Julie Y. Park

**Lieff
Cabraser
Heimann &
Bernstein**
Attorneys at Law

Lieff Cabraser Heimann & Bernstein, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
t 212.355.9500
f 212.355.9592

November 16, 2015

Jonathan D. Selbin
Partner
jselbin@lchb.com

VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED

Mr. Andy Missan, VP and General Counsel
Fitbit, Inc.
405 Howard Street, Suite 550
San Francisco, CA 94105

Registered Agent
CT Corporation
818 West Seventh Street, Suite 930
Los Angeles, CA 90017

RE: Notice Concerning Deceptive Practice under the California Consumer
Legal Remedies Act

Dear Mr. Missan:

Together with my co-counsel Robert Klonoff, I write on behalf of our client Kate Mclellan to provide written notice pursuant to the California Consumer Legal Remedies Act, California Civil Code Section 1750 *et seq.* (the "CLRA"), and specifically, Sections 1782(a)(1) and (2). On behalf of herself and all others similarly situated (the "Proposed Class"), Ms. Mclellan hereby notifies you that Fitbit, Inc. ("Fitbit") is alleged to have violated the CLRA and engaged in unfair, deceptive, fraudulent, and other unlawful conduct by falsely advertising its Fitbit "Charge HR" and "Surge" models, which employ the same PurePulse™ technology (the "Fitbit PurePulse Models"), as detailed below. This letter also serves to provide any required notice that Fitbit has breached express and/or implied warranties with respect to the Fitbit PurePulse Models.

Ms. Mclellan purchased her Fitbit Charge HR on February 27, 2015, at Sports Chalet in Temecula, California. The watch retailed for \$149.95 and cost her \$161.94 after tax.

Fitbit has engaged—and is engaged—in an extensive and widespread advertising campaign in which it expressly represents and markets the Fitbit PurePulse Models based upon their purported ability to accurately record heart rates, even during high intensity workouts. For example, Fitbit represents to consumers that the heart rate monitors "measure heart rate automatically and continuously" and allow users to "accurately track workout intensity."

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Similarly, Fitbit advertises the Fitbit PurePulse Models with slogans such as: “The Difference Between Good and Great...Is Heart”; “For Better Fitness, Start with Heart”; “Get More Benefits with Every Beat—Without An Uncomfortable Chest Strap”; and “Every Beat Counts.” Importantly, those advertisements depict users utilizing the heart rate function of their watches in a variety of high intensity exercises. Fitbit charges a premium for the heart rate function, as demonstrated by the \$20 price differential between the Charge and Charge HR which are distinguished only by the PurePulse technology.

In fact, as Ms. Mclellan and many other purchasers of the Fitbit PurePulse Models have discovered, the heart rate monitor feature Fitbit advertises the Fitbit PurePulse Models as having—and for which it charges a price premium—fails to accurately record heart rates, particularly during high intensity exercise. Ms. Mclellan has observed this inaccuracy during a wide range of activities and exercises. Upon informing Fitbit of these problems, Ms. Mclellan was instructed to reboot her Fitbit PurePulse Model and to heed user manual instructions. She did both, to no effect.

Upon information and belief, this defect is well known to Fitbit, as it has received scores of complaints regarding the inability of the Fitbit PurePulse Models to accurately measure heart rates, and has conceded to at least some complainants that the heart rate monitors are accurate only at rest. Accordingly, it appears Fitbit knowingly manufactured and sold, and continues to sell, the PurePulse Models with a known defect and that do not function as expressly represented and warranted. Fitbit thus misrepresented the nature and characteristics of the Fitbit PurePulse Models and knowingly omitted and failed to disclose the presence of the defect to Ms. Mclellan and the Proposed Class.

Fitbit’s conduct as summarized here constitutes a violation of Cal. Civ. Code § 1770(a); specifically, Fitbit violated—and continues to violate—the CLRA by, among other things:

1. Representing through advertising, warranties, and other express representations, that the Fitbit PurePulse Models had characteristics, benefits, or uses that they did not have;
2. Falsely representing that the Fitbit PurePulse Models are of a particular standard, quality, and/or grade when they are of another;
3. Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve;
4. Advertising the Fitbit PurePulse Models with the intent not to sell them as advertised;
5. Failing to disclose that the Fitbit PurePulse Models have a defect, which is a material fact, the omission of which tends to mislead or deceive the

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consumer, and a fact that could not reasonably be known by the consumer;

6. Failing to disclose the Fitbit PurePulse Models' defect with the intent that consumers rely on the concealment or omission in connection with their decisions to purchase the subject heart rate watches;
7. Failing to properly repair the Fitbit PurePulse Models to correct or eliminate the defect; and
8. Other unfair or deceptive conduct or practices in trade or commerce with respect to the marketing, advertising, sale and warranty/customer service of the Fitbit PurePulse Models.

Fitbit's conduct also violates California's Unfair Competition Law, California Business and Professions Code Section 17200, and constitutes common law fraud, fraudulent inducement to contract, and breach of express and implied warranties.

Ms. Mclellan and the Proposed Class have all suffered actual damages as a result of this conduct, including but not limited to, the original cost of the Fitbit PurePulse Models and/or the premium paid for them. Notably, for many purchasers who use their Fitbit PurePulse Models to monitor heart rate for medical and/or health reasons, the failure of the Fitbit PurePulse Models to accurately measure heart rate poses a health and safety risk as well.

Ms. Mclellan and the Proposed Class hereby demand that within thirty (30) days of receiving this letter, Fitbit agree to (1) cease all false and misleading statements and advertising of the heart rate monitoring feature of the Fitbit PurePulse Models and (2) offer all Proposed Class members the option to either return their Fitbit PurePulse Models for a full refund or, alternatively, to retain the watches and receive a refund of the difference in price between the Fitbit PurePulse Models and those models without the heart rate monitoring feature. Unless Fitbit agrees to do so within the thirty-day timeframe, we intend to bring claims for damages as permitted by Cal. Civ. Code § 1782(d) in addition to our claims of equitable, injunctive, and other relief available under applicable law, and for attorneys' fees.

Finally, a note regarding forced arbitration, class action bans, and limitations on statutes of limitation. Any attempt by Fitbit to prohibit Ms. Mclellan and Proposed Class members from vindicating their substantive statutory rights under California law, and their constitutional rights to a jury trial and to petition for redress, through post-purchase imposition of an undisclosed arbitration clause, class action ban, and claim period limitation, is legally invalid and unenforceable as a matter of law. Whatever the enforceability of such clauses on consumers who purchased their Fitbit PurePulse Models *directly* from Fitbit's website, Proposed Class members—including Ms. Mclellan—who did not purchase their watches directly from Fitbit but instead through third party vendors (either in-person or on-line) did *not* agree to arbitrate at the time they purchased their Fitbit PurePulse Models. Nothing on any of the presale marketing or displays available at such vendors, nor the product packaging itself,

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disclosed or directed these Proposed Class members to any terms of service including such provisions. Nor were Proposed Class members provided any advance notice that a post-purchase agreement to such terms would be necessary to enable them to “use their activity tracker as intended” or to activate the devices’ most basic functions, a fact your Vice President for Customer Support attested to under oath. (See Ex. A hereto). Those post-purchase clauses are therefore invalid and unenforceable as to Ms. Mclellan and Proposed Class members, and may themselves evidence and constitute an unfair and deceptive business practice and fraudulent scheme to defraud consumers and/or deceive them into waiving their rights.

We sincerely hope to confer with you to resolve these violations without the need for litigation. I invite you to contact me to discuss this demand at any time. I can be reached at (212) 355-9500 or jselbin@lchb.com. I look forward to hearing from you.

Very truly yours,



Jonathan D. Selbin

JDS/krb

cc: Robert Klonoff
Elizabeth Cabraser
Kevin Budner

1280554.4

EXHIBIT A

1 WILLIAM L. STERN (CA SBN 96105)
WStern@mofo.com
2 MORRISON & FOERSTER LLP
425 Market Street
3 San Francisco, California 94105
Telephone: 415.268.7000

4 JAMES W. HUSTON (CA SBN 115596)
JHuston@mofo.com
5 ERIN M. BOSMAN (CA SBN 204987)
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6 JULIE Y. PARK (CA SBN 259929)
JuliePark@mofo.com
7 MORRISON & FOERSTER LLP
12531 High Bluff Drive
8 San Diego, California 92130-2040
9 Telephone: 858.720.5100
Facsimile: 858.720.5125

10
11 Attorneys for Defendant
FITBIT, INC.

12
13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15

16 JAMES P. BRICKMAN, individually and as a
representative of all others similarly situated,

17 Plaintiff,

18 v.

19 FITBIT, INC.,

20 Defendant.
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28

Case No. 3:15-cv-2077-JD

**DECLARATION OF ERIN M. BOSMAN
IN SUPPORT OF DEFENDANT
FITBIT, INC.'S MOTION TO COMPEL
ARBITRATION AND DISMISS
LITIGATION**

Date: November 4, 2015
Time: 10:00 a.m.
Ctrm: 11, 19th Floor

The Honorable James Donato

Date Action Filed: May 8, 2015

1 I, ERIN M. BOSMAN, hereby declare as follows:

2 1. I am an attorney admitted to practice in the State of California and am a member
3 of good standing in the state bar. I am a partner with the law firm of Morrison & Foerster LLP,
4 and counsel of record for Defendant Fitbit, Inc. ("Fitbit") in the above captioned action.
5 Statements made in this Declaration are based on my personal knowledge, and I could and would
6 so testify if called as a witness in this matter.

7 2. Before this Motion to Compel Arbitration was filed, I informed Plaintiff Mallick's
8 counsel at Dworken & Bernstein Co. L.P.A. via correspondence that claims relating to the Fitbit
9 Charge HR™ ("Charge HR") were subject to arbitration.

10 3. I explained to Plaintiff's counsel that Fitbit would file a motion to compel
11 arbitration if Plaintiff's counsel did not agree to arbitrate Ms. Mallick's dispute relating to the
12 Charge HR. In addition, I explained to Plaintiff's Counsel that Ms. Mallick assented to the class
13 action waiver in Fitbit's Terms of Service.

14 4. Attached as Exhibit 1 is a true and correct copy of the letter sent to Dworken &
15 Bernstein Co., L.P.A., on September 8, 2015, notifying Plaintiff's Counsel that Fitbit's records
16 indicate that Ms. Mallick agreed to the Terms of Service, including the following two provisions:
17 (1) "You and Fitbit agree to resolve any Disputes through final and binding arbitration, except as
18 set forth under Exceptions to Agreement to Arbitrate below" and (2) "You may only resolve
19 Disputes with Fitbit on an individual basis and may not bring a claim as a plaintiff or a class
20 member in a class, consolidate, or representative action. Class arbitrations, class action, private
21 attorney general action, and consolidation with other arbitrations aren't allowed under our
22 agreement."

23
24 I declare under penalty of perjury that the foregoing is true and correct. Executed this
25 30th day of September, 2015, in San Francisco, California.

26
27 s/ Erin M. Bosman
Erin M. Bosman

EXHIBIT 1

MORRISON | FOERSTER

12531 HIGH BLUFF DRIVE
SAN DIEGO, CALIFORNIA
92130-2040

TELEPHONE: 858.720.5100
FACSIMILE: 858.720.5125

WWW.MOFO.COM

MORRISON & FOERSTER LLP
BEIJING, BERLIN, BRUSSELS, DENVER,
HONG KONG, LONDON, LOS ANGELES,
NEW YORK, NORTHERN VIRGINIA,
PALO ALTO, SACRAMENTO, SAN DIEGO,
SAN FRANCISCO, SHANGHAI, SINGAPORE,
TOKYO, WASHINGTON, D.C.

September 8, 2015

Writer's Direct Contact
+1 (858) 720.5178
EBosman@mofo.com

Via E-Mail

Patrick J. Perotti
Frank A. Bartela
DWORKEN & BERNSTEIN CO., L.P.A.
60 South Park Place
Plainesville, Ohio 44077

Re: Demand for Arbitration
Brickman v. Fitbit Inc., Case No. 3:15-cv-2077

Dear Counsel:

This letter contains Fitbit's demand for arbitration concerning the claims brought by your client, Stephanie Mallick. Ms. Mallick agreed to arbitrate her claims against Fitbit under Fitbit's Terms of Service. A copy of the Terms of Service, which were published on Fitbit's website on December 18, 2014, is attached to this letter at **Exhibit A**. Specifically, Ms. Mallick agreed to arbitrate on the same day she purchased and paired her Charge HR for the first time: February 4, 2015.

When a Fitbit user sets up an account, the user is prompted to agree to the Terms of Service and the Privacy Policy. A hyperlink allows the customer to review these documents before agreeing to their terms. The user must then affirmatively check the box indicating, "I agree to the Terms of Service and the Privacy Policy."

In the Dispute Resolution section of the Terms of Service, there is a heading stating "**We Both Agree To Arbitrate.**" The text below this bolded heading reads, "You and Fitbit agree to resolve any Disputes through final and binding arbitration, except as set forth under Exceptions to Agreement to Arbitrate below."¹ Directly below the agreement to arbitrate,

¹ The Agreement to Arbitrate in the Terms of Service has two exceptions for customers with claims under a certain monetary threshold. First, they provide an exception to arbitration for claims brought in small claims court. Second, under the Terms of Sale, Fitbit provides that it "will pay all arbitration fees for claims less than \$75,000." (*Id.*) Neither applies to Ms. Mallick's claims.

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Brickman P Counsel
September 8, 2015
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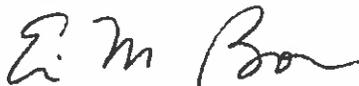
there is another heading explaining how to “**Opt-out of Agreement to Arbitrate.**” This opt-out section allows that “you can decline this agreement to arbitrate by contacting legal@fitbit.com within 30 days of first accepting these Terms and stating that you (include your first and last name) decline this arbitration agreement.” The Terms of Service provide that the “American Arbitration Association (AAA) will administer the arbitration under its Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes.”

Ms. Mallick also agreed that she would not bring a claim as a plaintiff or a class member in a class. Under the Dispute Resolution section there is a heading “**No Class Actions.**” This section provides: “You may only resolve Disputes with Fitbit on an individual basis and may not bring a claim as a plaintiff or a class member in a class, consolidate, or representative action. Class arbitrations, class action, private attorney general action, and consolidation with other arbitrations aren’t allowed under our agreement.”

Ms. Mallick agreed to the terms of service and she is bound by them. She did not opt out of the arbitration procedures.

Please confirm that you will dismiss Ms. Mallick as a plaintiff from the above referenced case. Otherwise, we will be forced to move to compel individual arbitration of her claims.

Sincerely,



Erin M. Bosman

Attachment

cc: William L. Stern
James W. Huston
Julie Y. Park