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

ERIN M. BOSMAN (CA SBN 204987)
EBosman@mofo.com
JULIE Y. PARK (CA SBN 259929)
JuliePark@mofo.com
KAI BARTOLOMEO (CA SBN 264033)
KBartolomeo@mofo.com
MORRISON & FOERSTER LLP
12531 High Bluff Drive
San Diego, California 92130-2040
Telephone: 858.720.5100
Facsimile: 858.720.5125

Attorneys for Defendant
FITBIT, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KATE MCLELLAN, TERESA BLACK, DAVID URBAN, ROB DUNN, RACHEL SAITO, TODD RUBINSTEIN, RHONDA CALLAN, JAMES SCHORR, BRUCE MORGAN, and AMBER JONES, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, v. FITBIT, INC., Defendant.	Case No. 16-cv-00036-JD **DEFENDANT FITBIT, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS SECOND AMENDED COMPLAINT PURSUANT TO RULE 12(B)(6)** Date: April 19, 2018 Time: 10:00 a.m. Ctrm: 11, 19th Floor The Honorable James Donato Date Action Filed: May 8, 2015
JUDITH LANDERS, LISA MARIE BURKE, and JOHN MOLENSTRA, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, v. FITBIT, INC., Defendant.	Case No. 16-cv-00777-JD

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on April 19, 2018, at 10:00 a.m., or as soon thereafter as the matter may be heard, in the United States District Court for the Northern District of California, Defendant Fitbit, Inc. ("Fitbit") will, and hereby does, move the Court pursuant to Fed. R. Civ. P., Rule 12(b)(6) to dismiss the claims of the Second Amended Consolidated Master Class Action Complaint, Dkt. No. 127-1 ("SAC"), for failure to state a claim upon which relief can be granted.

This Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, documents in the Court's file, any matters of which this Court may take judicial notice, and on such other written and oral argument as may be presented to the Court.

Dated: March 13, 2018

MORRISON & FOERSTER LLP

By: s/ William L. Stern
William L. Stern

Attorneys for Defendant
FITBIT, INC.

STATEMENT OF ISSUES TO BE DECIDED

This motion raises the following issues:

1. Does Plaintiff state a claim for fraud, fraud in the inducement, or violation of California's and Arizona's fraud-based consumer protection statutes where his Second Amended Consolidated Master Class Action Complaint ("SAC") fails to allege an actionable statement, does not identify the specific statement he allegedly saw and on which he relied, and fails to allege any purported duty to disclose?
2. Does Plaintiff state a claim for violation of the "unlawful" prong of California's Unfair Competition Law where his SAC contains no predicate legal violation to support the claim?
3. Does Plaintiff state a claim for breach of express warranty based on Fitbit's non-actionable advertising statements?
4. Does Plaintiff state a claim for violation of the Magnuson-Moss Warranty Act where he fails to allege a predicate claim for breach of express or implied warranties?
5. Can Plaintiff, as an Arizona resident who purchased his device outside of California, state a claim for violation of the Song-Beverly Consumer Warranty Act?
6. Does Plaintiff state a claim for revocation of the California Commercial Code when Fitbit is not the "seller" of the trackers he purchased within the meaning of the Code?
7. Does Plaintiff state a tag-along claim for unjust enrichment when an express contract governs the terms of Plaintiff's purchase?

I. INTRODUCTION

Plaintiff Rob Dunn seeks to hold Fitbit's products to a higher standard than what Fitbit promised. He would have Fitbit be liable for purported misrepresentations that do not exist. Plaintiff challenges Fitbit's representations about the accuracy of its heartrate tracking technology, but nowhere in the Second Amended Consolidated Master Class Action Complaint ("SAC") does he identify the specific representations that he saw and relied on in purchasing his Fitbit product. That is fatal to his claims under Rule 9(b). In addition, Plaintiff's fraud and fraud-based consumer protection claims fail because he cannot identify an actionable misrepresentation. His warranty claims fail because they are premised on a purportedly false advertising scheme that does not exist. And Plaintiff's claim for revocation under the California Commercial Code fails because the statute has no application here. Finally, Plaintiff has no claim for unjust enrichment because, as he admits, a written agreement governs the terms of his purchase.

Fitbit respectfully requests that all claims in the SAC be dismissed.

II. FACTUAL BACKGROUND

A. Fitbit's PurePulse Trackers

Fitbit is a California-based technology company that designs and manufactures wearable devices to help people set and achieve their health and fitness goals. (*See* SAC ¶ 7.) For nearly a decade, Fitbit's users have tracked their way to better health by using Fitbit devices to track metrics such as steps taken, floors climbed, active minutes, sleep, and heart rate.

The SAC makes claims about three devices equipped with Fitbit's "PurePulse" heartrate tracking technology—Charge HR, Surge, and Blaze (the "PurePulse Trackers")[1]—and whether Fitbit misrepresented its PurePulse technology to Plaintiff. (*Id.* ¶ 1.) As explained on Fitbit's website, PurePulse uses LED lights to detect blood volume changes from a user's heartbeat, which causes his or her capillaries to expand and contract. (*Id.* ¶ 20 & n.3.) The Fitbit platform processes that information using proprietary algorithms to track the user's heartrate. (*Id.*) When Fitbit launched PurePulse Trackers, relatively few wrist-based trackers were on the market;

[1] For the sake of consistency, Fitbit borrows Plaintiff's nomenclature from the SAC.

numerous users and third-party publications, including Consumer Reports, praised Fitbit's new heartrate-tracking feature.[2] In a study conducted in direct response to Plaintiff's claims in this lawsuit (and cited in Plaintiff's SAC), Consumer Reports concluded: "Both the Fitbit Charge HR and Fitbit Surge passed our tests handily, accurately recording heart rates at everything from a leisurely walk up to a fast run."[3]

B. Fitbit's "Heart"-Driven Marketing

When Fitbit launched its PurePulse Trackers, it drove the launch with marketing statements that included catchy phrases using the words "heart" and "beat." For example, the SAC cites "Every Beat Counts" and "Know Your Heart" from a television ad aired during the 2015 World Series. (SAC ¶ 2.) Other statements include "The Difference Between Good and Great . . . Is Heart" or "For Better Fitness, Start with Heart" from unspecified Fitbit "promotional efforts." (*Id.* ¶ 21.) According to Plaintiff, promotional materials explained the PurePulse technology, which uses LED lights to detect changes in capillary blood volume. (*Id.* ¶ 20.) While Plaintiff makes numerous allegations about Fitbit's various representations, he never states the specific representations he viewed or relied on in purchasing his Fitbit device. (*See generally* SAC.)

C. Plaintiff's Claims in This Lawsuit

Based on these marketing statements, Plaintiff brings various claims for fraud, breach of warranty, and violations of consumer protection laws.[4] Plaintiff, an Arizona resident, claims that he purchased two Charge HR devices from two different stores (Bed Bath & Beyond and Best Buy) on December 26, 2015. (SAC ¶ 13.) He decided to purchase after "conducting research online for fitness trackers" and seeing Fitbit's unspecified "representations about the PurePulse

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[2] Consumer Reports, What We Do, https://www.consumerreports.org/cro/about-us/what-we-do/index.htm (last accessed Mar. 9, 2018).

[3] Patrick Austin, *Taking the Pulse of Fitbit's Contested Heart Rate Monitors*, Consumer Reports (Jan. 22, 2016), http://www.consumerreports.org/fitness-trackers/taking-the-pulse-of-fitbitscontested-heart-rate-monitors (cited in SAC ¶ 54 & n.11).

[4] This lawsuit's procedural history is detailed in Fitbit's concurrently filed motion to strike Plaintiff's improper class allegations. Briefly, the previous iteration of the complaint named 13 plaintiffs. Today, only one remains.

Trackers' ability to consistently record accurate heart rates, even during exercise." (*Id.*) Shortly after purchasing the Charge HR, Plaintiff decided that his device did not work as represented because his heartrate readings during exercise often differed from "the heart rate monitors on his stationary cardiovascular machine." (*Id.*)

Plaintiff claims that Fitbit's statements were false or misleading because the trackers do not "consistently record accurate heart rates, even during exercise." (*Id.* ¶¶ 30, 86.) Plaintiff purports to sue on behalf of a nationwide class defined as "[a]ll persons or entities in the United States who purchased a Fitbit PurePulse Tracker," even those who agreed to arbitrate their claims. (*Id.* ¶ 63.) Plaintiff also purports to represent a state-specific class of Arizona residents defined as "[a]ll persons or entities in Arizona who purchased a Fitbit PurePulse Tracker . . . ." (*Id.* ¶ 64.)

The SAC comprises 11 causes of action: (1) violation of California's Consumers Legal Remedies Act ("CLRA"); (2) violation of California's False Advertising Law ("FAL"); (3) violation of California's Unfair Competition Law ("UCL"); (4) fraud; (5) fraud in the inducement; (6) unjust enrichment; (7) revocation of acceptance pursuant to California Commercial Code § 2608; (8) breach of express warranty; (9) violation of the Magnuson-Moss Warranty Act; (10) violation of the Song-Beverly Consumer Warranty Act for Breach of Implied Warranty of Merchantability; and (11) violation of the Arizona Consumer Fraud Act ("ACFA"). None of Plaintiff's claims are viable, warranting dismissal of the entire SAC.

III. LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) should be granted if the plaintiff is unable to articulate facts establishing a claim to relief that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008). A court must accept all factual allegations pleaded in the complaint as true, *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996), but it need not accept unreasonable inferences, legal conclusions cast in the form of factual allegations, or unwarranted deductions of fact. *See Iqbal*, 556 U.S. at 680-81 ("bare assertions . . . amount[ing] to nothing more than a 'formulaic recitation of the

elements' . . . are not entitled to the assumption of truth") (citing *Twombly*, 550 U.S. at 555); *Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 968 (N.D. Cal. 2008) (citing *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)), *aff'd*, 322 Fed. App'x 489 (9th Cir. 2009).

IV. ARGUMENT

A. Plaintiff's Fraud Claim and Fraud-Based Consumer Protection Claims Should Be Dismissed

Plaintiff's fraud and fraud-based claims fail to meet the Rule 9(b) heightened pleading standard because Plaintiff does not state what representations he saw or when. Even if he had, his claims would fail because Fitbit's marketing phrases, like "Know Your Heart," are non-actionable puffery or not alleged to be false. Finally, Plaintiff cannot premise his claims on purported omissions because he does not sufficiently allege any duty to disclose.

1. Plaintiff's Allegations Fail to Meet Rule 9(b)'s Heightened Pleading Requirements

Plaintiff's vague representations about the purportedly false or misleading statements he saw, and on which he allegedly relied, fail the Rule 9(b) standard. A claim for fraud must "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). To satisfy this heightened standard, the plaintiff must allege an account of the time, place, and specific content of any false representations as well as the identities of the parties to the misrepresentations. *Moore v. Apple, Inc.*, 73 F. Supp. 3d 1191, 1198 (N.D. Cal. 2014) (internal quotation marks and citation omitted). The plaintiff must also set forth "what is false or misleading about a statement, and why it is false." *Id*; *see Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) ("A party alleging fraud must set forth *more* than the neutral facts necessary to identify the transaction.") (internal quotation marks omitted). If a plaintiff relies on allegedly fraudulent conduct as the basis for his claims, those claims are "said to be 'grounded in fraud' or to 'sound in fraud,' and the pleading . . . as a whole must satisfy the particularity requirement of Rule 9(b)." *Kearns*, 567 F.3d at 1125 (internal citations omitted).

Here, Plaintiff's CLRA, FAL, UCL, and ACFA causes of action are all grounded in fraud. They rely on the premise that Fitbit misrepresented the ability of its PurePulse Trackers to

"consistently" or "continuously" record "accurate heart rates," including during exercise, or omitted material information regarding that ability. (*See, e.g.*, SAC ¶¶ 1-2, 30, 86, 92, 100, 109-10, 118, 123, 134, 143, 151, 159, 170-71, 187, 205-07.) As such, these claims, and Plaintiff's fraud and fraudulent inducement claims, are subject to the more exacting pleading requirements of Federal Rule of Civil Procedure 9(b) discussed above. *See Kearns*, 567 F.3d at 1125

Plaintiff's general allegations about viewing Fitbit's marketing statements do not provide the "who, what, when, where, and how" required for fraud claims under Rule 9(b). *Id*. at 1124 (citation omitted). Although Plaintiff claims he "conduct[ed] research online for fitness trackers, and view[ed] Fitbit's representations about the PurePulse Trackers' ability to consistently record accurate heart rates, even during exercise" (SAC ¶ 13), he fails to specify *which* purported representations he saw, *where* they appeared, or *what*, precisely, they said about the accuracy of PurePulse. This falls short of the heightened pleading standard, meriting dismissal of his claims. *See McKinney v. Google, Inc.*, No. 5:10-cv-01177 EJD (PSG), 2011 WL 3862120, at *5 (N.D. Cal. Aug. 30, 2011) (dismissing claims where plaintiff "merely assert[ed] that she based her decision to buy the . . . Phone on [defendants'] misrepresentations but [did] not particularly identif[y] any representation upon which she relied or allege[] facts showing her actual and reasonable reliance on any such representations"); *Baltazar v. Apple Inc.*, No. CV-10-3231-JF, 2011 WL 588209, at *3-*4 (N.D. Cal. Feb. 10, 2011) (dismissing CLRA and misrepresentation claims where plaintiffs failed to "ple[ad] with specificity the content of the alleged misrepresentations made by Apple in its commercials and advertisements").

Plaintiff does not allege the necessary element of reliance with particularity either. Each of Plaintiff's fraud and fraud-based consumer protection claims requires him to plead actual reliance on the allegedly deceptive or misleading statement(s). *In re Arizona Theranos, Inc., Litig.*, 256 F. Supp. 3d 1009, 1028 (D. Ariz. 2017) (dismissing CFA claim because plaintiffs could not have relied on misrepresentation); *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1026 (N.D. Cal. 2012) (dismissing FAL claims and finding that "actual reliance is required to have standing to sue under the FAL"); *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 326 (2011) (UCL); *Meyer v. Sprint Spectrum, L.P.*, 45 Cal. 4th 634, 641 (2009) (noting that the CLRA requires that a

violation "cause[] or result[] in some sort of damage"); *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal. 4th 979, 990 (2004) (intentional misrepresentation). Plaintiff's failure to identify a misrepresentation means that he cannot assert which specific representations he found material or those on which he relied in purchasing his PurePulse Devices. *See Kearns*, 567 F.3d at 1126 (plaintiff failed to satisfy Rule 9(b) where he did not specify "when he was exposed to" the advertisements or sales materials, "which ones he found material," or "which sales material he relied upon in making his [purchase] decision"); *Wehlage v. EmpRes Healthcare, Inc.*, 791 F. Supp. 2d 774, 789-90 (N.D. Cal. 2011) (dismissal appropriate where plaintiff failed to "allege the circumstances in which she viewed [the allegedly fraudulent] materials or what was false about them").

Plaintiff's failure to satisfy Rule 9(b)'s pleading standards requires dismissal of his fraud and fraud-based consumer protection claims.

2. The Representations at Issue Are Non-Actionable Puffery

The alleged representations in the SAC are "general, subjective claim[s] about a product [that constitute] non-actionable puffery" and cannot support a claim for fraud or violation of the consumer protection statutes. *See, e.g., Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1053 (9th Cir. 2008); *Grouse River Outfitters Ltd. v. NetSuite, Inc.*, No. 16-cv-02954-LB, 2018 WL 306719, at *3 (N.D. Cal. Jan. 5, 2018) ("Statements constituting mere 'puffery' cannot support liability under a claim for fraud or negligent misrepresentation."); *Hadley v. Kellogg Sales Co.*, 273 F. Supp. 3d 1052, 1081 (N.D. Cal. 2017) ("Generalized, vague, and unspecified assertions constitute mere puffery upon which a reasonable consumer could not rely, and thus are not actionable under the UCL, FAL, or CLRA." (internal quotation marks omitted)); *Cheatham v. ADT Corp.*, 161 F. Supp. 3d 815, 826 (D. Ariz. 2016) (examining whether statements are considered nonactionable puffery under the ACFA); *In re Sony Grand Wega KDF-E A10/A20 Series Rear Projection HDTV Television Litig.*, 758 F. Supp. 2d 1077, 1089 (S.D. Cal. 2010) (non-actionable puffery cannot support a claim under the UCL or CLRA).

Fitbit uses a number of catchy phrases playing on the word "heart" to promote the PurePulse Trackers, but those phrases, like "Know your Heart" and "Every Beat Counts," are

classic puffing. They make no specific promises and provide no specific descriptions about the heartrate feature. (*See* SAC ¶¶ 2, 20, 21, 24, 29.) Likewise, describing technology as "advanced" (*id.* ¶ 159) is well-established non-actionable puffery, as confirmed by numerous courts in the Ninth Circuit. *See, e.g.*, *Atari Corp. v. 3DO Co.*, No. C 94–20298 RMW (EAI), 1994 WL 723601, at *2 (N.D. Cal. May 16, 1994) (manufacturer's slogan that its product was "the most advanced home gaming system in the universe" was non-actionable puffery); *Anunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133 (C.D. Cal. 2005) (description of product as having the "latest technology" was non-actionable puffery). To the extent Plaintiff challenges Fitbit's representations about the accuracy of heartrate tracking, the only alleged Fitbit statement mentioning accuracy refers to workout intensity, not heartrate—and is a general representation that promises no particular degree of heartrate accuracy. (SAC ¶ 30.) Generalized statements regarding a product's "accuracy," without more, are non-actionable puffery. *See Shields v. Alere Home Monitoring, Inc.*, No. C15-2580 CRB, 2015 WL 7272672, at *10 (N.D. Cal. Nov. 18, 2015) (holding that blood monitoring company's statements that its devices were "accurate and reliable" and a "convenient alternative to traditional lab tests," as well as including the words "simplicity, accuracy, and convenience" on advertising materials all amounted to non-actionable puffery).

3. Plaintiff Fails to Adequately Allege Why the Majority of Fitbit's Statements Are False or Misleading

Rule 9(b) requires Plaintiff to set forth "what is false or misleading about a statement, and why it is false." *Moore*, 73 F. Supp. 3d at 1198. Plaintiff's exclusive basis for claiming that Fitbit's purported representations were false or misleading is his assertion that the PurePulse Trackers did not have "the ability to consistently record accurate heart rates, even during high-intensity exercise." (SAC ¶ 86; *see also id.* ¶ 2.) But the alleged statements cited in the SAC have nothing to do with accuracy. For example, consider "The Difference Between Good and Great . . . Is Heart" (*id.* ¶ 21); "For Better Fitness, Start with Heart" (*id.*); and "track[] your heart rate all day and during exercise" (*id.* ¶ 26). None of these touch on accuracy. And, as discussed above, any suggestions Fitbit may have made about accuracy are non-actionable puffery.

Plaintiff's failure to connect his theory of falsity to the numerous and varied representations in the SAC is fatal. His fraud and fraud-based consumer protection claims should be dismissed.

4. Plaintiff Does Not Plead Any Actionable Omissions

To be actionable, an omission must be "contrary to a representation actually made by the defendant, or an omission of a fact the defendant was obliged to disclose." *Baltazar*, 2011 WL 588209, at *4 (quoting *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 835 (2006)); *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1141 (9th Cir. 2012) ("California courts have generally rejected a broad obligation to disclose . . . ."). Rule 9(b) applies with equal force to alleged omissions. *Kearns*, 567 F.3d at 1127 (because "nondisclosure is a claim for misrepresentation in a cause of action for fraud, it . . . must be pleaded with particularity under Rule 9(b)"). Plaintiff has pled no omissions that satisfy these requirements.

a. No Omission Contrary to a Representation

As discussed above, Plaintiff has alleged no actionable misstatement by Fitbit regarding accuracy or otherwise. The representations at issue are either generalized, catchy marketing slogans that would not mislead or deceive a reasonable consumer or non-specific descriptions of the PurePulse Tracker's features that have nothing to do with Plaintiffs' allegations that the trackers are inaccurate. In any event, Plaintiff never specifies which of those representations he saw and on which he relied. Therefore, Plaintiff identifies no statements about heartrate accuracy that would be contradicted by an alleged omission.

b. No Obligation to Disclose

Plaintiff can point to no other basis for requiring Fitbit to disclose the precise degree of accuracy provided through its heartrate tracking technology. "California courts have generally rejected a broad obligation to disclose . . . ." *Wilson*, 668 F.3d at 1141. As the Ninth Circuit has held, an obligation to disclose arises only when the alleged defect relates to a safety issue. *Daniel v. Ford Motor Co.*, 806 F. 3d 1217, 1225 (9th Cir. 2015) ("Alleged defects that create unreasonable safety risks are considered material.") (quotations and citations omitted). Plaintiff's "safety" theory strains credulity. He claims that users "could jeopardize their health by relying on

the inaccurate heart rate readings and potentially achieving dangerous heart rates." (SAC ¶ 89a.) But he also concedes that Fitbit warns users that the PurePulse Trackers "are not intended to be scientific or medical devices." (SAC ¶ 57.) Plaintiff cannot base his omission claim on an alleged safety concern that stems from misuse of the product.[5]

B. Plaintiff Does Not State a Claim Under the Unlawful Prong of the UCL

Plaintiff's UCL claim fails for an additional reason: he does not satisfy the "unlawful" prong of the statute.[6] An "unlawful" practice or act under the UCL is "anything that can properly be called a business practice and that at the same time is forbidden by law." *People v. McKale*, 25 Cal. 3d 626, 634 (1979) (citation omitted). The UCL thus "borrows" violations of other laws and treats them as unlawful practices that are independently actionable under the statute. *Farmers Ins. Exch. v. Super. Ct.*, 2 Cal. 4th 377, 383 (1992). Courts routinely dismiss UCL claims where the plaintiff has not established a predicate violation of underlying law. *See, e.g.*, *Indep. Cellular Tel., Inc. v. Daniels & Assocs.*, 863 F. Supp. 1109, 1118 (N.D. Cal. 1994).

Plaintiff bases his claim under the "unlawful" prong of the UCL on a purported violation of the CLRA. (SAC ¶ 108.) As discussed above, Plaintiff has not stated a viable predicate claim under that statute and therefore cannot plead an "unlawful" act under the UCL. *Daugherty*, 144 Cal. App. 4th at 837-38 (dismissing UCL claim for lack of a violation of statute or other law); *Hodges v. Apple Inc.*, 13-CV-01128-WHO, 2013 WL 4393545, at *6 (N.D. Cal. Aug. 12, 2013) ("Because Hodges fails to plead with particularity how Apple violated any statute, he also fails to adequately plead a violation under the UCL's 'unlawful' prong.").

C. Plaintiff's Failure to Provide Pre-suit Notice Also Compels Dismissal of His CLRA Claim

Plaintiff's CLRA claim should also be dismissed for failure to provide proper pre-suit

[5] The ACFA imposes a duty to disclose when the purportedly omitted fact is "material" and when the defendant intended that others rely thereon. Ariz. Rev. Stat. § 44-1522(A). But what Plaintiff dubs the "Heart Rate Defect" is little more than his own subjective belief regarding how Fitbit's devices should perform. Plaintiff cannot plausibly claim that Fitbit was under a duty to disclose the fact that PurePulse Trackers did not meet Plaintiff's unknown, subjective expectations; nor can he plausibly claim that others viewed Plaintiff's expected degree of accuracy to be "material."

[6] Fitbit does not challenge Plaintiff's claim under the "unfair" prong.

notice. "The CLRA requires written notice and demand thirty days before commencement of a suit." *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 826 F. Supp. 2d 1180, 1204 (C.D. Cal. 2011) (citing Cal. Civ. Code § 1782). Plaintiff does not plead in the SAC that he provided notice to Fitbit. Rather, he attaches letters sent on behalf of other consumers. (SAC ¶¶ 96, 175-176.) The statute, though, requires the consumer who brings the claim to provide notice himself. *In re Toyota*, 826 F. Supp. 2d at 1204 (dismissing CLRA claims where plaintiffs attempted to rely on notice provided in a different case). Plaintiff cannot piggyback on attempts at notice provided by others not before the Court. His CLRA claim should be dismissed.

D. Plaintiff's Breach of Warranty Claims Fail

Plaintiff's warranty claims are not viable. As discussed below, Plaintiff failed to provide adequate pre-suit notice and tender his devices to Fitbit—prerequisites for express and implied warranty claims under California law. In addition, Plaintiff does not allege breach of express warranty based on Fitbit's purported representations, and his federal statutory warranty claim fails because he does not allege a predicate state-law warranty claim. Finally, Plaintiff's Song-Beverly Consumer Warranty Act claim cannot be asserted by an out-of-state plaintiff who purchased his product outside of California.

1. Plaintiff's Failure to Give Pre-suit Notice and Tender His PurePulse Trackers Bars His Warranty Claims

Plaintiff's failure to provide the requisite pre-suit notice, and failure to tender his PurePulse Trackers to Fitbit, bars his warranty claims. Under California law, "[t]he buyer must, within a reasonable time after he or she discovers or should have discovered any breach [of warranty], notify the seller of breach or be barred from any remedy." *In re Trader Joe's Tuna Litig.*, No. 2:16-cv-01371-ODW(AJWx), 2017 WL 4442918, at *10 (C.D. Cal. Oct. 3, 2017); *see also* Cal. Com. Code § 2607(3)(A). The purpose of this rule is to "allow the seller the opportunity to repair the defective item, reduce damages, avoid defective products in the future, and negotiate settlements." *Minkler v. Apple, Inc.*, 65 F. Supp. 3d 810, 817 (N.D. Cal. 2014) (quoting *Cardinal Health 301 v. Tyco Elec. Corp.*, 169 Cal. App. 4th 116, 135 (2008)). Here,

Fitbit could not avail itself of those options because Plaintiff never provided notice to Fitbit that he believed any express or implied warranty had been breached. His breach of warranty claims should be dismissed. *See In re Trader Joe's Tuna Litig.*, 2017 WL 4442918, at *10 (dismissing claims for breach of express warranty when notice was not provided within a reasonable time period).

2. Plaintiff Fails to State a Claim for Express Warranty

Plaintiff fails to allege facts sufficient to plead a claim for breach of express warranty because no express warranty was given. A breach of express warranty claim has three elements: (1) statements made by the seller amounting to "an affirmation of fact or promise relating to the goods sold," (2) that become part of the basis of the bargain, and (3) a subsequent breach of that express warranty by the seller. *McDonnell Douglas Corp. v. Thiokol Corp.*, 124 F.3d 1173, 1176 (9th Cir. 1997) (internal quotation marks omitted); *see also Robichaud v. Speedy PC Software*, No. C 12 04730 LB, 2013 WL 818503, at *12 (N.D. Cal. Mar. 5, 2013) (reasonable reliance is an additional element). An express warranty may not be created through inference. *Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1399 (E.D. Cal.1994) (distinguishing between puffery, which cannot serve as the basis of an express warranty, and "specific, detailed factual assertions," which can); *Yastrab v. Apple Inc.*, No. 5:14-cv-01974-EJD, 2015 WL 1307163, at *7 (N.D. Cal. Mar. 23, 2015) ("Plaintiff must identify a specific and unequivocal written statement about the product that constitutes an explicit guarantee." (internal quotations omitted)); *id.* (dismissing breach of express warranty claim because the plaintiff failed to plead "the exact terms of the purported warranty . . . with the requisite level of clarity.").

Plaintiff's allegations fail to establish that Fitbit provided an express warranty. According to Plaintiff, Fitbit expressly warranted that its PurePulse Trackers would "consistently record accurate heartrates, especially during exercise." (SAC ¶ 161.) But the only Fitbit statements Plaintiff claims create an express warranty are as follows:

- "continuous, automatic . . . heart rate";
- "maintain intensity";
- "Surge tracks your heart rate all day and during exercise"; and

- "[Charge HR] is an advanced heart rate and activity-tracking wristband, built for all-day activity, workouts and beyond."

(SAC ¶ 159.)[7]

These statements do not form the basis of the express warranty that Plaintiff pleads, which is a promise regarding an unspecified degree of accuracy that Plaintiff subjectively expected. Instead, Plaintiff's understanding of the terms of the "express warranty" appears to come from implication alone—i.e., because a product is warranted to "work," it must record heartrate with a degree of accuracy suitable to Plaintiff. Such inferences and implications cannot form the basis of an express warranty. *Haskell*, 857 F. Supp. at 1399.

Fitbit has not created the express warranty that Plaintiff claims. Plaintiff's representation-based express warranty claim should be dismissed.

3. Plaintiff Fails to State a Claim for Violation of the Magnuson-Moss Warranty Act

Plaintiff's claim under the Magnuson-Moss Warranty Act ("MMWA") fails as a matter of law because he has not pled a predicate state-law breach of express or implied warranty.

The MMWA provides a federal private right of action for state law warranty claims (15 U.S.C. § 2310(d)(1)), but does not expand those state law rights. To plead a cause of action under the MMWA, the plaintiff must allege the existence of an underlying viable state-law warranty claim. *In re Apple iPhone 3G Prods. Liab. Litig.*, 728 F. Supp. 2d 1065, 1072 n.10 (N.D. Cal. 2010). Plaintiff has failed to do so.

First, as explained above, Plaintiff has no breach of express warranty claim.

Second, Plaintiff has no breach of implied warranty claim either. Plaintiff's implied warranty claim suffers from the same deficiencies that doom his express warranty claim. According to the SAC, Fitbit labeled and marketed its products to have "consistent, accurate heart rate readings, even during exercise." (SAC ¶¶ 187, 189.) Plaintiff claims that the products

[7] Plaintiff only enumerates these four representations as the basis of his breach of express warranty claim. While he includes other alleged Fitbit representations throughout the SAC, none of those speak to any product's degree of accuracy. They similarly cannot form the basis of the express warranty Plaintiff contends exists.

therefore violate the implied warranty of merchantability because they "do not conform to the promises or affirmations of fact made on the container or label." (SAC ¶ 190.) But just as with his express warranty claim, the allegedly offending statements do not make specific representations that could form the basis of Plaintiff's implied warranty claim because they are unrelated to the degree of accuracy of its heartrate feature.

In addition, Plaintiff claims that Fitbit breached the implied warranty of merchantability because the PurePulse Trackers' alleged "inability to record ***accurate*** heart rates renders them unfit for the ordinary purpose of a heart rate monitor." (SAC ¶ 188 (emphasis added).) He is wrong as a matter of law. "[A] plaintiff claiming breach of an implied warranty of merchantability must show that the product 'did not possess even the most basic degree of fitness for ordinary use.'" *Keegan v. Am. Honda Motor Co., Inc.*, 838 F. Supp. 2d 929, 945 (C.D. Cal. 2012) (quotation omitted). The gravamen of Plaintiff's claim is that Fitbit's heartrate tracking is not sufficiently accurate, not that it has no basic degree of fitness for ordinary use. He even admits that various studies support the accuracy of Fitbit's products. (SAC ¶¶ 54, 56.) Even accepting the allegations in the SAC as true, Fitbit has not breached the implied warranty of merchantability.

Finally, to the extent Plaintiff's MMWA claim is premised on his claim for violation of the Song-Beverly Consumer Warranty Act, Plaintiff has no predicate cause of action under that state statute, discussed below.

Because Plaintiff has failed to plead facts sufficient to establish a predicate state-law express or implied breach of warranty claim, he has no cause of action under the MMWA.

4. The Song-Beverly Consumer Warranty Act Applies Only to Sales in California, Barring Plaintiff's Claim.

Plaintiff is a resident of Arizona and expressly alleges that he purchased his Charge HR in Arizona. (SAC ¶ 13.) The Song-Beverly Consumer Warranty Act, however, applies only to consumer goods "sold in this state," i.e., California. Cal. Civ. Code § 1792. The California Supreme Court and courts in the Ninth Circuit have unequivocally held that Song-Beverly's jurisdictional reach is limited to California. *Cummins, Inc. v. Super. Ct.*, 36 Cal. 4th 478 (2005);

Kowalsky v. Hewlett-Packard Co., 771 F. Supp. 2d 1138, 1155 (N.D. Cal. 2010)[8]; *Anunziato*, 402 F. Supp. 2d at 1141 (Song-Beverly claim "fails as a matter of law" where goods were purchased outside of California). Because Plaintiff's purchase occurred entirely in Arizona, as a matter of law, he cannot state a claim for violation of the Song-Beverly Consumer Warranty Act.

E. Plaintiff Has No Claim for Revocation Under the California Commercial Code

Plaintiff's claim for revocation of acceptance under the California Commercial Code fails as a matter of law and cannot be cured. California Commercial Code section 2608 permits a "buyer" to revoke his acceptance of the "seller's" allegedly nonconforming goods if certain conditions are satisfied. Cal. Com. Code § 2608. Those conditions do not matter here because Fitbit is not a "seller" in the transaction at issue within the meaning of the Commercial Code. The Commercial Code defines "seller" as "a person who sells or contracts to sell goods." *Id.* § 2103(1)(d). A "sale" is "the passing of title from the seller to the buyer for a price." Cal. Com. Code § 2106(3). Where, as here, the plaintiff purchased the product from a third-party retailer—here, Bed Bath & Beyond and Best Buy—that retailer is the "seller" in the qualifying transaction, and the plaintiff has no claim against the non-selling manufacturer, i.e., Fitbit. *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 754 F. Supp. 2d 1145, 1187-88 (C.D. Cal. 2010). Plaintiff's claim for revocation fails as a matter of law and should be dismissed with prejudice.

F. Plaintiff Has No Claim for Unjust Enrichment

Finally, Plaintiff's tag-along claim for unjust enrichment should be dismissed. Unjust enrichment is not an independent cause of action in California. *Melchior v. New Line Prods., Inc.*, 106 Cal. App. 4th 779, 794 (2003) (affirming trial court's dismissal of "unjust enrichment" claim on the ground that California law does not recognize such a cause of action); *Jogani v. Super. Ct.*, 165 Cal. App. 4th 901, 911 (2008) ("[U]njust enrichment is not a cause of action"). And even if it were a valid claim, unjust enrichment is not available "where a valid express

[8] *Vacated in part by Kowalsky v. Hewlett-Packard Co.*, 771 F. Supp. 2d 1156 (N.D. Cal. 2011) (granting defendant's request for reconsideration and motion to dismiss plaintiff's UCL and CLRA claims).

contract covering the same subject matter exists between the parties." *Gerlinger v. Amazon.com, Inc.*, 311 F. Supp. 2d 838, 856 (N.D. Cal. 2004).

Such is the case here. As Plaintiff expressly alleges, Plaintiff agreed to Fitbit's written Terms of Service at the time he registered his Charge HR (and affirmatively exercised his right to opt out of the arbitration provision of those terms). (SAC ¶ 13.) Those terms govern Plaintiff's relationship with Fitbit relative to his Charge HR purchases. *Tait v. BSH Home Appliances Corp.*, No. SACV 10-711 DOC (ANx), 2011 WL 1832941, at *6-*7 (C.D. Cal. May 12, 2011) (dismissing unjust enrichment claim where written warranty covered subject matter of claim).

V. CONCLUSION

For all the foregoing reasons, the Court should dismiss the claims of the Second Amended Consolidated Class Action Complaint without leave to amend.

Dated: March 13, 2018

MORRISON & FOERSTER LLP

By: /s/ William L. Stern
William L. Stern
Attorneys for Defendant FITBIT, INC.