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

20 KATE MCLELLAN, TERESA BLACK,
21 DAVID URBAN, ROB DUNN, RACHEL
22 SAITO, TODD RUBINSTEIN, RHONDA
23 CALLAN, JAMES SCHORR, BRUCE
24 MORGAN, and AMBER JONES, Individually
and on Behalf of All Others Similarly Situated,

25 Plaintiffs,

26 v.

27 FITBIT, INC.,

28 Defendant.

JUDITH LANDERS, LISA MARIE BURKE,
and JOHN MOLENSTRA, Individually and on
Behalf of All Others Similarly Situated,

Plaintiffs,

v.

FITBIT, INC.,

Defendant.

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Case Nos. 16-cv-00036-JD; 16-cv-00777-JD

**AMENDED CONSOLIDATED MASTER
CLASS ACTION COMPLAINT**

JURY DEMAND

Ctrm: 11, 19th Floor

The Honorable James D. Donato

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INTRODUCTION

1
2 1. In widespread national advertising, Defendant Fitbit, Inc. (“Fitbit”) touted the
3 purported ability of its wrist-based “activity trackers” to accurately record a wearer’s heart rate
4 during intense physical activity. To perform this function, Fitbit equipped its “Charge HR,”
5 “Surge,” and “Blaze” fitness watches (the “PurePulse Trackers”) with an LED-based technology
6 called “PurePulse™.”

7 2. Fitbit’s representations are repeated in and echoed throughout its advertising of the
8 PurePulse Trackers—including, for example, in commercials run repeatedly during Major League
9 Baseball’s nationally-televised 2015 World Series¹—which employs such descriptive slogans as
10 “Every Beat Counts” and “Know Your Heart.” But those representations are false. Far from
11 “counting every beat,” the PurePulse Trackers *do not* and *cannot* consistently and accurately
12 record wearers’ heart rates during the intense physical activity for which Fitbit expressly markets
13 them.

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

17 4. Expert testing confirms these observations. Professors from California State
18 Polytechnic University, Pomona (“Cal Poly Pomona”) conducted far and away the most
19 comprehensive study to date, and found that Fitbit’s PurePulse Trackers are inaccurate by an
20 average of approximately 20 bpm during moderate to high intensity exercise. They therefore
21 concluded that the devices could not provide meaningful heart rate data. Additional, independent
22 reviewers have reached the same conclusion.

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

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

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

6 7. On behalf of all those who purchased the Fitbit PurePulse Trackers, Plaintiffs Kate
7 McLellan, Teresa Black, David Urban, Rob Dunn, Rachel Saito, Todd Rubinstein, Rhonda
8 Callan, James Schorr, Bruce Morgan, Judith Landers, Lisa Marie Burke, John Molenstra, and
9 Amber Jones bring this action on behalf of themselves and all those similarly situated to seek
10 redress through this proposed class action in the form of injunctive relief, damages, restitution,
11 and all other relief this Court deems equitable.

12 8. While Fitbit purports to bind all purchasers of its products to an arbitration
13 agreement and class action ban, its method of doing so fails as a matter of law and, in itself,
14 constitutes an unfair and deceptive trade practice with respect to those who purchased their
15 products from third-party retailers (“indirect purchasers”).

16 9. Fitbit sells the PurePulse Trackers through its own website and through many
17 third-party online and brick-and-mortar stores. While Fitbit’s own website requires purchasers to
18 agree to be bound by the arbitration clause and class action ban, third-party websites and brick-
19 and-mortar stores do not require any such agreement in advance or at the time of the purchase of
20 a Fitbit product, or give *any* indication that such an agreement will later be required.

21 10. Instead, Fitbit includes an instruction *inside* the box that requires purchasers (post-
22 purchase) to visit its website and register the PurePulse Tracker online. Such registration is
23 required for the PurePulse Trackers to function in real time and for users to access their own data
24 online. In an affidavit submitted in other litigation, Fitbit admitted that “[a] Fitbit user cannot use
25 their [PurePulse Trackers] as intended until the user has set up an [online] account. In fact, the
26 Charge HR cannot even be used as a watch until the device is first paired to a Fitbit account,
27 which requires the user to agree to the Terms of Service.” (*Brickman v. Fitbit, Inc.*, No. 3:15-cv-
28 2077, Doc. 41 at ¶4 (N.D. Cal. Sept. 30, 2015)).

1 11. Remarkably, Fitbit purports to bind anyone who even visits its website to its
2 arbitration agreement, whether they purchase or register any product at all.² Indeed, if the reader
3 of this Complaint visits the link provided in the footnote below, she or he is now deemed by Fitbit
4 to have agreed to arbitration and a class action ban.

5 12. To be clear, indirect purchasers do not agree to the Terms of Service when they
6 complete their sales contracts. Fitbit does not actually perform its part of that initial contract by
7 providing a working device, however, until consumers agree to an additional contract, the Terms
8 of Service. But there is no additional consideration for the agreement to be bound by those
9 additional Terms of Service, which consumers find out post-purchase is necessary to obtain what
10 they already paid for. Thus, in addition to being unconscionable, the purported agreement is
11 invalid and unenforceable under traditional state law defenses to contract formation, as there is no
12 consideration or mutual assent, and any supposed assent is the product of fraud.

13 13. Fitbit's attempt to bind customers who bought PurePulse Trackers through third-
14 party online and brick-and-mortar stores to an arbitration clause and class action ban post-
15 purchase when they register the product—which is required to make the product function as
16 intended—is also an independent unfair and deceptive trade practice in its own right.

17 **JURISDICTION AND VENUE**

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

22 15. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because (1) the only
23 defendant in this action resides in this District and (2) a substantial part of the events and
24 omissions giving rise to Plaintiffs' claims occurred in this District—specifically, Fitbit designed

25 ² 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 and marketed its product from its headquarters in San Francisco, California, and some Class
2 members reside in and purchased their PurePulse Trackers in this District.

3 16. The Court has general personal jurisdiction over Defendant Fitbit, Inc., whose
4 headquarters is located in San Francisco, California.

5 **INTRADISTRICT ASSIGNMENT**

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

9 **PARTIES**

10 ***Plaintiffs***

11 18. Plaintiff KATE MCLELLAN is a California citizen and resident domiciled in
12 Murrieta, California. She holds a PhD in rehabilitation science and currently performs research
13 for a clinical research group. In early 2015, Plaintiff McLellan was in the market for a heart rate
14 monitor to help her track her fitness goals. At that time, she saw Fitbit's advertisements on Hulu,
15 which depicted users receiving consistent, real-time, accurate heart rate readings from their
16 PurePulse Trackers. Relying on those representations, Plaintiff McLellan purchased a Charge HR
17 at Sports Chalet in Temecula, California on February 27, 2015, for \$161.94 after tax. At no point
18 before or during the purchase of her Charge HR was Plaintiff McLellan provided with or required
19 to agree to an arbitration clause or class action ban, nor was she put on notice that she would be
20 required to agree to an arbitration clause or class action ban for her Charge HR to function as
21 intended. Shortly after purchasing her PurePulse Tracker, she noticed that it was not consistently
22 delivering accurate heart rate readings, particularly during exercise. She confirmed this by
23 comparing the real-time heart rate readings from her Charge HR with those on stationary
24 cardiovascular exercise machines. After re-reviewing the product manuals, Plaintiff McLellan
25 called Fitbit and was directed to reboot her Charge HR. She did so to no avail. When her Charge
26 HR continued to deliver inaccurate heart readings, Plaintiff McLellan initiated an online chat with
27 a Fitbit representative, who denied her a refund on her defective PurePulse Tracker. Had Fitbit
28 disclosed that the PurePulse Trackers cannot consistently deliver accurate heart rate readings,

1 even during exercise, Plaintiff McLellan would not have purchased her Charge HR or would have
2 paid significantly less for it. Plaintiff McLellan is now stuck with a PurePulse Tracker that
3 cannot perform the precise task for which she purchased it and which does not function as Fitbit
4 expressly promised and warranted.

5 19. Plaintiff TERESA BLACK is a Colorado citizen and resident domiciled in Grand
6 Junction, Colorado. Plaintiff Black saw Fitbit's advertisements touting the heart rate
7 functionality of the PurePulse Trackers. Relying on those representations, she told her husband
8 that she wanted a Charge HR, and her husband bought one for her from REI.com on May 25,
9 2015. At no point before or during the purchase of her Charge HR was Plaintiff Black provided
10 with or required to agree to an arbitration clause or class action ban, nor was she put on notice
11 that she would be required to agree to an arbitration clause or class action ban for her Charge HR
12 to function as intended. Shortly after that purchase, Plaintiff Black noticed that her Charge HR
13 was not consistently delivering accurate heart rate readings, particularly during exercise. At an
14 intense part of a personal training session in mid-June 2015, Plaintiff Black's personal trainer
15 manually recorded her heart rate, which was 160 beats per minute ("bpm"). In stark contrast, her
16 Charge HR indicated her heart rate was only 82 bpm. Plaintiff Black was approaching the
17 maximum recommended heart rate for her age, and if she had continued to rely on her inaccurate
18 PurePulse Tracker, she may well have exceeded it, thereby jeopardizing her health and safety.
19 Had Fitbit disclosed that the PurePulse Trackers cannot consistently deliver accurate heart rate
20 readings, even during exercise, Plaintiff Black would not have purchased her Charge HR or
21 would have paid significantly less for it. Plaintiff Black is now stuck with a PurePulse Tracker
22 that cannot perform the precise task for which she purchased it and which does not function as
23 Fitbit expressly promised and warranted.

24 20. Plaintiff DAVID URBAN is a Wisconsin citizen and resident domiciled in
25 Hudson, Wisconsin. Plaintiff Urban is a fitness enthusiast who signed up for his first marathon in
26 mid-2015. Given his father's history with heart disease, Plaintiff Urban's doctor recommended
27 that he keep his heart rate from exceeding approximately 160 bpm. As a result, Plaintiff Urban
28 sought an accurate heart rate monitor for his exercise and training. At the recommendation of his

1 friends, Plaintiff Urban purchased a Surge at a Target store in Hudson, Wisconsin on October 9,
2 2015, for \$248.82.³ At no point before or during the purchase of his Surge was Plaintiff Urban
3 provided with or required to agree to an arbitration clause or class action ban, nor was he put on
4 notice that he would be required to agree to an arbitration clause or class action ban for his Surge
5 to function as intended. Soon after purchasing the Surge, Plaintiff Urban noticed the heart rate
6 function did not work. Even at high intensities it never displayed a reading over 125 bpm.
7 Plaintiff Urban then cross-referenced his Surge against his chest strap-based triathlon monitor and
8 found that the PurePulse Tracker consistently under-recorded his heart rate at high intensities,
9 often by as many as 15-25 bpm. In order to train effectively and safely, Plaintiff Urban needs to
10 accurately record his heart rate during exercise so that he can reach, but not exceed, certain
11 intensity levels. He cannot trust his Surge to deliver those accurate readings. Had Fitbit
12 disclosed that the PurePulse Trackers cannot consistently deliver accurate heart rate readings,
13 even during exercise, Plaintiff Urban would not have purchased his Surge or would have paid
14 significantly less for it. Plaintiff Urban is now stuck with a PurePulse Tracker that cannot
15 perform the precise task for which he purchased it and which does not function as Fitbit expressly
16 promised and warranted.

17 21. Plaintiff ROB DUNN is an Arizona citizen and resident domiciled in Yuma,
18 Arizona. Plaintiff Dunn is also a fitness enthusiast. After conducting research online for fitness
19 trackers, and viewing Fitbit's representations about the PurePulse Trackers' ability to consistently
20 record accurate heart rates, even during exercise, Plaintiff Dunn decided to purchase a Charge
21 HR. In fact, he bought two, both on December 26, 2015—one for his wife at Bed Bath & Beyond
22 in Yuma, Arizona, and one for himself at Best Buy, also in Yuma, Arizona. At no point before or
23 during the purchase of either Charge HR was Plaintiff Dunn or his wife provided with or required
24 to agree to an arbitration clause or class action ban, nor were they put on notice that they would
25 be required to agree to an arbitration clause or class action ban for their PurePulse Trackers to
26 function as intended. Soon after purchasing the Charge HR, Plaintiff Dunn noticed the heart rate

27 _____
28 ³ 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 function did not work as represented. During exercise, his PurePulse tracker returned inconsistent
2 and inaccurate readings, often recording well below (and occasionally well over) the readings
3 from the heart rate monitors on his stationary cardiovascular machine. Had Fitbit disclosed that
4 the PurePulse Trackers cannot consistently deliver accurate heart rate readings, even during
5 exercise, Plaintiff Dunn would not have purchased his Charge HR or would have paid
6 significantly less for it. Plaintiff Dunn is now stuck with a PurePulse Tracker that cannot perform
7 the precise task for which he purchased it and which does not function as Fitbit expressly
8 promised and warranted. On January 15, 2016, twenty days after they registered for accounts on
9 Fitbit.com, Plaintiff Dunn and his wife opted out of the arbitration provision in the Terms of
10 Service purportedly governing the use of their PurePulse Trackers.

11 22. Plaintiff RACHEL SAITO is a Florida citizen and resident domiciled in Land O'
12 Lakes, Florida. Plaintiff Saito is a longtime fitness enthusiast who sought to get back in shape
13 after delivering a child in September 2015. She believed a fitness tracker would help her in this
14 process, and specifically sought one with a heart rate monitor. Although she already owned a
15 chest strap heart monitor, Plaintiff Saito purchased a PurePulse Tracker based on the anticipated
16 convenience of a wrist-based product, and Fitbit's representations regarding the ability of the
17 PurePulse Trackers to accurately record heart rate during the high-intensity exercises she enjoys.
18 Relying on those representations, Plaintiff Saito purchased her Charge HR at Kohl's in Brandon,
19 Florida, on October 18, 2015. At no point before or during the purchase of her Charge HR was
20 Plaintiff Saito provided with or required to agree to an arbitration clause or class action ban, nor
21 was she put on notice that she would be required to agree to an arbitration clause or class action
22 ban for her Charge HR to function as intended. Almost immediately after that purchase, Plaintiff
23 Saito noticed that her Charge HR was not consistently delivering accurate heart rate readings,
24 particularly during exercise. She typically aims for a target heart rate of 150 bpm when
25 exercising and knows what intensity is required to achieve this goal. Her Charge HR's heart rate
26 readings consistently lagged behind her actual heart rate, and appeared to consistently record a
27 heart rate of approximately 115-120 bpm, even when her actual heart rate reached her target rate
28 of 150 bpm. Had Fitbit disclosed that the PurePulse Trackers cannot consistently deliver accurate

1 heart rate readings, even during exercise, Plaintiff Saito would not have purchased her Charge HR
2 or would have paid significantly less for it. Plaintiff Saito feels deceived and is now stuck with a
3 PurePulse Tracker that cannot perform the precise task for which she purchased it and which does
4 not function as Fitbit expressly promised and warranted.

5 23. Plaintiff TODD RUBINSTEIN is a Maryland citizen and resident domiciled in
6 Rockville, Maryland. He and his wife are both fitness enthusiasts who were contemplating
7 buying fitness trackers in early 2015. Originally, they intended to buy a Charge without the heart
8 rate functionality. After seeing Fitbit's advertisements regarding the heart rate monitors on the
9 PurePulse Trackers, however, Plaintiff Rubinstein decided to purchase a Charge HR. Relying on
10 Fitbit's representations about the ability of the PurePulse Trackers to consistently record accurate
11 heart rates, even during exercise, Plaintiff Rubinstein purchased his Charge at Sports Authority in
12 Rockville, Maryland, on February 26, 2015. At no point before or during the purchase of his
13 Charge HR was Plaintiff Rubinstein provided with or required to agree to an arbitration clause or
14 class action ban, nor was he put on notice that he would be required to agree to an arbitration
15 clause or class action ban for his Charge HR to function as intended. Shortly after that purchase,
16 Plaintiff Rubinstein noticed that his Charge HR was not consistently delivering accurate heart rate
17 readings, particularly during exercise. When his heart rate rose above 90 bpm, he found the
18 PurePulse tracker to be effectively useless, providing wildly inaccurate readings, or none at all.
19 Had Fitbit disclosed that the PurePulse Trackers cannot consistently deliver accurate heart rate
20 readings, even during exercise, Plaintiff Rubinstein would not have purchased his Charge HR or
21 would have paid significantly less for it. Plaintiff Rubinstein is now stuck with a PurePulse
22 Tracker that cannot perform the precise task for which he purchased it and which does not
23 function as Fitbit expressly promised and warranted.

24 24. Plaintiff RHONDA CALLAN is a Michigan citizen and resident domiciled in
25 Battle Creek, Michigan. Plaintiff Callan suffers from dysautonomia, a condition that requires her
26 to monitor her heart rate in real time, as her heart rate can spike and drop suddenly. If she exerts
27 herself too much during one of these extremes, she can cause herself serious physical injury.
28 Plaintiff Callan saw Fitbit's representations regarding the purported ability of the PurePulse

1 Trackers to provide continuous and automatic accurate heart rate readings. Relying on those
2 representations, Plaintiff Callan purchased a Charge HR from Amazon.com on June 4, 2015. At
3 no point before or during the purchase of her Charge HR was Plaintiff Callan provided with or
4 required to agree to an arbitration clause or class action ban, nor was she put on notice that she
5 would be required to agree to an arbitration clause or class action ban for her Charge HR to
6 function as intended. As soon as Plaintiff Callan started wearing her PurePulse Tracker, she
7 suspected it was not delivering the accurate heart rate readings that Fitbit had promised. This
8 suspicion was confirmed when her doctor performed a stress test on her and compared the heart
9 rate readings from the Charge HR to an electrocardiogram. As expected, the PurePulse Tracker
10 was off by a significant margin. Plaintiff Callan could have seriously jeopardized her health and
11 safety by continuing to rely on the heart rate readings from her PurePulse Tracker. Had Fitbit
12 disclosed that the PurePulse Trackers cannot consistently deliver accurate heart rate readings,
13 even during exercise, Plaintiff Callan would not have purchased her Charge HR or would have
14 paid significantly less for it. Plaintiff Callan is now stuck with a PurePulse Tracker that cannot
15 perform the precise and vital task for which she purchased it and which does not function as Fitbit
16 expressly promised and warranted.

17 25. Plaintiff JAMES SCHORR is an Ohio citizen and resident domiciled in
18 Beachwood, Ohio. Plaintiff Schorr suffers from mild atrial fibrillation. His doctor advised him
19 to lose weight to help combat the condition, but cautioned that he should keep his heart rate under
20 120 bpm while exercising in order stay safe. To that end, his doctor recommended that he
21 purchase a PurePulse Tracker. Based on that recommendation, and Fitbit's representations about
22 the ability of the PurePulse Trackers to consistently record accurate heart rate, even during
23 exercise, Plaintiff Schorr purchased a Charge HR on Amazon.com on November 20, 2015. At no
24 point before or during the purchase of his Charge HR was Plaintiff Schorr provided with or
25 required to agree to an arbitration clause or class action ban, nor was he put on notice that he
26 would be required to agree to an arbitration clause or class action ban for his Charge HR to
27 function as intended. Soon after purchasing the Charge HR, Plaintiff Schorr noticed the heart rate
28 function did not work as represented and consistently under-recorded his heart rate by significant

1 margins. He confirmed the inaccuracy by comparing it to his home blood pressure monitor,
2 among other instruments. Plaintiff Schorr is concerned that he cannot safely exercise without
3 accurate heart rate readings, which his PurePulse Tracker cannot provide. Had Fitbit disclosed
4 that the PurePulse Trackers cannot consistently deliver accurate heart rate readings, even during
5 exercise, Plaintiff Schorr would not have purchased his Charge HR or would have paid
6 significantly less for it. Plaintiff Schorr is now stuck with a PurePulse Tracker that cannot
7 perform the precise and vital task for which he purchased it and which does not function as Fitbit
8 expressly promised and warranted.

9 26. Plaintiff BRUCE MORGAN is a Texas citizen and resident domiciled in Royse
10 City, Texas. Plaintiff Morgan is a fitness enthusiast who sought to monitor his heart rate during
11 exercise. Although he owned a chest strap heart rate monitor, he was attracted to Fitbit's
12 representations about the ability of the PurePulse Trackers to consistently record accurate heart
13 rate, even during exercise, combined with the apparent convenience of a wrist-based device.
14 Relying on Fitbit's representations, Plaintiff Morgan purchased a Charge HR at Kohl's in
15 Rockwall, Texas, on December 4, 2015. At no point before or during the purchase of his Charge
16 HR was Plaintiff Morgan provided with or required to agree to an arbitration clause or class
17 action ban, nor was he put on notice that he would be required to agree to an arbitration clause or
18 class action ban for his Charge HR to function as intended. Plaintiff Morgan noticed almost
19 immediately after purchasing his Charge HR that the heart rate function did not work as
20 represented. Following intense workouts, his actual pulse would approach 160 bpm; his
21 PurePulse Tracker, in contrast, would display no more than 120 bpm, or give no reading at all.
22 Plaintiff Morgan took every effort to comply with Fitbit's fitting instructions, but no matter how
23 hard he tried, the results were always the same: his Charge HR's heart rate readings were
24 inaccurate to the point of being useless during exercise. Had Fitbit disclosed that the PurePulse
25 Trackers cannot consistently deliver accurate heart rate readings, even during exercise, Plaintiff
26 Morgan would not have purchased his Charge HR or would have paid significantly less for it.
27 Plaintiff Morgan is now stuck with a PurePulse Tracker that cannot perform the precise task for
28 which he purchased it and which does not function as Fitbit expressly promised and warranted.

1 27. Plaintiff JUDITH LANDERS is a New York citizen and resident domiciled in
2 Watervliet, New York. Plaintiff Landers, who is currently in her late 60s, began working with a
3 personal trainer in 2015. Her trainer wanted Plaintiff Landers to use a heart rate monitor during
4 her work outs as a training tool and safety precaution. Plaintiff viewed advertisements promoting
5 the Charge HR and the PurePulse technology online, including, but not limited to, on Facebook.
6 She relied on Fitbit's claims that the PurePulse Trackers could consistently record accurate heart
7 rate, including during the high-intensity exercise for which it was advertised. On August 19,
8 2015, Plaintiff purchased the Charge HR from a local L.L. Bean retail store for \$161.95 after tax.
9 At no point before or during the purchase of her Charge HR was Plaintiff Landers provided with
10 or required to agree to an arbitration clause or class action ban, nor was she put on notice that she
11 would be required to agree to an arbitration clause or class action ban for her Charge HR to
12 function as intended. Since that time Plaintiff Landers has used her PurePulse Tracker during her
13 independent work out sessions, which occur approximately four times per week, and trainer
14 sessions, which take place two times per week. Both Plaintiff Landers and her trainer have
15 observed that the Charge HR misreports, and usually underestimates, her true heart rate. For
16 example, during a recent session with her personal trainer, her Charge HR reported a heart rate of
17 approximately 112 bpm; however, at that time Plaintiff's heart rate was in fact approximately 153
18 bpm. Had Fitbit disclosed that the PurePulse Trackers cannot consistently deliver accurate heart
19 rate readings, even during exercise, Plaintiff Landers would not have purchased her Charge HR or
20 would have paid significantly less for it.

21 28. Plaintiff LISA MARIE BURKE is a citizen and resident of the state of Illinois,
22 domiciled in Aurora, Illinois. Plaintiff Burke viewed Fitbit's advertisements promoting the
23 Charge HR both on television and the internet, including, but not limited to on Facebook as well
24 as on Amazon.com. Plaintiff, who has had heart surgery, relied on Fitbit's advertising claims that
25 the Charge HR could consistently record accurate heart rate, even during exercise, and Plaintiff
26 Burke purchased the Charge HR with her husband specifically because of the heart rate feature.
27 Plaintiff and her husband paid approximately \$150.00 for the Charge HR, before tax, which they
28 purchased from a Verizon retail store located in North Aurora, Illinois, on or around May 31,

1 2015. At no point before or during the purchase of her Charge HR was Plaintiff Burke provided
2 with or required to agree to an arbitration clause or class action ban, nor was she put on notice
3 that she would be required to agree to an arbitration clause or class action ban for her Charge HR
4 to function as intended. Upon using the Charge HR, Plaintiff Burke noticed that the heart rate
5 readings were very inaccurate. For example, Plaintiff Burke observed that while simply lying in
6 bed, her heart rate reading will jump from approximately 88 to 145 bpm. Plaintiff Burke also
7 compared the Charge HR heart rate readings with other heart rate monitors that she frequently
8 consults and finds that the Charge HR heart rate reading is consistently inaccurate, typically by
9 between 10 and 30 bpm. Plaintiff Burke contacted Fitbit regarding both the inaccurate heart rate
10 readings and problems she has experienced with the Charge HR's step counter. Fitbit responded
11 to Plaintiff with regard to the step count issue, but offered no response regarding the inaccuracy
12 of the heart rate data. Had Fitbit disclosed that the PurePulse Trackers cannot consistently deliver
13 accurate heart rate readings, even during exercise, Plaintiff Burke would not have purchased her
14 Charge HR or would have paid significantly less for it.

15 29. Plaintiff JOHN MOLENSTRA is a citizen and resident of the state of Illinois,
16 domiciled in Chicago, Illinois. In January 2015, Plaintiff Molenstra purchased a Charge HR from
17 an AT&T store located in Norridge, Illinois for approximately \$150. In December 2015, Plaintiff
18 purchased a Surge from Brookstone.com for approximately \$250. In purchasing his PurePulse
19 Trackers, Plaintiff relied on Fitbit's claims in magazine and internet advertisements, including but
20 not limited to Men's Health and Men's Fitness magazines, that the PurePulse Trackers could
21 consistently record accurate heart rate, even during exercise. At no point before or during the
22 purchase of his PurePulse Trackers was Plaintiff Molenstra provided with or required to agree to
23 an arbitration clause or class action ban, nor was he put on notice that he would be required to
24 agree to an arbitration clause or class action ban for his Trackers to function as intended. Since
25 purchasing and using the PurePulse Trackers, Plaintiff has noticed the heart rate feature on the
26 Trackers fails to accurately report his heart rate. Generally, Plaintiff finds his heart rate is
27 understated, but at times, the PurePulse Trackers fail to register his heart rate at all. For example,
28 in late 2015, Plaintiff compared the heart rate reading on the Surge to a chest strap heart monitor

1 and found that the Surge understated his heart rate by approximately 15 to 20 beats per minute.
2 Had Plaintiff known that the PurePulse Trackers do not work as represented by Fitbit and cannot
3 consistently record accurate heart rate during exercise, Plaintiff would not have purchased the
4 PurePulse Trackers or would have paid less for them

5 30. Plaintiff AMBER JONES is a Washington citizen and resident domiciled in Walla
6 Walla, Washington. She is a fitness enthusiast who wanted a heart rate monitor to help her track
7 her work outs. Plaintiff Jones purchased a Charge HR from Fitbit.com in September 2015 after
8 viewing and relying upon Fitbit's representations regarding the ability of the PurePulse Trackers
9 to consistently record accurate heart rate during the high-intensity exercises she enjoys. After
10 spending some time with the device, however, she noted that the heart rate monitor did not work
11 as advertised. She noted a significant discrepancy between the device's readings and those from
12 the monitors on her Bowflex and Elliptical machines. Although she was disappointed with the
13 performance of her Charge HR, Plaintiff Jones still desired a device that could consistently
14 deliver accurate heart rate readings, even during exercise. Based on Fitbit's representations
15 regarding the device's accuracy, Plaintiff Jones believed that Fitbit's newer model, the Blaze, had
16 improved technology that would provide the advertised functionality. On February 10, 2016, she
17 pre-ordered a Fitbit Blaze for \$217.75, including tax. But again, Plaintiff Jones was disappointed.
18 The Blaze performed just as poorly as the Charge HR, consistently registering her heart rate at
19 approximately 20 bpm off from her cardio machine readings. Had Fitbit disclosed that the
20 PurePulse Trackers cannot consistently deliver accurate heart rate readings, even during exercise,
21 Plaintiff Jones would not have purchased her Charge HR or her Blaze or would have paid
22 significantly less for them.

23 ***Defendant***

24 31. Defendant Fitbit, Inc. is a corporation doing business in all 50 states. Fitbit
25 designs, manufactures, promotes, and sells the PurePulse Trackers described herein. Fitbit is
26 organized and incorporated under the laws of Delaware, and its principal place of business is in
27 San Francisco, California. It is therefore a citizen of Delaware and California. *See* 28 U.S.C.
28 § 1332(c)(1).

COMMON FACTUAL ALLEGATIONS

32. Fitbit is a manufacturer of activity trackers founded in 2007 and headquartered in San Francisco, California. Its products' functions have included, among other things, step counting, distance calculating, calorie calculating, and sleep monitoring.

33. In October 2014, Fitbit announced a new feature: wrist-based heart rate monitoring. The two products first equipped with this technology, dubbed PurePulse, were the Charge HR and Surge, which were released January 2015 and initially retailed at approximately \$150⁴ and \$250 respectively. In March 2016, Fitbit released a third PurePulse Tracker, the Blaze, which retails for approximately \$200. All three products are shown below:



I. Fitbit Falsely Claims the PurePulse Trackers Consistently Record Accurate Heart Rate.

34. Heart rate monitoring is an important feature for exercisers. Among other things, it can help users achieve and maintain proper intensity, measure effort, track progress, and stay motivated. And for those with certain health conditions—like Plaintiffs Urban, Schorr, Rubinstein, Callan, and Burke—monitoring one's heart rate can be essential to staying safe. Traditionally, however, accurate heart rate monitoring required a chest strap, which can be uncomfortable, distracting, difficult to clean, and may not work with dry skin.

⁴ In contrast, the Charge model without a heart rate monitor originally retailed for approximately \$130, and has been available for as low as \$90.

1 35. Fitbit attempted to circumvent these problems with its wrist-based PurePulse
2 technology, which it expressly contrasts with “uncomfortable” chest straps.

3 36. Per Fitbit’s promotional materials, PurePulse uses LED lights to detect changes in
4 capillary blood volume. It then applies “finely tuned algorithms” to “measure heart rate
5 automatically and continuously” and allow users to “accurately track workout intensity.”⁵

6 37. Unsurprisingly, the feature is the centerpiece of Fitbit’s promotional efforts. The
7 widely-circulated advertisements include slogans like: “The Difference Between Good and
8 Great...Is Heart”; “For Better Fitness, Start with Heart”; “Get More Benefits with Every Beat—
9 Without An Uncomfortable Chest Strap”; “Know Your Heart”; and, most egregiously, “Every
10 Beat Counts.”

11 38. These representations feature in an extensive and widespread advertising
12 campaign. As noted, the “Know Your Heart” commercial, for example, appeared prominently
13 throughout Major League Baseball’s nationally-televised 2015 World Series, which averaged
14 14.7 million viewers per game.

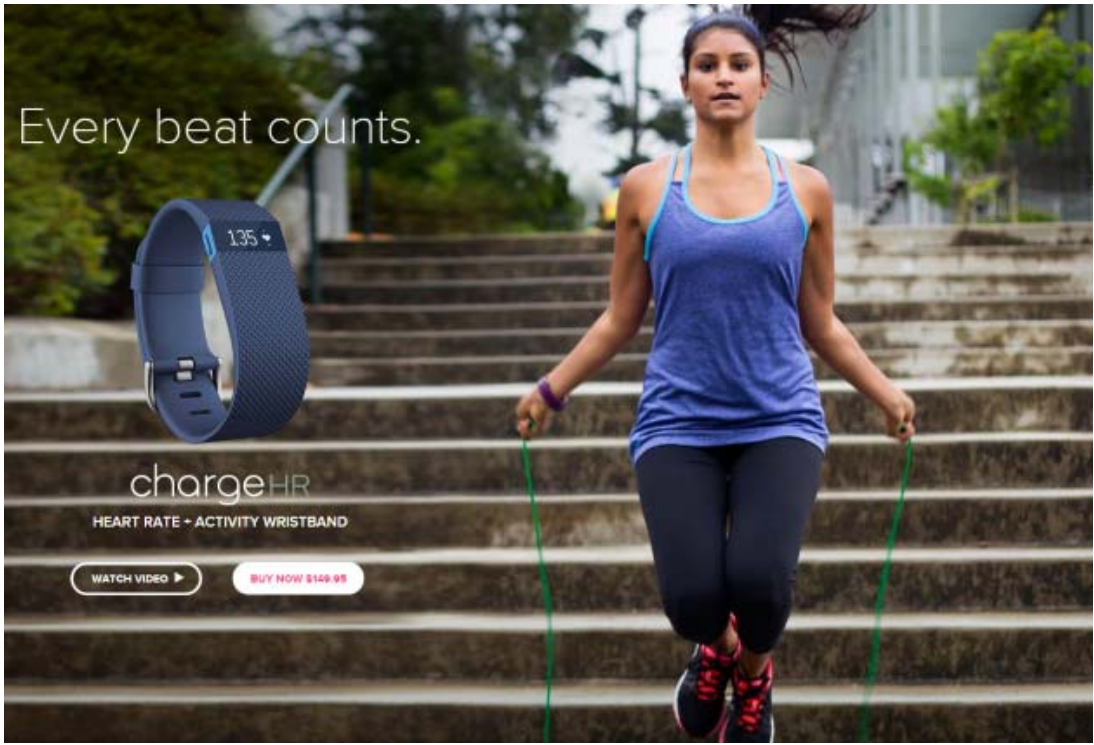
15 39. Importantly, these advertisements and product descriptions do not state or even
16 remotely suggest that the PurePulse technology works only at low or resting heart rates. To the
17 contrary, Fitbit expressly markets the PurePulse Trackers for activity and fitness, and depicts
18 them in use during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

19 40. The following advertisement, for example, shows a user wearing a Charge HR and
20 jumping rope. That, combined with the elevated heart rate shown on the featured device—135
21 bpm—and the tag line’s promise that “Every beat counts,” indicates that the product accurately
22 records every beat, even during high-intensity exercise.

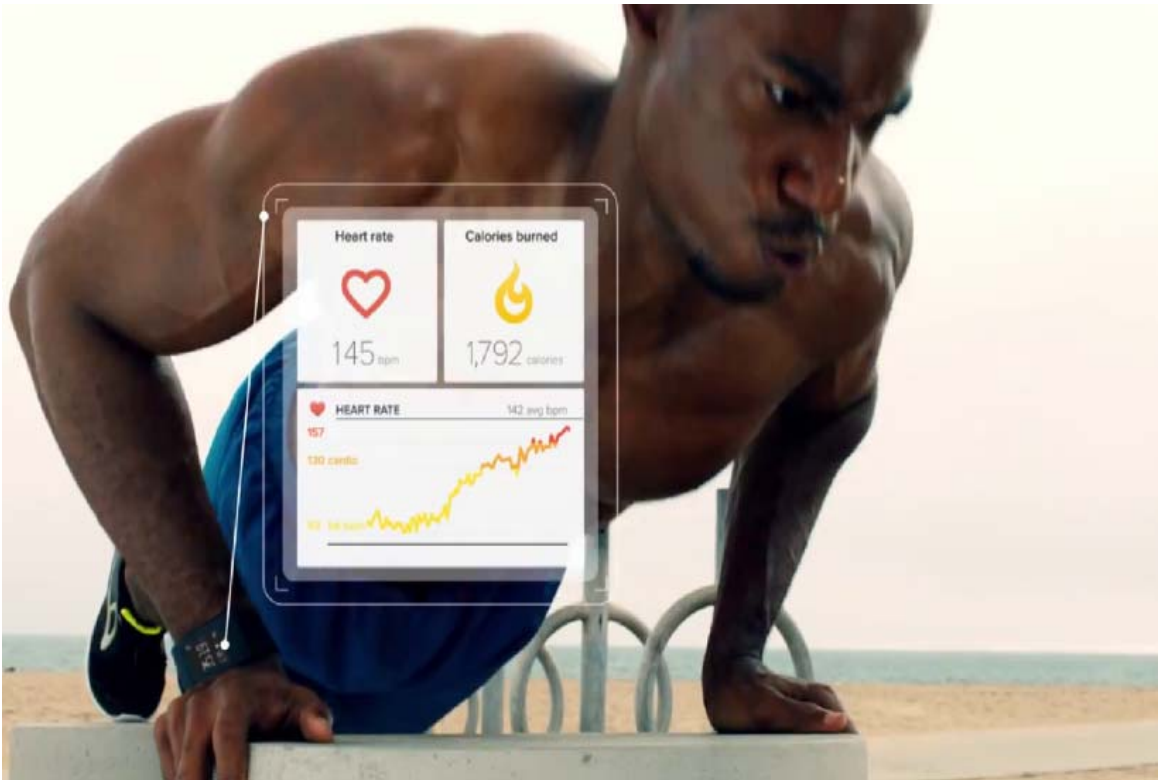
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⁵ Available at: http://help.fitbit.com/articles/en_US/Help_article/Heart-rate-FAQs#How (last visited January 5, 2016).

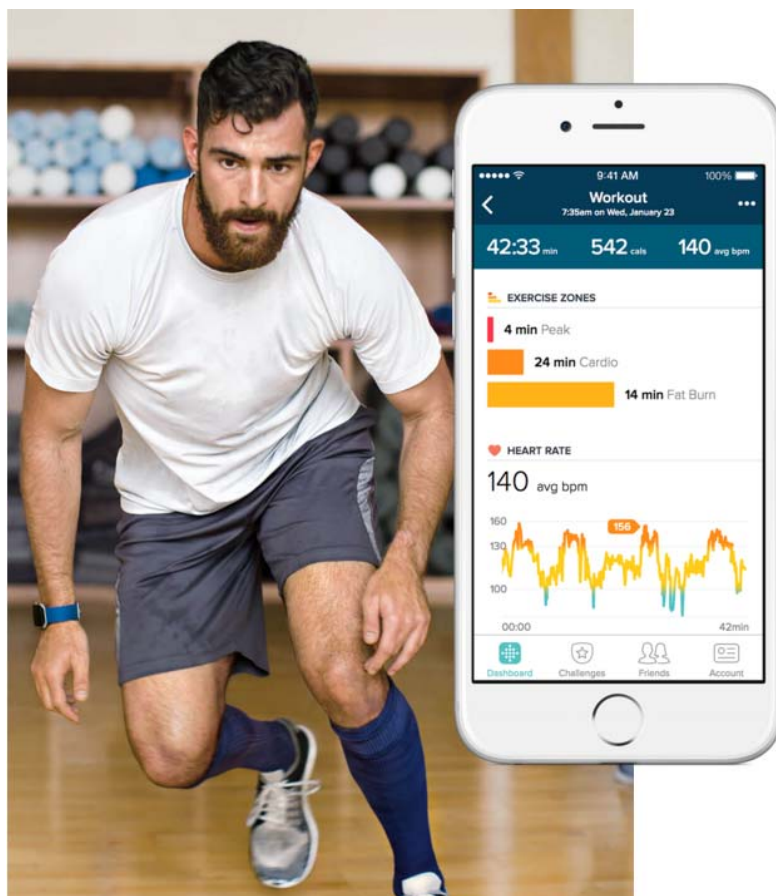
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41. Similarly, the following commercial and website screenshots purport to show the PurePulse Trackers delivering real-time, elevated heart rate readings during strenuous activity:



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42. In addition, the following promotional materials tout the PurePulse Trackers' ability to monitor "real-time heart rate" at intensity, to "track[] your heart rate all day and during exercise," promises users the ability to "[c]heck heart rate at a glance to gauge your effort and adjust workouts on the spot."

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The Perks of PurePulse™

GET MORE BENEFITS WITH EVERY BEAT—WITHOUT AN UNCOMFORTABLE CHEST STRAP



MONITOR CALORIE BURN

Accurately track calorie burn all day and during exercise to stay in control of your weight.



MAINTAIN INTENSITY

Check real-time heart rate to ensure you're working out at the right intensity.



MAXIMIZE TRAINING

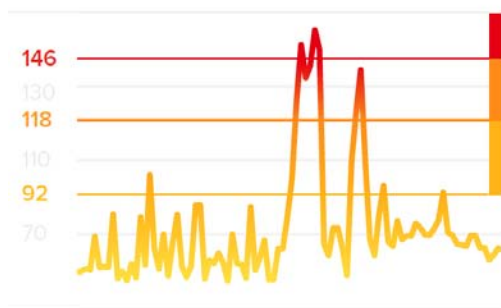
Use simplified heart rate zones to tailor your workouts on the spot and make the most of training time.



OPTIMIZE HEALTH

See when your health is improving by analyzing your all-day and resting heart rate trends.




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



Maintain intensity to make the most of workouts.

Check heart rate at a glance to gauge your effort and adjust workouts on the spot.

Set a target heart rate zone to ensure you're pushing yourself hard enough, but not overtraining.

See your time spent in each heart rate zone and review exercise summaries.

TIPS TO GET THE MOST OF PUREPULSE™ DURING WORKOUTS



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



11 44. Some Target sites feature a similar, though lower-tech, display:



26 45. Fitbit’s representations even permeate electronic points of sale of third-party
 27 online retailers. For example, in advertising the Charge HR, the Kohl’s website encourages
 28 consumers to “Make every beat count!” and promises that the “Charge HR delivers continuous,

1 wrist-based heart rate and activity tracking during workouts and beyond.”⁶ These representations
2 track Fitbit’s advertisements verbatim.

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

5 **II. The PurePulse Trackers Fail to Consistently Record Accurate Heart Rate as**
6 **Promised and Warranted.**

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

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

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

16 50. Plaintiff Urban had the same problem, which he verified by checking his Surge
17 against his chest strap heart rate monitor.

18 51. Indeed, every named Plaintiff observed significant inaccuracies, which rendered
19 their PurePulse Trackers effectively worthless as high-intensity heart rate monitors.

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

- 23
- 24 • “The HR technology is not accurate. It's close enough below 100bpm. But 100+ and it's
25 consistently off by 30-50%. I tested this multiple times against my chest strap and other
26 monitors in the gym.”
 - 27 • “The FitBit is regularly lower than the Polar [chest strap monitor] or cannot capture a
28 reading at all.”

⁶ Available at: <http://www.kohls.com/product/prd-2389728/fitbit-charge-hr-wireless-activity-heart-rate-wristband.jsp> (last visited January 28, 2016).

- 1 • “Workouts I know I've kept my heart rate in the 140-170 range, Fitbit says an average of
2 100 bpm and a max of 120. I've measure it against a chest strap as well as machines at the
3 gym. It's just not accurate, simple as that. Huge disappointment. Not to mention it
4 randomly stops tracking heart rate during the workout...”
- 5 • “I checked the HR accuracy of the new fitbit Charge by using it along with my Zephyr
6 HRM which is worn on the chest and I have used for several years now. The accuracy of
7 the fitbit swung wildly even when I switched the HR controls of the Charge from ‘auto’ to
8 ‘on’. It could be off by as much as 20 BPM! That's fricken robbing me of my workout!”
- 9 • “I followed all the directions very closely as far as placement, etc, but there is a 30
10 beat/min difference between the fitbit and my Timex HR chest strap HR monitor with the
11 discrepancy increasing as my heart rate increased.”
- 12 • “[A]s soon as my HR got above 120 [the Charge HR] either shuts down or just sits on
13 120. On a couple different occasions I wore my Polar at the same time. Polar had my
14 highest heart rate at 160 BPM while the charge hr had me resting at 75.”
- 15 • “Paid extra money for HR function and it's useless....If accuracy is important to you, this
16 isn't for you.”
- 17 • “If you are buying the HR version you are essentially just buying a more expensive
18 Charge that has two green lights on the back and has a nicer strap because the heart rate
19 function is useless.”
- 20 • “While working out, the heart rate jumps around for no reason. I have tried many different
21 positions and modified the tightness. Nothing seems to help....What good is tracking your
22 heart rate when it's mostly wrong[?]”
- 23 • “I am a 82 year old with a resting heart rate of 50 BPM just trying to stay in good basic
24 shape using a stationary bike and rowing machine. I do 30-60 minute sessions at about
25 100-110 BPM...When I am working the exercise machines the reading is far short of my
26 actual heart rate. I have tried all the suggestions here and on the Fitbit site. No luck. I am
27 reminded of the proverbial broken clock which is 100% accurate twice a day.”
- 28 • “During my workouts the heart rate goes all over the place, [my Fitbit Blaze] will show
my heart rate at 150 then will go up to 200 and down to 108 within a couple of minutes
and takes forever to register the proper heart rate. I would imagine this has to do with my
wrist sweating and is I have to take it off and keep drying it then what good is it.”
- “DO NOT BUY THIS AS A ‘FITNESS’ WATCH or a heartrate monitor.... I've used the
Blaze during numerous workouts over the course of three weeks. I've used it on the
treadmill, weight lifting (all muscle groups), kettlebell and plyometrics. I can now
confidently say the Blaze HR monitor is BAD at detecting my heart rate during all of
those activities, except on the treadmill, it did fine there. MOST of the time it is not even
in the correct zone, always low. Within the mentioned activities, I've tried every
combination of tightness and placement on my wrist. From time to time it'll be accurate,
but it's rare and not often enough to use that HR in my workout. The higher my heart rate
the worse it gets. It MIGHT be okay if your heartrate never get over 120-130.”

- 1 • “I bought [the Blaze] to replace my chest strap (I hate wearing them) during workouts.
2 Here's where the trouble starts. Depending on the workout my heart rate according to my
3 manual measurement and the chest strap is MUCH higher than the Blaze would suggest.
4 Sometimes the actual heart rate was double or more! At best this can lead to a gross
miscalculation of calories burned. At worst it could be dangerous for someone not familiar
with their target zones.”

5 **A. Comprehensive Expert Analysis Further Confirms That The PurePulse**
6 **Trackers Cannot Provide Meaningful Heart Rate Data.**

7 53. Expert analysis confirms that the PurePulse Trackers cannot perform as promised
8 and warranted. Before filing this lawsuit, Plaintiffs consulted a board-certified cardiologist to test
9 the PurePulse Trackers against an electrocardiogram (“ECG”), the gold standard of heart rate
10 monitoring, on a number of subjects at various exercising intensities.

11 54. The results corroborated the consumer complaints: the PurePulse Trackers
12 consistently mis-recorded the heart rates by a significant degree. At intensities over 110 bpm, the
13 PurePulse Trackers often failed to record any heart rate at all. And even when they did record
14 heart rates, the PurePulse Trackers were inaccurate by an average of 24.34 bpm, with some
15 readings off by as many as 75 bpm. With those margins of error, the PurePulse Trackers are
16 effectively worthless as heart rate monitoring devices.

17 55. Since then, researchers at Cal Poly Pomona conducted the most thorough and
18 comprehensive study of the PurePulse Trackers performed to date, which resulted in a peer-
19 review-quality report, attached as Exhibit 1. The study authors, Drs. Edward Jo and Brett
20 Dolezal, have considerable experience with product validation studies and set out to determine
21 whether the PurePulse Trackers are statistically-valid heart rate monitors. As the report
22 unequivocally demonstrates, they are not.

23 56. The professors tested the Trackers on 43 separate subjects during a variety of
24 activities, including the precise exercises depicted by Fitbit when marketing the Trackers, such as
25 jogging, stair climbing, jump roping, and plyometrics. While performing these activities, each
26 subject wore two PurePulse Trackers—a Charge HR and a Surge—on different wrists, which
27 were measured against a time-synchronized ECG.

28 57. After carefully analyzing the more than 46 hours’ worth of comparative data—
including hundreds of thousands of individual data points—that resulted from this testing, Drs. Jo

1 and Dolezal concluded that the Fitbit devices simply could not accurately track users' actual heart
2 rates, particularly during exercise.

3 58. Indeed, the data revealed that "during moderate to high intensity exercise, the
4 PurePulse Trackers recorded a heart rate that differed from the ECG by an average of 19.2 bpm."

5 59. Even that grossly inaccurate number is generous to Fitbit since it disregards the
6 many instances in which the Fitbit devices recorded no heart rate at all. Interpret those readings
7 as a heart rate of zero, and the average discrepancy balloons to 24.23 bpm.

8 60. The report also confirms that the devices are not only inaccurate, but also
9 surprisingly inconsistent. The two devices simultaneously recording the same users' heart rate
10 were off even from each other by an average of 10 bpm.

11 61. The report thus concludes: "The PurePulse Trackers do not accurately measure a
12 user's heart rate, particularly during moderate to high intensity exercise, and cannot be used to
13 provide a meaningful estimate of a user's heart rate." This is precisely what Plaintiffs have
14 alleged.

15 **B. Third-Party, Independent Media Reviews Also Confirm Fitbit's Failures.**

16 62. Several independent reviews reached similar conclusions. Wareable.com, for
17 instance, concluded that the Charge HR heart rate readings were "criminally wide of the mark,"
18 even at rest.⁷ Similarly, it found that the Surge took between five and eight minutes to get even
19 close to the proper heart rate during exercise, and even then, it failed to record heart rates in even
20 the right "zone" about twenty percent of the time.⁸ Ultimately, the review concluded that the
21 PurePulse Trackers offer nothing more than an "estimate" of heart rate, and the publication could
22 not recommend the PurePulse Trackers for "those doing training based on heart rate zones."⁹

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24
25 ⁷ James Stables, *Fitbit Charge HR review, UPDATED: Fitbit's flagship tracker now lags behind*
the competition, Wareable (Dec. 15, 2015), [http://www.wareable.com/fitbit/fitbit-charge-hr-](http://www.wareable.com/fitbit/fitbit-charge-hr-review)
26 [review](http://www.wareable.com/fitbit/fitbit-charge-hr-review).

27 ⁸ Shane Richmond, *The real world wrist-based heart rate monitor test: Are they accurate*
enough? Fitbit, Mio and Basis versus the trusty chest strap, Wareable (July 3, 2015),
<http://www.wareable.com/fitness-trackers/heart-rate-monitor-accurate-comparison-wrist>.

28 ⁹ *Id.*

1 63. A German consumer organization, Stiftung Warentest, conducted a comparable
2 test pitting a PurePulse Tracker against an ECG on five subjects at a variety of intensities. After
3 the testing, the reviewers found the heart rate readings “imprecise” and gave the heart rate
4 functionality a “D” grade.¹⁰

5 64. Another striking example comes from a broad study commissioned by a TV
6 station in Indiana, WTHR, in collaboration with researchers at the Human Performance
7 Laboratory at Ball State University.¹¹ There, the researchers compared the Charge HR (and other
8 devices) against sophisticated laboratory fitness equipment—including a pulse oximeter and a
9 metabolic analyzer—during hour-long tests which included a variety of both high and low
10 intensity activities.

11 65. The results were very, very bad for Fitbit. The heading of the section of the article
12 addressing heart rate read “Heart rate: Bordering on dangerous.” It went on to note:

13 The box for the Fitbit Charge HR says “every beat counts.” Despite
14 what the package says, the tracking device inside missed lots of
15 them.

16 For example, when the Fitbit detected Alexis’ heart rate at 68 beats
17 per minute, the portable pulse oximeter showed her real heart rate
18 was actually much higher at 91.

19 ...

20 Calculating a heart rate that’s off by 20 or 30 beats per minute can
21 be dangerous -- especially for people at high risk of heart disease.

22 “That’s too high to be acceptable to us,” Montoye said. “Heart rate
23 is a measure of exercise intensity. Small changes in intensity can
24 affect the benefit you’ll receive, but they also increase your risk
25 associated with the activity. That risk can be very real ... so the
26 heart rate has to be accurate.”

27 In sum, the study concluded that the average error rate for the PurePulse heart rate readings was
28 about 14%, which is *almost triple what the researchers deemed to be an acceptable margin of
error.* (The PurePulse Tracker was also 40% less accurate than the competitor device.)

29 ¹⁰ *Noch nicht in Topform*, Stiftung Warentest (Jan. 2016), <https://www.test.de/Fitnessarmbaender-Nur-zwei-von-zwoelf-sind-gut-4957497-0/>

30 ¹¹ Bob Segall, *Sometimes your fitness tracker lies – a lot*, WTHR (Feb. 22, 2016),
31 <http://www.wthr.com/story/31285468/sometimes-your-fitness-tracker-lies-a-lot-fitbit-jawbone-garmin-ifit-misfit-accuracy>.

1 66. Notably, the calorie counting functionality—which relies on the heart rate
2 readings, as Fitbit’s own promotional materials explain—also performed terribly. The lead
3 researcher concluded that “[t]he numbers aren’t even close,” and the article noted that the Charge
4 HR over-recorded one subject’s calorie burn by **122%**.

5 67. Based on these “woeful test results,” the WTHR reviewers gave the Charge HR
6 one star out of four for both the heart rate and calorie counting features, which denoted a greater
7 than 12% and 30% error rate, respectively.

8 **C. Fitbit Has Not Credibly Responded and Cannot Credibly Respond to These**
9 **Studies.**

10 68. Fitbit’s response to the WTHR study, and to the allegations in previous versions of
11 this Complaint, is telling. Fitbit has repeatedly told the press that “our team has performed and
12 continues to perform internal studies to validate our products’ performance.”¹² Yet Fitbit has not
13 referenced a single, specific study which it contends in fact validates its products’ performance,
14 nor has it disclosed the details of *any* study to Plaintiffs’ counsel, despite their repeated requests.

15 69. Instead, in discussions with Plaintiffs’ counsel, Fitbit has relied on a meager test
16 conducted by Consumer Reports,¹³ which post-dates Plaintiffs’ original Complaint and Fitbit’s
17 representations about its internal studies. But the Consumer Reports experiment suffers from
18 serious flaws—it did not use sophisticated laboratory equipment and tested a only small range of
19 activities—and does not begin to counter the overwhelming evidence demonstrating the
20 inaccuracy of the PurePulse Trackers.

21 70. Fitbit’s other public defense to the damning reviews and to the allegations in this
22 Complaint is an (irrelevant) after-the-fact disclaimer. Fitbit has pleaded with the press that the
23 PurePulse Trackers “are not intended to be scientific or medical devices.”¹⁴ This plea has fallen

24 ¹² See, e.g., Jason Cipriani, *Lawsuit Says Fitbit Fitness Trackers Are Inaccurate*, Fortune (Jan. 6,
25 2016), <http://fortune.com/2016/01/06/fitbit-heart-rate-accuracy-lawsuit/>.

26 ¹³ 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-fitbits-contested-heart-rate-monitors>.

27 ¹⁴ *Fitbit accused of putting customers in danger with ‘wildly inaccurate’ heart rate readings*, ITV
28 Report (Jan. 8, 2016), <http://www.itv.com/news/2016-01-08/fitbit-accused-of-putting-customers-in-danger-with-wildly-inaccurate-heart-rate-readings/>.

1 on deaf ears. The author of the WTHR article, commenting on Fitbit's written response to the
2 article, astutely asked: "since when does a wristband accelerometer with a built-in heartbeat
3 monitor not qualify as a scientific or medical device?"

4 71. No amount of post-hoc disavowals can change the fact that Fitbit has marketed the
5 PurePulse Trackers as medical devices. For example, Fitbit recommends that consumers "[s]et a
6 target heart rate zone to ensure you're pushing yourself hard enough, but not overtraining," and
7 advises them to "[t]alk to your doctor to learn which heart rate zones are right for you."

8 72. Fitbit's own CEO, James Park has also promoted the medical potential of the
9 devices, as reflected in his statement from Fitbit's February 22, 2016, Earnings Call:

10 While Fitbit is known as a consumer brand, the real potential of our
11 brand and technology is to become a digital health platform that
12 improves people's health and integrates into their healthcare
13 ecosystem. Digital health refers to the emergence of powerful
14 technologies that combined can help people lead healthier lives,
15 reduce healthcare costs and broaden the reach of our healthcare
16 system.

17 These technologies include what Fitbit is already pioneering, more
18 powerful sensors that continuously monitor useful biometrics,
19 massive sets of health data in the cloud where analytics enable
20 insights, and guidance and coaching to help consumers make
21 important changes to their lifestyles and daily behaviors.

22 ...

23 Fitbit trackers are distributed as the device of choice in several
24 disease management programs for two of the largest U.S. health
25 insurers.

26 ...

27 Fitbit also is increasingly active in the medical research community
28 by supporting researchers who are incorporating Fitbit trackers and
interactive features into their efforts.

73. But perhaps more importantly, whether the PurePulse Trackers are "medical
devices" is beside the point. Representations regarding the accuracy of heart rate monitors have
significant health and safety implications regardless of how the devices are labeled. What matters
in this case is that Fitbit represented to Plaintiffs and the Class that the PurePulse Trackers could
consistently record accurate heart rates when in fact they cannot. This is classic consumer fraud.

1 74. Interestingly, Fitbit even *admitted* informally to some Class members that the
2 PurePulse Trackers are inaccurate during high-intensity workouts. As such, the PurePulse
3 Trackers fail to perform the precise task for which they are expressly marketed, and Class
4 members are deprived of the clear benefit of the bargain.

5 **III. Fitbit Attempts to Keep Class Members Out of Court Through an Unconscionable**
6 **Post-Purchase Agreement, Which Class Members Are Required to Accept in Order**
7 **to Render Operational the PurePulse Trackers They Already Purchased.**

8 75. Plaintiffs and Class members did not sacrifice their constitutional rights to a jury
9 trial, their right to join a class action, or any substantive statutory rights when they purchased
10 their PurePulse Trackers. No agreement to so limit their rights was requested by anyone or
11 represented to be necessary to complete the purchase transactions of the indirect purchasers, nor
12 was there any indication at the point of sale or on the product packaging that such an agreement
13 would be necessary to render their PurePulse Trackers operational.

14 76. Only *after* purchasing their PurePulse Trackers were indirect purchaser Plaintiffs
15 and Class members informed that in order to render their PurePulse Trackers functional, they
16 must first register and create an online account through Fitbit.com and, in doing so, purportedly
17 bind themselves to an adhesive arbitration clause and class action ban.

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

24 78. Mr. Kershner was correct. Before being synced to an online account or app, the
25 devices do not provide consumers the individual user data that is so central to the purchase
26 agreement. Nor can users enter their individual data (height, weight, age, etc.) supposedly

27 ¹⁵ 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 necessary to make the readings accurate. But perhaps most surprisingly, before the user creates
2 an online account, the devices do not provide even the basic, real-time functionalities that Fitbit
3 advertises. The Charge HR, for example, cannot be used as a watch (since the time cannot be set)
4 before registration. The Surge and the Blaze simply *do not work at all*. Before being synched to
5 an online account, the devices direct users to fitbit.com/setup (where they must register for an
6 account). The following photo depicts a Blaze after being turned on for the first time—it is the
7 only thing that will display before users follow the registration instructions:



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20 79. In other words, until users register online or through Fitbit’s app, and thereby
21 “agree” to the unilaterally-imposed, post-purchase Terms of Service, their Blaze and Surge
22 devices are literally nothing more than \$200 or \$250 bracelets.

23 80. Agreeing to those Terms of Service, in turn, comes at a high and hidden cost. The
24 Terms of Service contain a section entitled “Dispute Resolution” which, among other things,
25 purports to:

26 a. eliminate the consumer’s constitutional rights to a jury trial by designating
27 binding arbitration as the only forum for dispute resolution (with a one-sided exception allowing
28 Fitbit to utilize the courts to prosecute intellectual property claims);

- 1 b. prohibit class actions; and
- 2 c. impose an extra-judicial, one-year statute of limitations on every one of the
- 3 Class members' potential causes of action relating to use of the PurePulse Trackers.

4 81. Notably, the Terms of Service claim to govern not just the services offered through

5 the online account, but also any conceivable grievance that might arise from use of the PurePulse

6 Trackers themselves, regardless of whether that use implicates the wireless service.

7 82. Even more remarkably, Fitbit maintains that the Terms of Service bind anyone

8 who so much as visits Fitbit's website, even if they do not register for an account.

9 83. This unilateral and unconscionable attempt to curtail Class members'

10 constitutional and statutory rights is buried near the end of a long document and, unlike the

11 preceding section, is not highlighted or emphasized in any way.

12 84. Moreover, while the Dispute Resolution section contains an inconspicuous

13 provision outlining a limited procedure for opting out of the arbitration agreement, no such opt-

14 out possibility exists for the class action waiver, the one-year statute of limitation, or the clauses

15 governing selection of law and forum.¹⁶

16 85. To reiterate, there is no mention on the product packaging or anywhere else at

17 third-party points of sale that the PurePulse Trackers will work as intended (or at all) only after

18 setting up an online account or, critically, that such an account will be governed by Terms of

19 Service including the unconscionable provisions detailed above. Moreover, Fitbit withheld from

20 consumers the working devices that they had already purchased until those consumers agreed to

21 additional terms.

22 86. Those consumers cannot be bound by the Terms of Service since no valid contract

23 was ever formed. The consumers did not receive additional consideration for their agreement to

24 sacrifice their legal rights, and any purported assent was procured by fraud. As such, any post-

25 purchase "agreement" is, in addition to being unconscionable, unenforceable as a matter of law to

26 Plaintiffs and Class members.

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28 ¹⁶ As noted above, Plaintiff Dunn opted out of arbitration within the prescribed thirty-day period.

1 **CLASS ACTION ALLEGATIONS**

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

7 88. The proposed Classes are defined as:

8 **Nationwide Indirect Purchaser Class**

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

12 **Nationwide Direct Purchaser Class**

13 All persons or entities in the United States who purchased a Fitbit
14 PurePulse Tracker on Fitbit.com and who did not opt out of the
arbitration agreement.

15 89. California law applies to the claims of all Class members, for the reasons outlined
16 below. In the alternative, however, the proposed Subclasses are defined as:

17 **Arizona Subclass**

18 All persons or entities in Arizona who purchased a Fitbit PurePulse
19 Tracker, as defined herein, excluding those who 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 California who purchased a Fitbit
22 PurePulse Tracker, 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 Colorado who purchased a Fitbit
26 PurePulse Tracker, 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 **Florida Subclass**

All persons or entities in Florida who purchased a Fitbit PurePulse

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Tracker, as defined herein, excluding those who purchased their PurePulse Trackers directly from Fitbit on Fitbit.com and who did not opt out of the arbitration agreement.

Illinois Subclass

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

Maryland Subclass

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

Michigan Subclass

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

New York Subclass

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

Ohio Subclass

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

Texas Subclass

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

Wisconsin Subclass

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

Typicality

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2 93. The claims of the representative Plaintiffs are typical of the claims of the Classes
3 in that the representative Plaintiffs, like all Class members, purchased a PurePulse Tracker
4 designed, manufactured, and distributed by Fitbit. The representative Plaintiffs, like all Class
5 members, were damaged by Fitbit's misconduct in that they have suffered actual damages as a
6 result of their purchase of the PurePulse Trackers. Furthermore, the factual bases of Fitbit's
7 misconduct are common to all Plaintiffs and represent a common thread of misconduct resulting
8 in injury to all Class members.

Adequate Representation

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10 94. Plaintiffs are members of the Classes and will fairly and adequately represent and
11 protect the interests of the Classes. Plaintiffs have retained counsel with substantial experience in
12 prosecuting consumer class actions, including actions involving defective products.

13 95. Plaintiffs and their counsel are committed to vigorously prosecuting this action on
14 behalf of the Classes and have the financial resources to do so. Neither Plaintiffs nor their
15 counsel have interests adverse to those of the Classes.

Predominance of Common Issues

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17 96. There are numerous issues of law and fact common to Plaintiffs and Class
18 members that predominate over any issue affecting only individual Class members. Resolving
19 these common issues will advance resolution of the litigation as to all Class members. These
20 common legal and factual issues include:

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

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

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

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

4 e. whether Fitbit made material misrepresentations regarding PurePulse
5 Trackers;

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

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

10 h. whether Plaintiffs and Class members are entitled to a declaratory
11 judgment;

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

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

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

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

20 **Superiority**

21 97. Plaintiffs and Class members all suffered—and will continue to suffer—harm and
22 damages as a result of Fitbit's uniformly unlawful and wrongful conduct. A class action is
23 superior to other available methods for the fair and efficient adjudication of this controversy.

24 98. Absent a class action, most Class members would likely find the cost of litigating
25 their claims prohibitively high and would have no effective remedy at law. Because of the
26 relatively small size of the individual Class members' claims, it is likely that few, if any, Class
27 members could afford to seek legal redress for Fitbit's misconduct. Absent a class action, Class
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1 members' damages will go uncompensated, and Fitbit's misconduct will continue without
2 remedy.

3 99. Class treatment of common questions of law and fact would also be a superior
4 method to multiple individual actions or piecemeal litigation in that class treatment will conserve
5 the resources of the courts and the litigants, and will promote consistency and efficiency of
6 adjudication.

7 100. Fitbit has acted in a uniform manner with respect to the Plaintiffs and Class
8 members.

9 101. Classwide declaratory, equitable, and injunctive relief is appropriate under
10 Rule 23(b)(1) and/or (b)(2) because Fitbit has acted on grounds that apply generally to the class,
11 and inconsistent adjudications with respect to the Fitbit's liability would establish incompatible
12 standards and substantially impair or impede the ability of Class members to protect their
13 interests. Classwide relief assures fair, consistent, and equitable treatment and protection of all
14 Class members, and uniformity and consistency in Fitbit's discharge of their duties to perform
15 corrective action regarding the PurePulse Trackers.

16 **CHOICE OF LAW ALLEGATIONS**

17 102. Because this Complaint is brought in California, California's choice of law regime
18 governs the state law allegations in this Complaint.

19 103. Under California's governmental interest/comparative impairment choice of law
20 rules, California law applies to the claims of all Class members, regardless of their state of
21 residence or state of purchase.

22 104. Because Fitbit is headquartered—and made all decisions relevant to these
23 claims—in California, California has a substantial connection to, and materially greater interest
24 in, the rights, interests, and policies involved in this action than any other state.

25 105. Nor would application of California law to Fitbit and the claims of all Class
26 members be arbitrary or unfair. Indeed, in its Terms of Service, Fitbit declares that, regardless of
27 any state's conflict of law principles, "the resolution of any Disputes shall be governed by and
28 construed in accordance with the laws of the State of California." Although the Terms of Service

1 are void and unenforceable as to Plaintiffs and Class members in other respects, this provision
2 demonstrates Fitbit’s awareness and agreement that California law should apply to the claims in
3 this Complaint, and Fitbit is estopped from contending otherwise.

4 **CLAIMS FOR RELIEF**

5 **FIRST CLAIM FOR RELIEF**

6 Violations of California’s Consumers Legal Remedies Act,
7 Cal. Civ. Code § 1750, *et seq.*

8 106. Plaintiffs hereby incorporate by reference the allegations contained in the
9 preceding paragraphs of this Complaint.

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

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

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

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

19 111. Fitbit engaged in unfair or deceptive trade practices that violated Cal. Civ. Code §
20 1770(a), as described above and below, by, among other things, failing to disclose the defective
21 nature of the PurePulse Trackers, representing that the PurePulse Trackers had characteristics and
22 benefits that they do not have (e.g., the ability to consistently record accurate heart rates, even
23 during high-intensity exercise), representing that the PurePulse Trackers were of a particular
24 standard, quality, or grade when they were of another, and advertising PurePulse Trackers with
25 the intent not to sell them as advertised. *See* Cal. Civ. Code §§ 1770(a)(5), (a)(7), (a)(9).

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

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

4 114. Fitbit was under a duty to Plaintiffs and Class members to disclose the deceptive
5 and defective nature of the PurePulse Trackers because:

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

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

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

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

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

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

23 117. Plaintiffs and Class members are reasonable consumers who expect that their
24 PurePulse Trackers will consistently record accurate heart rates, as represented.

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

1 119. Plaintiffs and the Class seek an order enjoining Fitbit's unfair or deceptive acts or
2 practices, equitable relief, an award of attorneys' fees and costs under Cal. Civ. Code § 1780(e),
3 and any other just and proper relief available under the CLRA.

4 120. In addition, many Class members are senior citizens or disabled persons, as
5 defined by Cal. Civ. Code §§ 1761(f) and (g), who suffered substantial economic damage
6 resulting from the Fitbit's fraudulent representations regarding the PurePulse Trackers. Each of
7 those Class members is entitled to up to an additional \$5,000. Cal. Civ. Code § 1780(b).

8 121. In accordance with section 1782(a) of the CLRA, on November 16, 2015, counsel
9 for Plaintiffs in the *McLellan* action served Fitbit with notice of its alleged violations of Cal. Civ.
10 Code § 1770(a) relating to the Heart Rate Defect in the PurePulse Trackers purchased by
11 Plaintiffs and Class members. Counsel for Plaintiffs in the *Landers* action did the same on
12 February 22, 2016. Plaintiffs' letters are attached to this Complaint as Exhibits 2 and 3, for
13 reference. Fitbit did not correct or agree to correct the actions described in the letter and in this
14 Complaint within thirty (30) days of the notices. Fitbit's responses are attached as Exhibits 4 and
15 5. Plaintiffs and Class members thus seek an award of compensatory, monetary, and punitive
16 damages based on the conduct described herein, as well as any other relief the Court deems
17 proper.

18 **SECOND CLAIM FOR RELIEF**

19 Violations of California's False Advertising Law,
20 Cal. Bus. & Prof. Code §§17500, *et seq.*

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

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

25 124. California's False Advertising Law ("FAL"), Bus. & Prof. Code §§17500, *et seq.*,
26 makes it "unlawful for any person to make or disseminate or cause to be made or disseminated
27 before the public in this state, . . . in any advertising device . . . or in any other manner or means
28 whatever, including over the Internet, any statement, concerning . . . personal property or
services, professional or otherwise, or performance or disposition thereof, which is untrue or

1 misleading and which is known, or which by the exercise of reasonable care should be known, to
2 be untrue or misleading.”

3 125. Fitbit committed acts of false advertising, as defined by the FAL, by using false
4 and misleading statements, and material omissions, to promote the sale of the PurePulse Trackers,
5 as described above, and including, but not limited to, representing that the PurePulse Trackers
6 would continuously and accurately record and report Class members’ real time heart rate.

7 126. Fitbit knew or should have known, through the exercise of reasonable care, that its
8 statements were untrue and misleading.

9 127. Fitbit’s actions and omissions in violation of the FAL were false and misleading
10 such that the general public is and was likely to be deceived.

11 128. As a direct and proximate result of these acts and omissions, consumers have been
12 and are being harmed. Plaintiffs and members of the Classes have suffered injury and actual out-
13 of-pocket losses as a result of Fitbit’s FAL violation because: (a) Plaintiffs and Class members
14 would not have purchased the PurePulse Trackers or would not have paid as much for them if
15 they had known the true facts; (b) Plaintiffs and Class members purchased the PurePulse Trackers
16 due to Fitbit’s misrepresentations and omissions; and (c) the PurePulse Trackers did not have the
17 level of quality or value as promised.

18 129. Plaintiffs bring this action pursuant to Bus. & Prof. Code § 17535 for injunctive
19 relief to enjoin the practices described herein and to require Fitbit to issue corrective disclosures
20 to consumers. Plaintiffs and the Class are therefore entitled to: (a) an order requiring Fitbit to
21 cease the acts of unfair competition alleged herein; (b) full restitution of all monies paid to Fitbit
22 as a result of its deceptive practices; (c) interest at the highest rate allowable by law; and (d) the
23 payment of Plaintiffs’ attorneys’ fees and costs pursuant to, inter alia, California Code of Civil
24 Procedure §1021.5.

25 **THIRD CLAIM FOR RELIEF**

26 Violations of California’s Unfair Competition Law,
27 Cal. Bus. & Prof. Code § 17200, *et seq.* – *Based On the Heart Rate Defect*

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

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

3 132. 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.” Fitbit’s conduct related to the Heart Rate Defect
6 violated each of this statute’s three prongs.

7 133. Fitbit committed an unlawful business act or practice in violation of Cal. Bus. &
8 Prof. Code § 17200, *et seq.*, by their violations of the Consumers Legal Remedies Act, Cal. Civ.
9 Code § 1750, *et seq.*, as set forth above, by the acts and practices set forth in this Complaint.

10 134. Fitbit committed unfair business acts and practices in violation of Cal. Bus. &
11 Prof. Code § 17200, *et seq.*, when it represented that the PurePulse Trackers could consistently
12 record accurate heart rate, even during exercise, when in fact they cannot. The Heart Rate Defect
13 also presents a safety hazard as it can jeopardize the health and safety of users who rely on the
14 inaccurate heart rate readings and unknowingly achieve dangerous heart rates.

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

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

24 137. 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.

27 138. 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.

1 146. Fitbit further advanced this unfair and fraudulent business act and practice by
2 attempting to compel arbitration and preclude class action litigation based on the unconscionable
3 post-purchase agreement. Indeed, in this case, Fitbit instructed Plaintiffs' counsel that "Ms.
4 McLellan cannot litigate her claim and cannot represent a class," despite the fact that she never
5 was presented with or agreed to any such "agreement" prior to purchasing her PurePulse Tracker.

6 147. Fitbit's unfair or deceptive acts or practices occurred repeatedly in the course of
7 Fitbit's trade or business, and were capable of deceiving a substantial portion of the purchasing
8 public.

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

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

14 150. Plaintiffs and the Class further seek an order enjoining Fitbit's unfair or deceptive
15 acts or practices, and an award of attorneys' fees and costs under Cal. Code of Civ. Proc. §
16 1021.5.

17 **FIFTH CLAIM FOR RELIEF**

18 Common Law Fraud

19 151. Plaintiffs hereby incorporate by reference the allegations contained in the
20 preceding paragraphs of this Complaint.

21 152. Plaintiffs bring this cause of action for themselves and on behalf of the Nationwide
22 Classes and all the Subclasses.

23 153. Fitbit engaged in both speaking and silent fraud, and in fraudulent and deceptive
24 conduct. As described above, Fitbit's conduct defrauded Plaintiffs and Class members, by
25 intentionally leading them to believe, through affirmative misrepresentations, omissions,
26 suppressions, and concealments of material fact, that the PurePulse Trackers possessed important
27 characteristics that they in fact do not possess—namely that they could consistently record
28 accurate heart rate, even during high-intensity exercise—and inducing their purchases.

1 154. Fitbit’s intentional and material misrepresentations included, among other things,
2 its advertising, marketing materials and messages, and other standardized statements claiming the
3 PurePulse Trackers consistently record accurate heart rates.

4 155. The foregoing misrepresentations were uniform across all Class members. The
5 same extensive and widespread advertising campaign was promoted nationwide, and all of the
6 promotional materials contained the same material representations regarding the PurePulse
7 Trackers’ ability consistently record accurate heart rates.

8 156. These representations were false, as detailed herein. Fitbit knew the
9 representations were false when it made them and intended to defraud purchasers thereby.

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

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

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

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

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

22 158. Fitbit’s actions constitute “actual fraud” within the meaning of Cal. Civ. Code §
23 1572 because Fitbit did the following with the intent to deceive Plaintiffs and Class member and
24 to induce them to enter into their contracts:

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

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

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

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

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

11 160. Fitbit's fraud and concealment were also uniform across all Class members; Fitbit
12 concealed from everyone the true nature of the Heart Rate Defect in the PurePulse Trackers.

13 161. Fitbit's misrepresentations and omissions were material in that they would affect a
14 reasonable consumer's decision to purchase a PurePulse Tracker. Consumers paid a premium for
15 the PurePulse Trackers precisely because they purportedly offered continuous, accurate heart rate
16 readings.

17 162. Fitbit's intentionally deceptive conduct induced Plaintiffs and Class members to
18 purchase the PurePulse Trackers and resulted in harm and damage to them.

19 163. Plaintiffs believed and relied upon Fitbit's misrepresentations and concealment of
20 the true facts. Class members are presumed to have believed and relied upon Fitbit's
21 misrepresentations and concealment of the true facts because those facts are material to a
22 reasonable consumer's decision to purchase the PurePulse Trackers.

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

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

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

9 **SEVENTH CLAIM FOR RELIEF**

10 Unjust Enrichment

11 176. Plaintiffs hereby incorporate by reference the allegations contained in the
12 preceding paragraphs of this Complaint.

13 177. Plaintiffs bring this cause of action for themselves and on behalf of the Nationwide
14 Class and all the Subclasses.

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

17 179. When purchasing their PurePulse Trackers, Plaintiffs and Class members
18 reasonably believed that the PurePulse Trackers would perform as advertised and as warranted
19 and would consistently record accurate heart rates, even during high-intensity exercise.

20 180. Plaintiffs and Class members received less than what they paid for in that the
21 PurePulse Trackers do not consistently record accurate heart rates as represented and therefore do
22 not deliver as promised.

23 181. Plaintiffs and Class members conferred a benefit on Fitbit by purchasing, and
24 paying a premium for, the PurePulse Trackers. Had Plaintiffs and Class members known about
25 the Heart Rate Defect, they would not have purchased the PurePulse Trackers or would have paid
26 significantly less for them.

27 182. Fitbit should therefore be required to disgorge all profits, benefits, and other such
28 compensation it obtained through its wrongful conduct.

EIGHTH CLAIM FOR RELIEF

Revocation of Acceptance,
Cal. Com. Code § 2608

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

5 184. Plaintiffs bring this cause of action for themselves and on behalf of the Nationwide
6 Classes and the California Subclass.

7 185. Plaintiffs and Class members revoke their acceptance of the PurePulse Trackers.

8 186. Plaintiffs and Class members had no knowledge of the Heart Rate Defect when
9 they purchased their PurePulse Trackers, and their acceptance of the goods was reasonably
10 induced by the difficulty of discovering the Heart Rate Defect and Fitbit's false representations
11 that the PurePulse Trackers could consistently record accurate heart rates, and therefore were not
12 defective.

13 187. The Heart Rate Defect substantially impairs the value of the PurePulse Trackers to
14 Plaintiffs and Class members.

15 188. There has been no substantial change in the condition of the PurePulse Trackers
16 not caused by the Heart Rate Defect.

17 189. As described herein, Plaintiffs notified Fitbit of the Heart Rate Defect.

18 190. Consequently, Plaintiffs and Class members are entitled to revoke their
19 acceptances, receive all payments made to Fitbit, and to all incidental and consequential damages,
20 and all other damages allowable under law, all in amounts to be proven at trial.

NINTH CLAIM FOR RELIEF

Breach of Express Warranty

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

25 192. Plaintiffs bring this cause of action for themselves and on behalf of the Nationwide
26 Classes and all the Subclasses.

1 193. By advertising the heart rate function of the PurePulse Trackers, Fitbit expressly
2 warranted to Plaintiffs and Class members that the PurePulse Trackers would record heart rate
3 accurately, even during exercise.

4 194. By way of non-exhaustive example, Fitbit represented that

5 a. the PurePulse Trackers provide “continuous, automatic . . . heart rate”
6 monitoring which allows users to “maintain intensity”;

7 b. “Surge tracks your heart rate all day and *during exercise*” (emphasis
8 added); and

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

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

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

16 197. As a result of the foregoing breaches of express warranty, Plaintiffs and other
17 Class members have been damaged in that they purchased PurePulse Trackers that could not
18 perform as warranted and did not receive the benefit of the bargain of their PurePulse Tracker
19 purchases.

20 198. Plaintiffs and Class members seek all damages permitted by law in an amount to
21 be proven at trial.

22 **TENTH CLAIM FOR RELIEF**

23 Violations of the Magnuson-Moss Act – Implied Warranty,
24 15 U.S.C. § 2301, *et seq.*

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

27 200. Plaintiffs bring this cause of action for themselves and on behalf of the Nationwide
28 Classes and all the Subclasses.

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

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

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

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

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

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

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

23 208. Plaintiffs and the other Class members have had sufficient direct dealings with
24 either Fitbit or its agents to establish privity of contract.

25 209. Nonetheless, privity is not required here because Plaintiffs and other Class
26 members are intended third-party beneficiaries of contracts between Fitbit and its retailers, and
27 specifically, of the implied warranties. The retailers were not intended to be the ultimate
28 consumers of the PurePulse Trackers and have no rights under the warranty agreements provided

1 with the PurePulse Trackers; the warranty agreements were designed for and intended to benefit
2 consumers.

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

7 211. Furthermore, to the extent such notice is required, it has been provided through the
8 letter sent to Fitbit by Plaintiffs' counsel on November 16, 2015 (Ex. 2), described herein, as well
9 as through complaints lodged by Plaintiff McLellan and other Class members. Fitbit refused to
10 remedy its wrongs after receiving these notifications and any further notice would be futile.

11 212. Plaintiffs' individual claims place into controversy an amount equal to or
12 exceeding \$25.00. The amount in controversy of this entire action exceeds the sum of
13 \$50,000.00, exclusive of interest and costs, computed on the basis of all claims to be determined
14 in this lawsuit. Plaintiffs, individually and on behalf of the other Class members, seek all
15 damages permitted by law in an amount to be proven at trial.

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

21 214. Further, Plaintiffs and the Class are also entitled to equitable relief under 15 U.S.C.
22 § 2310(d)(1).

23 **ELEVENTH CLAIM FOR RELIEF**

24 Violations of the Song-Beverly Consumer Warranty Act
25 for Breach of the Implied Warranty of Merchantability,
26 Cal. Civ. Code §§ 1791.1 & 1792

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

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

3 217. Plaintiffs and members of the Class are “buyers” within the meaning of Cal. Civ.
4 Code § 1791(b).

5 218. The PurePulse Trackers are “consumer goods” within the meaning of Cal. Civ.
6 Code § 1791(a).

7 219. Fitbit is a “manufacturer” of the PurePulse Trackers within the meaning Cal. Civ.
8 Code § 1791(j).

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

13 221. Cal. Civ. Code § 1791.1(a) states:

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

- 16 (1) Pass without objection in the trade under the contract
17 description.
18 (2) Are fit for the ordinary purposes for which such goods are
used.
19 (3) Are adequately contained, packaged, and labeled.
20 (4) Conform to the promises or affirmations of fact made on the
21 container or label.

22 222. The PurePulse Trackers would not pass without objection in the trade because they
23 do not perform as warranted because they do not provide consistent, accurate heart rate readings,
24 even during exercise.

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

27 224. The PurePulse Trackers are not adequately labeled because the labeling represents
28 that they consistently record accurate heart rates, which they do not do.

1 235. The PurePulse Trackers are “merchandise” within the meaning of Ariz. Rev. Stat.
2 § 44-1521(5).

3 236. The Arizona CFA provides that “[t]he act, use or employment by any person of
4 any deception, deceptive act or practice, fraud, . . . misrepresentation, or concealment,
5 suppression or omission of any material fact with intent that others rely on such concealment,
6 suppression or omission, in connection with the sale . . . of any merchandise whether or not any
7 person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful
8 practice.” Ariz. Rev. Stat. § 44-1522(A).

9 237. In the course of its business, Fitbit willfully failed to disclose and actively
10 concealed the Heart Rate Defect in the PurePulse Trackers as described herein and otherwise
11 engaged in activities with a tendency or capacity to deceive. Fitbit also engaged in unlawful trade
12 practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or
13 concealment, suppression or omission of any material fact with intent that others rely upon such
14 concealment, suppression or omission, in connection with the sale of PurePulse Trackers.

15 238. As alleged above, Fitbit made material statements about the characteristics and
16 efficacy of the PurePulse Trackers that were either false or misleading.

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

20 240. Fitbit owed the Arizona Subclass a duty to disclose the defective nature of
21 PurePulse Trackers, including the Heart Rate Defect because it:

22 a. Possessed exclusive knowledge of the Heart Rate Defect in the PurePulse
23 Trackers;

24 b. Intentionally concealed the Heart Rate Defect in the PurePulse Trackers
25 through their deceptive marketing campaign; and/or

26 c. Made incomplete representations about the characteristics of the PurePulse
27 Trackers, while purposefully withholding material facts from the Arizona Subclass that
28 contradicted these representations.

1 249. As described above, California law applies to the claims of all Plaintiffs and Class
2 members. In the alternative, Plaintiff Black brings this cause of action for herself and on behalf
3 of the Colorado Subclass, and reserves the right to bring additional and/or different state-law
4 claims should the Court determine that California law does not apply to all Class members.

5 250. Colorado’s Consumer Protection Act (the “CCPA”) prohibits a person from
6 engaging in a “deceptive trade practice,” which includes knowingly making “a false
7 representation as to the source, sponsorship, approval, or certification of goods,” or “a false
8 representation as to the characteristics, ingredients, uses, benefits, alterations, or quantities of
9 goods.” Colo. Rev. Stat. § 6-1-105(1)(b),(e). The CCPA further prohibits “represent[ing] that
10 goods ... are of a particular standard, quality, or grade ... if he knows or should know that they
11 are of another,” and “advertis[ing] goods ... with intent not to sell them as advertised.” Colo.
12 Rev. Stat. § 6-1-105(1)(g), (i).

13 251. Fitbit is a “person” as defined by § 6-1-102(6) of the CCPA. Col. Rev. Stat. § 6-1-
14 101, *et seq.*

15 252. Plaintiff Black and Colorado Subclass members are “consumers” under the CCPA.

16 253. In the course of business, Fitbit wilfully misrepresented and failed to disclose the
17 Heart Rate Defect in the PurePulse Trackers. Fitbit therefore engaged in unlawful trade practices
18 proscribed by the CCPA, including representing that the PurePulse Trackers have characteristics,
19 uses, benefits, and qualities which they do not have; representing that PurePulse Trackers are of a
20 particular standard and quality when they are not; advertising the PurePulse Trackers with the
21 intent not to sell them as advertised; and otherwise engaging in conduct likely to deceive.

22 254. Plaintiff Black and Colorado Subclass members were deceived by Fitbit’s failure
23 to disclose the Heart Rate Defect in the PurePulse Trackers.

24 255. Plaintiff Black and Colorado Subclass members reasonably relied upon Fitbit’s
25 false and misleading misrepresentations and had no way of knowing that the representations were
26 false and misleading before purchasing their PurePulse Trackers.

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28

1 256. Fitbit intentionally and knowing misrepresented material facts regarding the Heart
2 Rate Defect in the PurePulse Trackers with an intent to mislead Plaintiff Black and Colorado
3 Subclass members.

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

7 258. Fitbit's actions as set forth above occurred in the conduct of trade or commerce.

8 259. Fitbit's conduct proximately caused injuries to Plaintiff Black and Colorado
9 Subclass members

10 260. Plaintiff Black and Colorado Subclass members were injured as a direct and
11 natural consequence of Fitbit's conduct in that they purchased PurePulse Trackers they would
12 have not otherwise purchased, or would have paid significantly less for, and did not receive the
13 benefit of their bargain.

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

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

21 **FOURTEENTH CLAIM FOR RELIEF**

22 Violations of Florida's Unfair & Deceptive Trade Practices Act,
23 Fla. Stat. § 501.201, *et seq.*

24 263. Plaintiff Saito hereby incorporates by reference the allegations contained in the
25 preceding paragraphs of this Complaint.

26 264. As described above, California law applies to the claims of all Plaintiffs and Class
27 members. In the alternative, Plaintiff Saito brings this cause of action for herself and on behalf of
28 the Florida Subclass, and reserves the right to bring additional and/or different state-law claims
should the Court determine that California law does not apply to all Class members.

1 265. Plaintiff Saito and the Florida Subclass members are “consumers” within the
2 meaning of Florida Unfair and Deceptive Trade Practices Act (“FUDTPA”), Fla. Stat.
3 § 501.203(7).

4 266. Fitbit engaged in “trade or commerce” within the meaning of Fla. Stat.
5 § 501.203(8).

6 267. The FUDTPA prohibits “[u]nfair methods of competition, unconscionable acts or
7 practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce....”
8 Fla. Stat. § 501.204(1). Fitbit participated in unfair and deceptive trade practices that violated the
9 FUDTPA as described herein.

10 268. In the course of its business, Fitbit willfully failed to disclose and actively
11 concealed the Heart Rate Defect in the PurePulse Trackers as described herein and otherwise
12 engaged in activities with a tendency or capacity to deceive. Fitbit also engaged in unlawful trade
13 practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or
14 concealment, suppression or omission of any material fact with intent that others rely upon such
15 concealment, suppression or omission, in connection with the sale of PurePulse Trackers.

16 269. As alleged above, Fitbit made material statements about the characteristics and
17 efficacy of the PurePulse Trackers that were either false or misleading.

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

21 271. Fitbit owed Plaintiff Saito and the Florida Subclass a duty to disclose the defective
22 nature of PurePulse Trackers, including the Heart Rate Defect because it:

23 a. Possessed exclusive knowledge of the Heart Rate Defect in the PurePulse
24 Trackers;

25 b. Intentionally concealed the Heart Rate Defect in the PurePulse Trackers
26 through their deceptive marketing campaign; and/or

1 c. Made incomplete representations about the characteristics of the PurePulse
2 Trackers, while purposefully withholding material facts from the Florida Subclass that
3 contradicted these representations.

4 272. Fitbit's unfair or deceptive acts or practices were likely to deceive reasonable
5 consumers, including the Florida Subclass, about the true characteristics of the PurePulse
6 Trackers. Fitbit intentionally and knowingly misrepresented material facts regarding the
7 PurePulse Trackers with intent to mislead the Florida Subclass.

8 273. The inability of the PurePulse Trackers to consistently record accurate heart rates,
9 even during exercise, was material to the Florida Subclass. Had Plaintiff Saito and the Florida
10 Subclass known of the Heart Rate Defect, they would either not have purchased their PurePulse
11 Trackers, or would have paid less for them than they did.

12 274. All members of the Florida Subclass suffered ascertainable loss caused by Fitbit's
13 failure to disclose material information. The Florida Subclass did not receive the benefit of their
14 bargain.

15 275. Plaintiff Saito and the Florida Subclass members risk irreparable injury as a result
16 of Fitbit's acts and omissions in violation of the FUDTPA, and these violations present a
17 continuing risk to the Florida Subclass as well as to the general public. Fitbit's unlawful acts and
18 practices complained of herein affect the public interest

19 276. Plaintiff Saito and the Florida Subclass members are entitled to recover their actual
20 damages under Fla. Stat. § 501.211(2) and attorneys' fees under Fla. Stat. § 501.2105(1).

21 277. Plaintiff Saito and the Florida Subclass also seek an order enjoining Fitbit's unfair,
22 unlawful, and/or deceptive practices, declaratory relief, attorneys' fees, and any other just and
23 proper relief available under the FUDTPA.

24 **FIFTEENTH CLAIM FOR RELIEF**

25 Illinois Consumer Fraud and Deceptive Business Practices Act,
26 815 Ill. Comp. Stat. 505/1, *et seq.*

27 278. Plaintiffs Burke and Molenstra hereby incorporate by reference the allegations
28 contained in the preceding paragraphs of this Complaint.

1 279. As described above, California law applies to the claims of all Plaintiffs and Class
2 members. In the alternative, Plaintiffs Burke and Molenstra bring this cause of action for
3 themselves and on behalf of the Illinois Subclass, and reserve the right to bring additional and/or
4 different state-law claims should the Court determine that California law does not apply to all
5 Class members.

6 280. The Illinois Consumer Fraud and Deceptive Business Practices Act (“ICFA”), 815
7 Ill. Comp. Stat. 505/1, et seq. (the “ICFA”) protects consumers and competitors by promoting fair
8 competition in commercial markets for goods and services.

9 281. The ICFA prohibits any unlawful, unfair, or fraudulent business acts or practices
10 including the employment of any deception, fraud, false pretense, false advertising,
11 misrepresentation, or the concealment, suppression, or omission of any material fact.

12 282. Section 2 of the ICFA provides in relevant part as follows:

13 Unfair methods of competition and unfair or deceptive acts or
14 practices, including but not limited to the use or employment of any
15 deception, fraud, false pretense, false promise, misrepresentation or
16 the concealment, suppression or omission of any material fact, with
17 intent that others rely upon the concealment, suppression or
18 omission of such material fact, or the use or employment of any
19 practice described in Section 2 of the “Uniform Deceptive Trade
20 Practices Act”, approved August 5, 1965, in the conduct of any
21 trade or commerce are hereby declared unlawful whether any
22 person has in fact been misled, deceived or damaged thereby.

23 815 ILCS 505/2 (footnote omitted).

24 283. The ICFA applies to Fitbit’s actions and conduct as described herein because it
25 protects consumers in transactions that are intended to result, or which have resulted, in the sale
26 of goods or services.

27 284. Fitbit is a person within the meaning of the ICFA.

28 285. Plaintiffs Burke and Molenstra and other members of the Illinois Subclass are
“consumers” within the meaning of the ICFA.

 286. Fitbit’s PurePulse Trackers are “merchandise” within the meaning of the ICFA and
the sale of its PurePulse Trackers is considered “trade” or “commerce” under the ICFA.

1 287. Fitbit violated the ICFA by misrepresenting and omitting material facts about the
2 PurePulse Trackers. Specifically, Fitbit advertised the Trackers as being capable of continuously
3 recording an accurate real time heart rate, even when engaged in vigorous exercise, when in fact
4 the PurePulse Trackers are not capable of consistently recording accurate heart rate, particularly
5 when users are engaged in vigorous exercise.

6 288. Fitbit was aware or should have been aware that the PurePulse Trackers were not
7 capable of recording an accurate real time heart rate, particularly when users are engaged in
8 vigorous exercise. Fitbit created its advertisements and marketing materials with the intent that
9 Plaintiffs and other consumers would rely on the information provided.

10 289. Fitbit's misrepresentations and omissions to Plaintiffs Burke and Molenstra and
11 other members of the Illinois Subclass constitute unfair and deceptive acts and practices in
12 violation of the ICFA.

13 290. Had Fitbit not engaged in the deceptive misrepresentation and omission of material
14 facts as described above, Plaintiffs Burke and Molenstra and Illinois Subclass members would not
15 have purchased the PurePulse Trackers or would have paid less for the PurePulse Trackers.

16 291. Plaintiffs and the Illinois Subclass members were damaged by Fitbit's conduct
17 directed towards consumers. As a direct and proximate result of Fitbit's violation of the ICFA,
18 Plaintiffs and Illinois Subclass members have suffered harm in the form of monies paid for
19 Fitbit's Trackers. Plaintiffs Burke and Molenstra, on behalf of themselves and the Illinois
20 Subclass, seek an order (1) requiring Fitbit to cease the unfair practices described herein; (2)
21 awarding damages, interest, and reasonable attorneys' fees, expenses, and costs to the extent
22 allowable; and/or (3) requiring Fitbit to restore to Plaintiffs Burke and Molenstra and each Illinois
23 Subclass member any money acquired by means of unfair competition.

24 **SIXTEENTH CLAIM FOR RELIEF**

25 Violations of the Maryland Consumer Protection Act,
26 Md. Code Com. Law § 13-101, *et seq.*

27 292. Plaintiff Rubinstein hereby incorporates by reference the allegations contained in
28 the preceding paragraphs of this Complaint.

1 293. As described above, California law applies to the claims of all Plaintiffs and Class
2 members. In the alternative, Plaintiff Rubinstein brings this cause of action for himself and on
3 behalf of the Maryland Subclass, and reserves the right to bring additional and/or different state-
4 law claims should the Court determine that California law does not apply to all Class members.

5 294. Fitbit and the Maryland Subclass members are “persons” within the meaning of
6 Md. Code Com. Law § 13-101(h).

7 295. The Maryland Consumer Protection Act (“Maryland CPA”) provides that a person
8 may not engage in any unfair or deceptive trade practice in the sale of any consumer good. Md.
9 Code Com. Law § 13-303. Fitbit participated in misleading, false, or deceptive acts that violated
10 the Maryland CPA, by failing to disclose and actively concealing the Heart Rate Defect in the
11 PurePulse Trackers.

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

13 297. In the course of its business, Fitbit willfully failed to disclose and actively
14 concealed the Heart Rate Defect in the PurePulse Trackers as described herein and otherwise
15 engaged in activities with a tendency or capacity to deceive. Fitbit also engaged in unlawful trade
16 practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or
17 concealment, suppression or omission of any material fact with intent that others rely upon such
18 concealment, suppression or omission, in connection with the sale of PurePulse Trackers.

19 298. As alleged above, Fitbit made material statements about the characteristics and
20 efficacy of the PurePulse Trackers that were either false or misleading.

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

24 300. Fitbit owed Plaintiff Rubinstein and the Maryland Subclass a duty to disclose the
25 defective nature of PurePulse Trackers, including the Heart Rate Defect because it:

26 a. Possessed exclusive knowledge of the Heart Rate Defect in the PurePulse
27 Trackers;

1 b. Intentionally concealed the Heart Rate Defect in the PurePulse Trackers
2 through their deceptive marketing campaign; and/or

3 c. Made incomplete representations about the characteristics of the PurePulse
4 Trackers, while purposefully withholding material facts from the Maryland Subclass that
5 contradicted these representations.

6 301. Fitbit's unfair or deceptive acts or practices were likely to deceive reasonable
7 consumers, including the Maryland Subclass, about the true characteristics of the PurePulse
8 Trackers. Fitbit intentionally and knowingly misrepresented material facts regarding the
9 PurePulse Trackers with intent to mislead the Maryland Subclass.

10 302. The inability of the PurePulse Trackers to consistently record accurate heart rates,
11 even during exercise, was material to the Maryland Subclass. Had Plaintiff Rubinstein and the
12 Maryland Subclass known of the Heart Rate Defect, they would either not have purchased their
13 PurePulse Trackers, or would have paid less for them than they did.

14 303. All members of the Maryland Subclass suffered ascertainable loss caused by
15 Fitbit's failure to disclose material information. The Maryland Subclass did not receive the
16 benefit of their bargain.

17 304. Plaintiff Rubinstein and the Maryland Subclass members risk irreparable injury as
18 a result of Fitbit's acts and omissions in violation of the Maryland CPA, and these violations
19 present a continuing risk to the Maryland Subclass as well as to the general public. Fitbit's
20 unlawful acts and practices complained of herein affect the public interest

21 305. Pursuant to Md. Code Com. Law § 13-408, the Maryland Subclass members seek
22 actual damages, attorneys' fees, and any other just and proper relief available under the Maryland
23 CPA.

24 **SEVENTEENTH CLAIM FOR RELIEF**
25 Violations of the Michigan Consumer Protection Act,
 Mich. Comp. Laws § 445.903, *et seq.*

26 306. Plaintiff Callan hereby incorporates by reference the allegations contained in the
27 preceding paragraphs of this Complaint.
28

1 307. As described above, California law applies to the claims of all Plaintiffs and Class
2 members. In the alternative, Plaintiff Callan brings this cause of action for herself and on behalf
3 of the Michigan Subclass, and reserves the right to bring additional and/or different state-law
4 claims should the Court determine that California law does not apply to all Class members.

5 308. Plaintiff Callan and Michigan Subclass members are “person[s]” within the
6 meaning of the Mich. Comp. Laws § 445.902(1)(d).

7 309. Fitbit is a “person” engaged in “trade or commerce” within the meaning of the
8 Mich. Comp. Laws § 445.902(1)(d) and (g).

9 310. The Michigan Consumer Protection Act (“Michigan CPA”) prohibits “[u]nfair,
10 unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce....”
11 Mich. Comp. Laws § 445.903(1). Fitbit engaged in unfair, unconscionable, or deceptive
12 methods, acts or practices prohibited by the Michigan CPA, including: “(c) Representing that
13 goods or services have... characteristics... that they do not have....”; “(e) Representing that
14 goods or services are of a particular standard... if they are of another”; “(i) Making false or
15 misleading statements of fact concerning the reasons for, existence of, or amounts of price
16 reductions”; “(s) Failing to reveal a material fact, the omission of which tends to mislead or
17 deceive the consumer, and which fact could not reasonably be known by the consumer”;
18 “(bb) Making a representation of fact or statement of fact material to the transaction such that a
19 person reasonably believes the represented or suggested state of affairs to be other than it actually
20 is”; and “(cc) Failing to reveal facts that are material to the transaction in light of representations
21 of fact made in a positive manner.” Mich. Comp. Laws § 445.903(1).

22 311. By failing to disclose and actively concealing the Heart Rate Defect in the
23 PurePulse Trackers, Fitbit participated in unfair, deceptive, and unconscionable acts that violated
24 the Michigan CPA.

25 312. In the course of its business, Fitbit willfully failed to disclose and actively
26 concealed the Heart Rate Defect in the PurePulse Trackers as described herein and otherwise
27 engaged in activities with a tendency or capacity to deceive. Fitbit also engaged in unlawful trade
28 practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or

1 concealment, suppression or omission of any material fact with intent that others rely upon such
2 concealment, suppression or omission, in connection with the sale of PurePulse Trackers.

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

6 314. Fitbit owed Plaintiff Callan and the Michigan Subclass a duty to disclose the
7 defective nature of PurePulse Trackers, including the Heart Rate Defect because it:

8 a. Possessed exclusive knowledge of the Heart Rate Defect in the PurePulse
9 Trackers;

10 b. Intentionally concealed the Heart Rate Defect in the PurePulse Trackers
11 through their deceptive marketing campaign; and/or

12 c. Made incomplete representations about the characteristics of the PurePulse
13 Trackers, while purposefully withholding material facts from the Michigan Subclass that
14 contradicted these representations.

15 315. Fitbit's unfair or deceptive acts or practices were likely to deceive reasonable
16 consumers, including the Michigan Subclass, about the true characteristics of the PurePulse
17 Trackers. Fitbit intentionally and knowingly misrepresented material facts regarding the
18 PurePulse Trackers with intent to mislead the Michigan Subclass.

19 316. The inability of the PurePulse Trackers to consistently record accurate heart rates,
20 even during exercise, was material to the Michigan Subclass. Had Plaintiff Callan and the
21 Michigan Subclass known of the Heart Rate Defect, they would either not have purchased their
22 PurePulse Trackers, or would have paid less for them than they did.

23 317. All members of the Michigan Subclass suffered ascertainable loss caused by
24 Fitbit's failure to disclose material information. The Michigan Subclass did not receive the
25 benefit of their bargain.

26 318. Plaintiff Callan and the Michigan Subclass members risk irreparable injury as a
27 result of Fitbit's acts and omissions in violation of the Michigan CPA, and these violations
28

1 present a continuing risk to the Michigan Subclass as well as to the general public. Fitbit's
2 unlawful acts and practices complained of herein affect the public interest

3 319. Plaintiff Callan and the Michigan Subclass seek injunctive relief to enjoin Fitbit
4 from continuing its unfair and deceptive acts; monetary relief against Fitbit measured as the
5 greater of (a) actual damages in an amount to be determined at trial and (b) statutory damages in
6 the amount of \$250 for each Michigan Subclass member; reasonable attorneys' fees; declaratory
7 relief in the nature of a judicial determination of whether Fitbit's conduct violated the Michigan
8 CPA, the just total amount of penalties to be assessed against each thereunder, and the formula
9 and procedure for fair and equitable allocation of statutory penalties among the Michigan
10 Subclass; and any other just and proper relief available under Mich. Comp. Laws § 445.911.

11 320. Plaintiff Callan and the Michigan Subclass also seek punitive damages against
12 Fitbit because it carried out despicable conduct with willful and conscious disregard of the rights
13 and safety of others. Fitbit's unlawful conduct constitutes malice, oppression, and fraud
14 warranting punitive damages.

15 **EIGHTEENTH CLAIM FOR RELIEF**
16 Deceptive Acts or Practices in Violation of
New York Gen. Bus. Law § 349

17 321. Plaintiff Landers hereby incorporates by reference the allegations contained in the
18 preceding paragraphs of this Complaint.

19 322. As described above, California law applies to the claims of all Plaintiffs and Class
20 members. In the alternative, Plaintiff Landers brings this cause of action for herself and on behalf
21 of the New York Subclass, and reserves the right to bring additional and/or different state-law
22 claims should the Court determine that California law does not apply to all Class members.

23 323. By the acts and conduct alleged herein, Fitbit committed unfair or deceptive acts
24 and practices by misrepresenting and omitting facts concerning the characteristics, uses, and
25 benefits of the PurePulse Trackers and caused Plaintiff Landers and New York Subclass members
26 to purchase the PurePulse Trackers and to pay a premium price for the PurePulse Trackers, which
27 they would not have done had the true facts been known.

28 324. The foregoing deceptive acts and practices were directed at consumers.

1 325. The foregoing deceptive acts and practices are misleading in a material way
2 because they fundamentally misrepresent the characteristics, quantities, and benefits of the
3 PurePulse Trackers to induce consumers to purchase the PurePulse Trackers.

4 326. Plaintiff Landers and members of the New York Subclass were injured because
5 they paid more for the PurePulse Trackers than they would have paid had they known the truth
6 about the PurePulse Trackers.

7 327. On behalf of herself and other members of the New York Subclass, Plaintiff
8 Landers seeks to enjoin the unlawful acts and practices described herein, to recover her actual
9 damages or fifty dollars, whichever is greater, three times actual damages, and reasonable
10 attorneys' fees.

11 **NINETEENTH CLAIM FOR RELIEF**

12 False Advertising in Violation of
13 New York Gen. Bus. Law § 350

14 328. Plaintiff Landers hereby incorporates by reference the allegations contained in the
15 preceding paragraphs of this Complaint.

16 329. As described above, California law applies to the claims of all Plaintiffs and Class
17 members. In the alternative, Plaintiff Landers brings this cause of action for herself and on behalf
18 of the New York Subclass, and reserves the right to bring additional and/or different state-law
19 claims should the Court determine that California law does not apply to all Class members.

20 330. Based on the allegations contained in the Complaint, Fitbit's has engaged in
21 consumer-oriented conduct that is deceptive or misleading in a material way which constitutes
22 false advertising in violation of Section 350 of the New York General Business Law.

23 331. Fitbit's misleading and deceptive misrepresentations and omissions of fact,
24 including misrepresentations and omissions concerning the ability of the PurePulse Trackers to
25 continuously report an accurate, real time heart rate, were and are directed at consumers.

26 332. Fitbit's misleading and deceptive misrepresentations of fact, including
27 misrepresentations and omissions concerning the ability of the PurePulse Trackers to
28 continuously report an accurate, real time heart rate, were likely to mislead a reasonable
consumer acting reasonably under the circumstances.

1 333. Fitbit's misleading and deceptive misrepresentations of fact, including
2 misrepresentations and omissions concerning the ability of the PurePulse Trackers to
3 continuously report an accurate, real time heart rate, have resulted in consumer injury and/or
4 harm the public interest.

5 334. As a result of Fitbit's misleading and deceptive misrepresentations of fact,
6 including misrepresentations and omissions concerning the ability of the PurePulse Trackers to
7 continuously report an accurate, real time heart rate, Plaintiff Landers has suffered and continues
8 to suffer economic injury.

9 335. Plaintiff Landers and New York Subclass members suffered an ascertainable loss
10 caused by Fitbit's misrepresentations and omissions concerning the ability of the PurePulse
11 Trackers to continuously report an accurate, real time heart rate because they paid more for the
12 PurePulse Trackers than they would have paid had they known the truth about the PurePulse
13 Trackers.

14 336. On behalf of herself and other members of the New York Subclass, Plaintiff
15 Landers seeks to enjoin the unlawful acts and practices described herein, to recover her actual
16 damages or five hundred dollars, whichever is greater, three times actual damages, and reasonable
17 attorneys' fees.

18 **TWENTIETH CLAIM FOR RELIEF**

19 Violations of the Ohio Consumer Sales Practices Act,
20 Ohio Rev. Code Ann. § 1345.01, *et seq.*

21 337. Plaintiff Schorr hereby incorporates by reference the allegations contained in the
22 preceding paragraphs of this Complaint.

23 338. As described above, California law applies to the claims of all Plaintiffs and Class
24 members. In the alternative, Plaintiff Schorr brings this cause of action for himself and on behalf
25 of the Ohio Subclass, and reserves the right to bring additional and/or different state-law claims
26 should the Court determine that California law does not apply to all Class members.

27 339. Fitbit is a "supplier" as that term is defined in Ohio Rev. Code § 1345.01(C).
28

1 340. Plaintiff Schorr and the Ohio Subclass members are “consumer[s]” as that term is
2 defined in Ohio Rev. Code § 1345.01(D), and their purchases of the PurePulse Trackers are
3 “consumer transaction[s]” within the meaning of Ohio Rev. Code § 1345.01(A).

4 341. The Ohio Consumer Sales Practices Act (“Ohio CSPA”), Ohio Rev. Code
5 § 1345.02, broadly prohibits unfair or deceptive acts or practices in connection with a consumer
6 transaction. Specifically, and without limitation of the broad prohibition, the Act prohibits
7 suppliers from representing (i) that goods have characteristics or uses or benefits which they do
8 not have; (ii) that their goods are of a particular quality or grade they are not; and (iii) the subject
9 of a consumer transaction has been supplied in accordance with a previous representation, if it has
10 not. *Id.* Fitbit’s conduct as alleged above and below constitutes unfair and/or deceptive
11 consumer sales practices in violation of Ohio Rev. Code § 1345.02.

12 342. By failing to disclose and actively concealing the Heart Rate Defect in the
13 PurePulse Trackers, Fitbit engaged in deceptive business practices prohibited by the Ohio CSPA,
14 including: representing that the PurePulse Trackers have characteristics, uses, benefits, and
15 qualities which they do not have; representing that the PurePulse Trackers are of a particular
16 standard, quality, and grade when they are not; representing that the subject of a transaction
17 involving the PurePulse Trackers has been supplied in accordance with a previous representation
18 when it has not; and engaging in other unfair or deceptive acts or practices.

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

20 344. In the course of its business, Fitbit willfully failed to disclose and actively
21 concealed the Heart Rate Defect in the PurePulse Trackers as described herein and otherwise
22 engaged in activities with a tendency or capacity to deceive. Fitbit also engaged in unlawful trade
23 practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or
24 concealment, suppression or omission of any material fact with intent that others rely upon such
25 concealment, suppression or omission, in connection with the sale of PurePulse Trackers.

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

1 346. Fitbit owed Plaintiff Schorr and the Ohio Subclass a duty to disclose the defective
2 nature of PurePulse Trackers, including the Heart Rate Defect because it:

3 a. Possessed exclusive knowledge of the Heart Rate Defect in the PurePulse
4 Trackers;

5 b. Intentionally concealed the Heart Rate Defect in the PurePulse Trackers
6 through their deceptive marketing campaign; and/or

7 c. Made incomplete representations about the characteristics of the PurePulse
8 Trackers, while purposefully withholding material facts from the Ohio Subclass that contradicted
9 these representations.

10 347. Fitbit's unfair or deceptive acts or practices were likely to deceive reasonable
11 consumers, including the Ohio Subclass, about the true characteristics of the PurePulse Trackers.
12 Fitbit intentionally and knowingly misrepresented material facts regarding the PurePulse Trackers
13 with intent to mislead the Ohio Subclass.

14 348. The inability of the PurePulse Trackers to consistently record accurate heart rates,
15 even during exercise, was material to the Ohio Subclass. Had Plaintiff Schorr and the Ohio
16 Subclass known of the Heart Rate Defect, they would either not have purchased their PurePulse
17 Trackers, or would have paid less for them than they did.

18 349. All members of the Ohio Subclass suffered ascertainable loss caused by Fitbit's
19 failure to disclose material information. The Ohio Subclass did not receive the benefit of their
20 bargain.

21 350. Plaintiff Schorr and the Ohio Subclass members risk irreparable injury as a result
22 of Fitbit's acts and omissions in violation of the Ohio CSPA, and these violations present a
23 continuing risk to the Ohio Subclass as well as to the general public. Fitbit's unlawful acts and
24 practices complained of herein affect the public interest.

25 351. Plaintiff Schorr and the Ohio Subclass members seek punitive damages against
26 Fitbit because its conduct was egregious.

27 352. Fitbit on notice pursuant to Ohio Rev. Code § 1345.09(B) that their actions
28 constituted unfair, deceptive, and unconscionable practices.

1 and (4) failing to disclose information concerning the PurePulse Trackers with the intent to
2 induce consumers to purchase the PurePulse Trackers.

3 359. Fitbit's actions as set forth above occurred in the conduct of trade or commerce.

4 360. In the course of its business, Fitbit willfully failed to disclose and actively
5 concealed the Heart Rate Defect in the PurePulse Trackers as described herein and otherwise
6 engaged in activities with a tendency or capacity to deceive. Fitbit also engaged in unlawful trade
7 practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or
8 concealment, suppression or omission of any material fact with intent that others rely upon such
9 concealment, suppression or omission, in connection with the sale of PurePulse Trackers.

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

13 362. Fitbit owed Plaintiff Morgan and the Texas Subclass a duty to disclose the
14 defective nature of PurePulse Trackers, including the Heart Rate Defect because it:

15 a. Possessed exclusive knowledge of the Heart Rate Defect in the PurePulse
16 Trackers;

17 b. Intentionally concealed the Heart Rate Defect in the PurePulse Trackers
18 through their deceptive marketing campaign; and/or

19 c. Made incomplete representations about the characteristics of the PurePulse
20 Trackers, while purposefully withholding material facts from the Texas Subclass that contradicted
21 these representations.

22 363. Fitbit's unfair or deceptive acts or practices were likely to deceive reasonable
23 consumers, including the Texas Subclass, about the true characteristics of the PurePulse Trackers.
24 Fitbit intentionally and knowingly misrepresented material facts regarding the PurePulse Trackers
25 with intent to mislead the Texas Subclass.

26 364. The inability of the PurePulse Trackers to consistently record accurate heart rates,
27 even during exercise, was material to the Texas Subclass. Had Plaintiff Morgan and the Texas
28

1 Subclass known of the Heart Rate Defect, they would either not have purchased their PurePulse
2 Trackers, or would have paid less for them than they did.

3 365. Pursuant to Tex. Bus. & Com. Code § 17.50(a)(1) and (b), the Plaintiff Morgan
4 and the Texas Subclass seek monetary relief against Fitbit measured as actual damages in an
5 amount to be determined at trial, treble damages for Fitbit's knowing violations of the Texas
6 DTPA, and any other just and proper relief available under the Texas DTPA.

7 366. For those Texas Subclass members who wish to rescind their purchases, they are
8 entitled under Tex. Bus. & Com. Code § 17.50(b)(4) to rescission and other relief necessary to
9 restore any money or property that was acquired from them based on violations of the Texas
10 DTPA.

11 367. The Texas Subclass also seeks court costs and attorneys' fees under § 17.50(d) of
12 the Texas DTPA.

13 368. Plaintiff Morgan and the Texas Subclass members have complied with the notice
14 requirement set forth in Tex. Bus. & Com. Code § 17.505(a) by virtue of the letter sent by
15 Plaintiffs' counsel on November 16, 2015, described herein.

16 369. Upon filing this Amended Complaint and as required by Tex. Bus. & Com. Code
17 § 17.501, Plaintiffs will provide the consumer protection division of the Texas Attorney General's
18 office a copy of the demand letter and a copy of the complaint.

19 **TWENTY-SECOND CLAIM FOR RELIEF**

20 Violations of the Wisconsin Deceptive Trade Practices Act,
21 Wis. Stat. § 110.18, *et seq.*

22 370. Plaintiff Urban hereby incorporates by reference the allegations contained in the
23 preceding paragraphs of this Complaint.

24 371. As described above, California law applies to the claims of all Plaintiffs and Class
25 members. In the alternative, Plaintiff Urban brings this cause of action for himself and on behalf
26 of the Wisconsin Subclass, and reserves the right to bring additional and/or different state-law
27 claims should the Court determine that California law does not apply to all Class members.
28 The Wisconsin Deceptive Trade Practices Act ("Wisconsin DTPA") prohibits a "representation or
statement of fact which is untrue, deceptive or misleading." Wis. Stat. § 100.18(1).

1 372. Fitbit is a “person, firm, corporation or association” within the meaning of the
2 Wisconsin DTPA. Wis. Stat. § 100.18(1).

3 373. Plaintiff Urban and the Wisconsin Subclass members, or their spouses, purchased
4 PurePulse Trackers and are members of “the public” within the meaning of the Wisconsin DTPA.
5 Wis. Stat. § 100.18(1).

6 374. In the course of its business, Fitbit engaged in unfair and deceptive acts and
7 practices that violated the Wisconsin DTPA, including misrepresenting the nature of the
8 PurePulse Trackers and concealing and suppressing information about the Heart Rate Defect in
9 the PurePulse Trackers with intent that others rely upon such concealment, suppression, or
10 omission, in connection with their PurePulse Tracker purchases.

11 375. Fitbit intentionally and knowingly misrepresented material facts regarding the
12 Heart Rate Defect in the PurePulse Trackers with intent to mislead Plaintiff Urban and Wisconsin
13 Subclass members.

14 376. Fitbit’s unfair or deceptive acts or practices were likely to and did in fact deceive
15 reasonable consumers, including Plaintiff Urban, and are presumed to have deceived Wisconsin
16 Subclass members.

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

20 378. Fitbit had an ongoing duty to refrain from unfair and deceptive trade practices.

21 379. Fitbit’s violations affect the public interest and present a continuing risk to
22 Plaintiff Urban, Wisconsin Subclass members, and the public.

23 380. Plaintiff Urban and the Wisconsin Subclass suffered ascertainable loss caused by
24 Fitbit’s misrepresentations and its concealment of and failure to disclose material information
25 regarding the Heart Rate Defect in the PurePulse Trackers.

26 381. Plaintiff Urban and Wisconsin Subclass members were injured as a direct and
27 proximate result of Fitbit’s conduct in that they purchased PurePulse Trackers they would have
28

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

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

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

8 **PRAYER FOR RELIEF**

9 Plaintiffs, individually and on behalf of all others similarly situated, request the Court to
10 enter judgment against Fitbit, as follows:

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

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

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

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

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

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

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

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

- 1 I. an award of attorneys' fees and costs, as allowed by law;
- 2 J. an award of pre-judgment and post-judgment interest, as provided by law;
- 3 K. leave to amend this Complaint to conform to the evidence produced at trial; and
- 4 L. such other relief as may be appropriate under the circumstances.


DEMAND FOR JURY TRIAL

5
6 Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiffs, individually and on behalf of
7 the Class, demand a trial by jury of any and all issues in this action so triable of right.

8
9 Dated: May 19, 2016

Respectfully submitted,

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

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