

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES**

CAROLYN LEVIN, in Her Individual and  
Representative Capacity on Behalf of a Class  
of All Persons Similarly-Situated,

Plaintiff,

v.

NIKE, INC., an Oregon Corporation; APPLE  
INC., a California Corporation; and DOES 1  
through 10, inclusive,

Defendant.

CASE NO. BC509363

Assigned to Hon. William F. Highberger

**SETTLEMENT AGREEMENT**

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**SETTLEMENT AGREEMENT**  
**(Subject To Court Approval)**

This settlement agreement ("Agreement" or "Settlement Agreement") is entered into by and between Nike, Inc. ("Nike," as defined herein at paragraph 24), Apple Inc. ("Apple," as defined herein at paragraph 25), and the named Plaintiff Class Representative Carolyn Levin ("Plaintiff," as defined herein at paragraph 31), both individually and on behalf of a Settlement Class (as defined herein at paragraph 15) of people and entities who purchased a Nike+ FuelBand.

**I. BACKGROUND**

1. Plaintiff filed a lawsuit against Nike and Apple on behalf of numerous persons claiming damages arising out of their purchases of the Nike+ FuelBand. That lawsuit, *Levin v. Nike, Inc. et al.* (Case No. BC509363), is currently pending in the Superior Court of California.
2. Plaintiff alleges that Nike and Apple made false and/or misleading statements regarding the Nike+ FuelBand and failed to honor the warranty terms of the Nike+ FuelBand. Plaintiff's Second Amended Complaint, a copy of which is attached hereto as Exhibit 1, and which Plaintiff has expressed an intention to file with the Court as the operative complaint in this action, alleges that Nike's and Apple's conduct violates California's Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 *et seq.*), Consumer Legal Remedies Act (Cal. Civ. Code § 1750 *et seq.*), and False Advertising Law (Cal. Bus. & Prof. Code § 17500 *et seq.*), and alleges claims for breach of warranty and "common counts" of "assumpsit, restitution, and quasi-contract."
3. Nike and Apple deny and continue to deny each and every allegation and all charges of wrongdoing or liability of any kind whatsoever that Plaintiff or members of the Class presently have asserted in this Litigation (as defined herein at paragraph 27) or may in the future assert. Despite Nike's and Apple's belief that they are not liable for, and have good defenses to, the claims alleged in the Litigation, Nike and Apple desire to settle the Litigation, and thus avoid the expense, risk, exposure, inconvenience, and distraction of continued litigation of any action or proceeding relating to the matters being fully settled and finally put to rest in this Agreement. Neither this Settlement Agreement, nor any negotiation or act performed or document created in relation to the settlement is, or may be deemed to be, or may be used as, an admission of, or evidence of, any wrongdoing or liability.
4. Following arms' length negotiations, including mediation before an experienced mediator, the Parties now seek to enter into this Settlement Agreement. Plaintiff and Class Counsel have conducted an investigation into the facts and the law regarding this Litigation and have concluded that a settlement with Nike and Apple according to the terms set forth below is fair, reasonable, and adequate, and

beneficial to and in the best interests of Plaintiff and the Class recognizing (1) the existence of complex and contested issues of law and fact, (2) the risks inherent in litigation, (3) the likelihood that future proceedings will be unduly protracted and expensive if the proceeding is not settled by voluntary agreement with Nike and Apple, (4) the magnitude of the benefits derived from the contemplated settlement in light of both the maximum potential and likely range of recovery to be obtained through further litigation and the expense thereof, as well as the potential of no recovery whatsoever, and (5) the Plaintiff's determination that the settlement is fair, reasonable, adequate, and will substantially benefit the Class Members.

5. The Parties shall use their best efforts to effectuate this Agreement, including, but not limited to, cooperating in promptly seeking the Court's approval of this Agreement, certification of the settlement class, and release of the Releasees of the Released Claims.
6. No party shall be deemed the drafter of this Agreement or any provision thereof. No presumption shall be deemed to exist in favor of or against any party as a result of the preparation or negotiation of this Agreement.
7. This Agreement shall be governed by, and construed and enforced in accordance with, the substantive laws of the State of California without regard to conflict of laws principles.
8. Nothing express or implied in this Agreement is intended or shall be construed to confer upon or give any person or entity other than the Parties and Class Members any right or remedy under or by reason of this Agreement.
9. This Agreement may be executed in multiple counterparts, all of which taken together shall constitute one and the same Settlement Agreement.
10. In consideration of the covenants, agreements, and releases set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, it is agreed by and among the undersigned that the Litigation be settled and compromised, and that the Class Members release the Releasees of the Released Claims, without costs as to Releasees, Plaintiff, or the Class, except as explicitly provided for in this Agreement, subject to the approval of the Court, on the following terms and conditions.
11. This Agreement may not be modified or amended unless such modification or amendment is in writing executed by the Parties, except as specifically permitted by this Agreement. An electronic signature will be considered an original signature for purposes of execution of this Agreement.
12. Where this Agreement requires any party to provide notice or any other communication or document to any other party, such notice, communication, or document shall be provided by email or letter by overnight delivery to their counsel in the Litigation.

## **II. DEFINITIONS**

The following terms, as used in this Agreement, have the following meanings:

13. "Administrative Expenses" shall mean expenses associated with the Settlement Administrator, including but not limited to costs in providing notice and disbursing payments or gift cards to the proposed Settlement Class Members.
14. "Approved Claims" shall mean complete and timely claims, submitted by Class Members, that have been approved for payment by the Settlement Administrator.
15. "Class," "Settlement Class," "Class Member," or "Settlement Class Member" shall mean each member of the settlement class, as defined in Section III of this Agreement, who does not timely elect to be excluded from the Class, and includes, but is not limited to, Plaintiff.
16. "Class Counsel" shall refer to:
  - a. Thomas V. Girardi  
GIRARDI | KEESE  
1126 Wilshire Blvd.  
Los Angeles, CA 90071; and
  - b. Paul N. Philips  
LAW OFFICES OF PAUL N. PHILIPS, APLC  
9255 W. Sunset Blvd., Suite 920  
Los Angeles, CA 90069.
17. "Counsel" means both Class Counsel and Nike's and Apple's Counsel, as defined in paragraphs 16 and 26.
18. "Class Period" shall mean the period from and including January 19, 2012, up to and including the date of the Court's order granting preliminary approval of the settlement.
19. "Class Release" shall have the meaning set forth in Section VI.
20. "Class Relief" means those benefits awarded to Class Members by the Settlement Agreement, including without limitation the right to submit a Proof of Claim Form.
21. "Court" shall mean the Superior Court of the State of California for the County of Los Angeles and the Honorable William F. Highberger, who presides over the Litigation, and his successors, if any.
22. "Effective Date" shall mean the date when the Settlement Agreement becomes Final.

- a. “Final” means the Order and Judgment has been entered on the docket in the Action, and (a) the time to appeal from such order has expired and no appeal has been timely filed; (b) if such an appeal has been filed, it has been finally resolved and has resulted in an affirmation of the Final Approval Order and Judgment; or (c) this Court following the resolution of the appeal enters a further order or orders approving settlement on the terms set forth herein, and either no further appeal is taken from such order(s) or any such appeal results in affirmation of such order(s).
- b. “Order and Judgment” shall mean an order and judgment entered by the Court that:
  - i. Certifies the Settlement Class pursuant to sections 382 and 1781 of the California *Code of Civil Procedure*;
  - ii. Enters judgment consistent with California Rule of Court 3.769(h) including a provision for the retention of the Court’s jurisdiction over the parties to enforce the terms of the judgment;
  - iii. Finds that the Settlement Agreement is fair, reasonable, and adequate, was entered into in good faith and without collusion, and approves and directs consummation of this Agreement;
  - iv. Releases each Releasee from the Released Claims which any Settlement Class Members have, had, or may have in the future, against such Releasee;
  - v. Bars and enjoins all Settlement Class Members from asserting against any Releasees any and all Released Claims which the Settlement Class Member had, has, or may have in the future; and
  - vi. Preserves the Court’s continuing and exclusive jurisdiction over the Parties to this Agreement, including Nike, Apple, Plaintiff, and all Settlement Class Members, to administer, supervise, construe and enforce this Agreement in accordance with its terms for the mutual benefit of the Parties, but without affecting the finality of the Judgment.
- 23. “Execution Date” shall mean the date on which this Agreement is fully executed by all parties.
- 24. “Nike” shall mean Nike, Inc. (an Oregon corporation), its past and present parents, predecessors, successors, affiliates, holding companies, subsidiaries, employees, agents, assigns, contractors, and resellers of the Nike+ FuelBand.
- 25. “Apple” shall mean Apple Inc. (a California corporation), its past and present parents, predecessors, successors, affiliates, holding companies, subsidiaries, employees, agents, assigns, and contractors.

26. "Nike's and Apple's Counsel" shall refer to:
- a. Samuel Liversidge  
GIBSON DUNN & CRUTCHER LLP  
333 South Grand Ave.  
Los Angeles, CA 90071; and
  - b. Austin V. Schwing  
GIBSON DUNN & CRUTCHER LLP  
555 Mission Street  
San Francisco, CA 94105.
27. "Litigation" shall mean *Levin v. Nike, Inc. et al.*, Case No. BC509363, currently pending in the Superior Court of California.
28. "Opt-Out" shall mean a written request for exclusion from the Class as provided in Section IX of this Settlement Agreement.
29. "Opt-Out Period" shall have the meaning set forth in paragraph 61.
30. "Parties" shall mean Nike, Apple, the Plaintiff, and the proposed Settlement Class.
31. "Plaintiff" of "Plaintiff Class Representative" shall mean the named class representative, Carolyn Levin.
32. "Preliminary Approval Order" shall mean an order of this Court preliminarily approving the Settlement Agreement.
33. "Proof of Claim Form" shall mean the form that Class Members may submit to obtain compensation under this Settlement.
34. "Nike+ FuelBand" shall mean the whole or any part of the Nike+ FuelBand, regardless of which entity sold it.
35. "Related Actions" shall mean any proceeding, other than the Litigation, that is related to the Nike+ FuelBand in any federal, state, or other arbitral forum.
36. "Released Claims" shall have the meaning set forth in Section VI.
37. "Releasees" shall refer, jointly and severally, and individually and collectively, to Nike and Apple, their past and present parents, predecessors, successors, affiliates, holding companies, subsidiaries, employees, agents, assigns, contractors, joint venturers, third-party agents with which they have or have had contracts or their affiliates relating to the Nike+ FuelBand, and any resellers of the Nike+ FuelBand.

38. "Releasers" shall refer, jointly and severally, and individually and collectively, to Plaintiff, the Class Members, and to each of their predecessors, successors, heirs, executors, administrators, and assigns of each of the foregoing, and anyone claiming by, through, or on behalf of them.
39. "Settlement Administrator" means the individual mutually selected and supervised by the Parties to administer the settlement. The Parties shall recommend Gilardi & Co. to serve as Settlement Administrator.

### **III. SETTLEMENT CLASS CERTIFICATION**

40. Subject to Court approval, the following Class shall be certified for settlement purposes:

All people and entities in the United States who purchased a Nike+ FuelBand from the time period from and including January 19, 2012, through the date of the order granting preliminary approval of the settlement.

41. Excluded from the Class are all persons who elect to exclude themselves from the Class, the Court and staff to whom this case is assigned, and any member of the Court's or staff's immediate family.
42. If for any reason the settlement is not granted preliminary and final approval, Nike's and Apple's agreement to certification of the Settlement Class shall not be used for any purpose, including in any request for class certification in this Litigation, Related Actions, or any other proceeding.

### **IV. SETTLEMENT OF LITIGATION AND ALL CLAIMS AGAINST RELEASEES**

43. As set forth in Sections VI, XII, and XIII, final approval of this Settlement Agreement will settle and resolve with finality, on behalf of the Plaintiff and the Class, the Litigation, any Related Actions, and the Released Claims and any other claims that have been brought, could have been brought, or could be brought now or at any time in the future against Releasees by the Plaintiff, Class Members, and their predecessors, successors, heirs, executors, administrators, and assigns of each of the foregoing, in the Litigation, Related Actions, or any other proceeding arising out of, in any manner related to, or connected in any way with the Released Claims (the "Class Release").

### **V. PAYMENTS TO THE SETTLEMENT ADMINISTRATOR AND THE CLASS MEMBERS UNDER THE SETTLEMENT**

44. **Payment of the Settlement Administrator**
- a. Nike shall be solely responsible for paying the Settlement Administrator the Administrative Expenses.



**45. Class Member's Election of Benefits Under the Settlement**

- a. A Class Member who timely submits a Proof of Claim Form shall receive, according to the Class Member's election, either a Fifteen Dollar (\$15) payment or a Twenty-Five Dollar (\$25) gift card redeemable at Nike-owned stores in the US and Puerto Rico, and online at Nike.com, for each Nike+ FuelBand purchased by the Class Member during the Class Period. The gift card will be freely transferable and will not expire. Nike will be solely responsible for these payments and gift cards and will coordinate their delivery with the Settlement Administrator. Apple will have no responsibility or liability with respect to payments or gift cards to Class Members.

**46. Submission and Evaluation of Claims**

- a. All claims must be submitted on a Proof of Claim Form. The Proof of Claim Form will require the Class Member to provide his or her name, mailing address, telephone number, and serial number for each Nike+ FuelBand for which a Proof of Claim Form is being submitted. The Proof of Claim Form must be submitted on or before the Proof of Claim Form Deadline, which shall be sixty (60) days after the date the Court sets for the Fairness Hearing in the Preliminary Approval Order. The Proof of Claim Form shall be substantially in the form attached hereto as Exhibit 2.
- b. Completed Proof of Claim Forms shall be submitted directly to the Settlement Administrator for processing, assessment, and payment. The Proof of Claim Form may be mailed, faxed or electronically transmitted.
- c. A Proof of Claim Form will be deemed to be complete if the Class Member fully answers all applicable questions on the Proof of Claim Form.
- d. Any Proof of Claim Form that lacks the requisite information will be deemed to be incomplete and ineligible for payment. For any partially completed Claim Forms, the Settlement Administrator shall attempt to contact the Class Member who submitted the Claim Form at least one time by e-mail (1) to inform the Class Member of any errors and/or omissions in the Claim Form and (2) to give the Class Member one opportunity to cure any errors and/or omissions in the Claim Form. The Class Member shall have until the Claim Form Deadline or 30-days after the Settlement Administrator sends the e-mail to the Class Member regarding the deficiencies in the Claim Form, whichever is later, to cure the errors and/or omissions in the Claim Form.
- e. A Class Member is not entitled to Class Relief if he/she submits a Proof of Claim Form after the Proof of Claim Form Deadline, if the Proof of Claim

Form is incomplete after an opportunity to cure any errors and/or omissions, or contains false information.

- f. The Settlement Administrator shall have sole and final authority for determining if Class Members' Proof of Claim Forms are complete and timely, in which case they will be accepted as Approved Claims. The Settlement Administrator may reject, accept in part, or accept in whole any claim submitted, and may, upon its sole discretion, request additional information prior to rejecting, accepting in part, or accepting in whole any claim submitted.
- g. Within fourteen (14) days of completion of its review of the Proof of Claim Forms, the Settlement Administrator will submit to the Parties a report listing all Approved Claims. The Settlement Administrator will inform Nike of the number of Approved Claims and the total money and gift cards necessary to satisfy those Approved Claims. Nike will provide the necessary money and gift cards to the Settlement Administrator within forty (40) days of being provided with the information described above in this sub-paragraph. The funds provided to the Settlement Administrator will be maintained by an escrow agent as a Court-approved Qualified Settlement Fund pursuant to Section 1.468B-1 et seq. of the Treasury Regulations promulgated under Section 468B of the Internal Revenue Code of 1986, as amended, and shall be deposited in an interest-bearing account.
- h. Prompt payment shall be made by the Settlement Administrator on Approved Claims after the Effective Date of the settlement. Checks will be mailed to Class Members with Approved Claims who opted for money. Gift cards may be mailed or e-mailed to Class Members with Approved Claims who opted for gift cards. The Settlement Administrator shall use the addresses and e-mail address provided by the Class Members on the Approved Claims.
- i. The Settlement Administrator shall notify the Parties that all Approved Claims have been paid within 10 days of the last such payment.
- j. In the event that checks sent to Class Members are not cashed within one (1) year of their mailing date, whether because the checks were not received or otherwise, those checks will become null and void and a corresponding amount of the null and void check will be paid through cy prés to Partnership for a Healthier America. The Class Members who did not cash their checks, whether or not they were actually received, shall not receive any payment from this Settlement Agreement. The Court may revise this cy prés provision as necessary without terminating or otherwise impacting this settlement, provided the Court's revision does not increase the amount that Defendants would otherwise pay under this Settlement Agreement.

**VI. RELEASE**

47. In addition to the effect of any final judgment entered in accordance with this Agreement, upon final approval of this Agreement, and for other valuable consideration as described herein, Releasees shall be completely released, acquitted, and forever discharged from any and all Released Claims as defined in this Section arising on or after January 19, 2012.
48. Except as specifically provided for below in this Section, "Released Claims" shall mean any and all claims against Releasees whatsoever arising out of, related to, or connected with the design, manufacturing, pricing, advertising, describing, representing, marketing, offering, promoting, facilitating, providing, warranting, replacing, repairing, or selling of the Nike+ FuelBand in the United States that relate to the Nike+ FuelBand. "Released Claims" include all claims that were or could have been asserted in the Litigation, regardless of whether such claims are known or unknown, filed or unfiled, asserted or as yet unasserted, existing or contingent, and regardless of the legal theory or theories of damages involved.
49. "Released Claims" expressly excludes any warranty claims that are in no way related to the Nike+ FuelBand's ability to monitor, track, record, display, calculate, estimate, compute and/or report a user's activity and calories burned.
50. "Released Claims" expressly excludes any claims and/or damages for personal injuries in any way related to the Nike+ FuelBand.
51. As of the Effective Date, and with the approval of the Court, all Releasors hereby fully, finally, and forever release, waive, discharge, surrender, forego, give up, abandon, and cancel any and all Released Claims against Releasees. As of the Effective Date, all Releasors will be forever barred and enjoined from prosecuting any action against the Releasees asserting any and/or all Released Claims.
52. Each Releasor waives California Civil Code Section 1542 and similar provisions in other states. Each Releasor hereby certifies that he, she, or it is aware of and has read and reviewed the following provision of California Civil Code Section 1542 ("Section 1542"):

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.
53. The provisions of the release set forth above shall apply according to their terms, regardless of the provisions of Section 1542 or any equivalent, similar, or comparable present or future law or principle of law of any jurisdiction.

54. Each Releasor waives any and all defenses, rights, and benefits that may be derived from the provisions of applicable law in any jurisdiction that, absent such waiver, may limit the extent or effect of the release contained in this Agreement.
55. The Parties and each member of the proposed Settlement Class agree that the amounts to be paid under this Settlement Agreement to each Class Member represent the satisfaction of that Class Member's claims for compensatory damages for the Released Claims. No portion of such settlement represents the payment of punitive or exemplary damages. Nonetheless, in consideration for the satisfaction of each Class Member's claim for compensatory damages, claims for punitive or exemplary damages shall be released as provided in Section VI.

## **VII. CERTIFICATION OF THE SETTLEMENT CLASS AND RELATED MOTIONS**

56. This Settlement shall be subject to approval of the Court. As set forth in Section XIV, Nike and Apple shall have the right to withdraw from the Settlement if the Court does not issue any of the requested orders (including the Order and Judgment) or if the Settlement Class is not certified, among other things.
57. Plaintiff shall submit to the Court a motion (the "Motion"): (a) for certification of a Class for settlement purposes; and (b) for preliminary approval of the Agreement, and authorization to disseminate notice of Class certification, the settlement, and the final judgment contemplated by this Agreement to all potential Class Members. The Motion shall include: (i) the definition of the Class for settlement purposes as set forth in Section III of this agreement; (ii) a proposed form of, method for, and date of dissemination of notice; (iii) a proposed form of preliminary approval, (iv) a proposed Proof of Claim Form; and (v) a date for the final approval hearing. The text of the items referred to in clauses (i) through (v) above shall be agreed upon by the parties before submission of the Motion. The Motion shall be accompanied by a proposed order for preliminary approval of the settlement substantially in the form attached hereto as Exhibit 3.

## **VIII. NOTICE TO PROPOSED CLASS MEMBERS**

### **58. List of Potential Class Members**

- a. Nike, with the assistance of the Settlement Administrator as appropriate, shall create a list of potential Class Members, based on readily available information already within its possession ("List of Potential Class Members").
- b. The List of Potential Class Members shall include the names, e-mail addresses, and mailing addresses of potential Class Members, to the extent such information is readily available.
- c. The Settlement Administrator shall keep the List of Potential Class Members confidential. Absent a Court order, the Settlement Administrator shall not release the List of Potential Class Members to

persons other than (1) Class Counsel; (2) Counsel and/or (3) under seal to the Court. The List of Potential Class Members is subject to the confidentiality provisions of the protective order issued in this Action.

**59. Type of Notice Required**

- a. The Class Settlement Notice, which shall be substantially in the form of Exhibits 4–6 attached hereto, shall be used for the purpose of informing proposed Class Members, prior to the fairness hearing before the Court (“Fairness Hearing”), that there is a pending settlement, and further (a) inform Class Members as to how they may obtain a copy of the Proof of Claim Form; (b) protect their rights regarding the settlement; (c) request exclusion from the Class and the proposed settlement, if desired; (d) object to any aspect of the proposed settlement; and (e) participate, if desired, in the Fairness Hearing. Finally, the Notice shall make clear the binding effect of the settlement on all persons who do not timely request exclusion from the Class.
- b. Dissemination of the Notice shall be the responsibility of the Settlement Administrator. The text of the Notice shall be agreed upon by the Parties, and shall be substantially in the forms attached as Exhibits 4–6 hereto.
- c. Individual notice shall be e-mailed to the List of Potential Class Members (substantially in the form of Exhibit 4) where possible and by mailing (substantially in the form of Exhibit 5) where e-mail delivery is not possible.
- d. Additionally, notice of the settlement shall be posted on the Settlement Administrator’s website and published in an agreed upon national publication (substantially in the form of Exhibit 6).

**60. Notice Deadline**

- a. Notice shall be sent to persons on the List of Potential Class Members within 30 days after the date that the Court enters the order preliminarily approving the Settlement, or such other date that the Court may set (“Notice Deadline”).

**IX. OPT-OUTS**

**61. Opt-Out Period**

- a. Class Members will have up to and including 60 days following the Notice Deadline to opt out of the settlement in accordance with this Section (the “Opt-Out Period”). If the settlement is finally approved by the Court, all Class Members who have not opted out by the end of the Opt-Out Period will be bound by the Settlement and the Class Release, and the relief

provided by the Settlement will be their sole and exclusive remedy for the claims alleged by the Class.

**62. Opt-Out Process**

- a. Any potential Class Member who wishes to be excluded from the Class must provide a request for exclusion to the Settlement Administrator, known as an "Opt-Out," on the form available on the Settlement Administrator's website.
- b. In order to be valid, the Opt-Out must be on the form available on the Settlement Administrator's website, and it must state the following in writing: (a) the Class Member's name, address, and the telephone number, and (b) that the Class Member wishes to be excluded from the Class. An original Opt-Out form must be signed by the Class Member and must be mailed to the address provided in the Class Notice. The Opt-Out Form shall be substantially in the form of Exhibit 7. An Opt-Out signed by counsel shall not be sufficient. The Opt-Out request must be postmarked or received within the Opt-Out Period.
- c. Within three (3) business days after the Opt-Out Period, the Settlement Administrator shall provide Counsel a written list reflecting all timely and valid requests for exclusion from the Class.
- d. A list reflecting all timely and valid requests for exclusion shall also be filed with the Court at the time of the motion for final approval of the settlement.

**X. OBJECTIONS**

63. Class Members may object to this Agreement up to and including the date ordered by the Court in the Preliminary Approval Order.
64. The Parties will request that the Court order that any Class Member who has any objection to certification of the Class, or to approval of this Settlement Agreement or any terms hereof, or to the approval process must send a letter providing:
  - a. the name and case number of this lawsuit (*Levin v. Nike, Inc. et al.*, Case No. BC509363 (L.A. Super. Ct.));
  - b. the objector's full name, current address and phone number;
  - c. proof of purchase of a Nike+ FuelBand and/or a serial number for the Nike+ FuelBand that qualifies him/her/it as a Class Member;
  - d. the reasons why the objector objects to the Settlement along with any supporting materials;

- e. information about other objections the objector or his or her lawyer(s) have made in other class action cases in the last four (4) years; and
  - f. the objector's signature.
65. The Parties will request the Court to set the Objection Deadline 30 days before the Fairness Hearing. The Parties will further request that the Court order that objections must be mailed to all four (4) of the following:

Clerk of the Court  
Central Civil West Courthouse  
600 South Commonwealth Ave.  
Los Angeles, CA 90005

Thomas V. Girardi  
Girardi | Keese  
1126 Wilshire Blvd.  
Los Angeles, CA 90071

Paul N. Philips  
LAW OFFICES OF PAUL N. PHILIPS, APLC,  
9255 W. Sunset Blvd., Suite 920  
Los Angeles, CA 90069

Austin V. Schwing  
Gibson, Dunn & Crutcher LLP  
555 Mission Street, Suite 3000  
San Francisco, CA 94105

66. The Parties will request that the Court order that failure to comply timely and fully with these procedures shall result in the invalidity and rejection of an objection. No Class Member shall be entitled to be heard at the Fairness Hearing (whether individually or through the objector's counsel), or to object to certification of the Class or to the Settlement Agreement, and no written objections or briefs submitted by any Class Member shall be received or considered by the Court at the Fairness Hearing, unless written notice of the Class Member's objection and any brief in support of the objection have been filed with the Court and served upon the Counsel not later than 30 days before the date of the Fairness Hearing.
67. The Parties will request that the Court order that the Court, within its discretion, may exercise its right to deem any objection as frivolous and award appropriate costs and fees to the Parties opposing such objection(s).
68. The Parties will request that the Court order that Class Members who fail to file and serve timely written objections in accordance with this Section shall be deemed to have waived any objections and shall be foreclosed from making any

objection (whether by appeal or otherwise) to the certification of the Settlement Class or to the Settlement Agreement.

**XI. FAIRNESS HEARING**

69. Together with the motion for preliminary approval of the Settlement Agreement, the Parties will jointly request that the Court hold a Fairness Hearing.
70. At the Fairness Hearing, the Parties will request the Court to consider whether the Class should be certified pursuant to sections 382 and 1781 of the California *Code of Civil Procedure* for settlement, and, if so, (1) consider any properly filed objections to the Settlement Agreement, (2) determine whether the Settlement Agreement is fair, reasonable, and adequate, was entered into in good faith and without collusion, and should be approved, and shall provide findings in connection therewith, and (3) enter the Order and Judgment, including final approval of the Settlement Class and the Settlement Agreement.

**XII. ORDER AND JUDGMENT**

71. The Parties shall jointly seek entry of an Order and Judgment, the text of which Plaintiff, Nike, and Apple shall agree upon. The orders, motions or stipulation to implement this Section shall, among other things, seek or provide for a release of the Releasees of the Released Claims and waiving any rights of appeal.
72. The Parties shall jointly submit to the Court a proposed Order and Judgment, substantially in the form attached hereto as Exhibit 8.
73. Class Counsel shall use their best efforts to assist Releasees in obtaining dismissal with prejudice of any Related Actions filed or maintained by any potential Class Member, whether in state court, federal court, or any arbitral forum.

**XIII. BAR ORDER**

74. As part of the Order and Judgment, the Court shall issue a bar order and permanent injunction against any and all pending or future claims by Class Members against Releasees raising or arising out of a Released Claim.
75. The bar order and permanent injunction shall enjoin and forever bar any and all Class Members from commencing and/or maintaining any action, legal or otherwise, against Releasees raising or arising out of a Released Claim.
76. This provision is not intended to prevent or impede the enforcement of claims or entitlement to benefits under this Settlement Agreement.

**XIV. TERMINATION OF THE SETTLEMENT**

77. The settlement is conditioned upon preliminary and final approval of the Parties' written Settlement Agreement, and all terms and conditions thereof without



material change, amendments, or modifications by the Court (except to the extent such changes, amendments or modifications are agreed to in writing between the Parties). All Exhibits attached hereto are incorporated into this Settlement Agreement. Accordingly, this Settlement Agreement shall be terminated and cancelled, at the option of any Party, upon any of the following events:

- a. This Settlement Agreement is changed in any material respect to which the Parties have not agreed in writing.
- b. The Court declines to enter the Preliminary Approval Order;
- c. The Fairness Hearing is not held by the Court;
- d. The Order and Judgment approving the Settlement and certifying the Settlement Class for the Class Period as provided in this Agreement is not entered by the Court or is reversed by a higher court; or
- e. Another party to this Settlement Agreement materially breaches the Settlement Agreement and such breach materially frustrates the purposes of this Agreement;

78. This Settlement Agreement shall be terminated and cancelled, at the sole and exclusive discretion of Nike and Apple, upon any of the following events:

- a. The notice required by the Court is inconsistent with Section VIII;
- b. The Proof of Claim required by the Court is inconsistent with Section V;
- c. The bar order and permanent injunction as provided in Section XII are not entered by the Court as provided in that Section;
- d. If at any time prior to final approval any governmental entity files or indicates its intention to investigate or file or bring a claim, cause of action, complaint, petition, or other action in any administrative, legal, equitable or governmental proceeding against Nike or Apple relating to the Nike+ FuelBand;
- e. Greater than 5% of the Class Members Opt-Out; or
- f. The Court does not permit the amendment of the operative complaint as set forth in Exhibit 1 prior to its order on preliminary approval of this Settlement Agreement.

79. In the event the Settlement Agreement is not approved or does not become final, or is terminated consistent with this Settlement Agreement, the Parties, pleadings, and proceedings will return to the *status quo ante* as if no settlement had been negotiated or entered into, and the Parties will negotiate in good faith to establish a new case schedule.

**XV. ATTORNEY'S FEES AND SERVICE AWARD**

80. Prior to or at the same time as Plaintiff seeks final approval of the Settlement Agreement, Class Counsel shall petition the Court for an award of attorneys' fees and costs not to exceed Two Million, Four Hundred Thousand Dollars (\$2,400,000.00).
81. Nike and Apple agree not to oppose an application for attorneys' fees and costs by Class Counsel in an amount not more than Two Million, Four Hundred Thousand Dollars (\$2,400,000.00).
82. Nike will be wholly responsible for paying Class Counsel's attorneys' fees and costs awarded by the Court, but in no event will Nike's responsibility or liability for attorneys' fees and costs exceed \$2,400,000.00. Apple will have no responsibility or liability for attorneys' fees and costs. Defendants shall have no obligation for attorneys' fees and costs to any counsel representing or working on behalf of either an individual Class Member or the Class (other than "Class Counsel"), including but not limited to any objector to this Settlement Agreement.
83. Nike and Apple will have no responsibility, obligation or liability for allocation of fees and costs among Class Counsel.
84. Prior to or at the same time as Plaintiff seeks final approval of the Settlement Agreement, Class Counsel shall petition the Court for a service award for Plaintiff Class Representative in an amount not to exceed \$1,000.00, and Nike and Apple agree that they will not oppose such a request. Apple will have no responsibility or liability for the service award.
85. The attorneys' fees and costs and service award awarded by the Court shall be paid by Nike within thirty (30) days of the Effective Date, provided Plaintiff's Counsel has provided Nike and Apple's Counsel wiring instructions.

**XVI. REPRESENTATIONS**

86. The Parties and Counsel agree that the Settlement Agreement provides fair, equitable and just compensation, and a fair, equitable, and just process for determining eligibility for compensation for any given Class Member who has asserted a claim arising from, or related to, the Released Claims.
87. Except as such agreement may be forbidden by the equivalent of Rule 1.16(d) or Rule 5.6(B) of the ABA Model Rules of Professional Conduct in the jurisdictions in which Class Counsel practice law or whose rules might otherwise apply, Class Counsel represents and agrees that, within 30 days after the conclusion of the Litigation, he or she will return to Nike's and Apple's Counsel, or certify destruction of, all materials produced by Nike and Apple, whether in their possession or in the possession of their clients, experts, consultants or other persons within their control, and shall provide a declaration to Nike and Apple that such return or destruction has occurred.

88. The Parties represent that they have obtained the requisite authority to enter this Settlement Agreement in a manner that binds each party to its terms.
89. The Parties, Counsel and Class Counsel shall use their best efforts to conclude the settlement and obtain the Order and Judgment, including affirmatively supporting the settlement in the event of an appeal.
90. Any Class Member (or his or her attorney) who submits false or intentionally misleading information, through any form of deception, dishonesty or fraud shall be subject to appropriate sanctions (including monetary sanctions and costs).
91. Should the Parties be required to submit any information or documentation to the Court to obtain preliminary approval, such information shall be, to the full extent permitted, for review by the Court in camera only, to the extent that Class Counsel, Nike and/or Apple request that information to remain confidential and the Court grants any such request.
92. The Parties specifically acknowledge, agree and admit that this Settlement Agreement and its exhibits, along with all related drafts, motions, pleadings, conversations, negotiations, correspondence, orders or other documents shall be considered a compromise within the meaning of California *Evidence Code* § 1152, Federal Rules of Evidence Rule 408, and any other equivalent rule of evidence of any state, and shall not (1) constitute, be construed, be offered, or received into evidence as an admission of the validity of any claim or defense, or the truth of any fact alleged or other allegation in the Litigation or in any other pending or subsequently filed action, or of any wrongdoing, fault, violation of law, or liability of any kind on the part of any Party, or (2) be used to establish a waiver of any defense or right, or to establish or contest jurisdiction or venue.
93. The Parties also agree that this Settlement Agreement and its exhibits, along with all related drafts, motions, pleadings, conversations, negotiations, correspondence, orders or other documents entered in furtherance of this Settlement Agreement, and any acts in the performance of this Settlement Agreement are not intended to establish grounds for certification of any class involving any Class Member other than for certification of the Settlement Class.
94. The provisions of this Settlement Agreement, and any orders, pleadings or other documents entered in furtherance of this Settlement Agreement, may be offered or received in evidence solely (1) to enforce the terms and provisions hereof or thereof, (2) as may be specifically authorized by a court of competent jurisdiction after an adversary hearing upon application of a Party hereto, (3) in order to establish payment, or an affirmative defense of preclusion or bar in a subsequent case, (4) in connection with any motion to enjoin or stay any other action related to the Nike+ FuelBand, or (5) to obtain Court approval of the Settlement Agreement.

95. Except as provided in the Notice provisions herein, below, or with the prior written consent of the other Party, there shall be no comments made to the press or any third party (references to "third party" do not apply to employees, agents, accountants, or directors of a Party or a Party's corporate affiliates who have a need to receive confidential information about the terms of the settlement), or any other disclosure by or through the Parties or their attorneys or agents, comprising opinions as to the Litigation. Nor may any Party (or their attorneys or agents) release any information relating to the litigation that is not already publicly available. The Parties (including their attorneys or agents) may, however, respond to media inquiries regarding the terms of the Settlement Agreement. If preliminary Court approval for the settlement is denied, the Parties and their attorneys and agents shall not make any comments to the media or other third parties regarding the proposed settlement. Nothing in this provision shall be interpreted to limit representations that the Parties or their attorneys may make to the Court to assist it in its evaluation of the proposed Settlement; nor shall this provision prohibit Class Counsel from having attorney-client communications directly with Class Members, including postings of the Settlement on Class Counsel's law firm(s)' website(s). If a Party is required by a valid, enforceable subpoena or government information request to disclose the settlement or information about the settlement, such Party shall provide reasonable prior notice (to the extent permitted by applicable law) to the other Party to allow the other Party to seek to prevent such disclosure. A party may also provide necessary and accurate information about the settlement to its shareholders and other persons or entities as required by securities laws or other applicable laws or regulations.
96. This agreement shall be deemed executed as of the date that the last party signatory signs the agreement. This agreement shall fully supersede any previous agreement entered into by the parties.

[Remainder of this page intentionally left blank.]

**IN WITNESS HEREOF**, the Parties have executed this Settlement Agreement by their duly authorized representatives on the dates stated below.

**For Plaintiff and the Proposed Settlement Class.**

By: 

Print Name: Carolyn Levin

Date: May 26, 2015

By: \_\_\_\_\_

Print Name: Paul N. Philips  
LAW OFFICES OF PAUL N. PHILIPS, APLC,  
9255 W. Sunset Blvd., Suite 920  
Los Angeles, CA 90069

Date: \_\_\_\_\_

By: \_\_\_\_\_

Print Name: Thomas V. Girardi  
GIRARDI | KEESE  
1126 Wilshire Blvd.  
Los Angeles, CA 90071

Date: \_\_\_\_\_

**For Nike, Inc.**

By: \_\_\_\_\_

Date: \_\_\_\_\_

**For Apple Inc.**

By: \_\_\_\_\_

Date: \_\_\_\_\_

**IN WITNESS HEREOF**, the Parties have executed this Settlement Agreement by their duly authorized representatives on the dates stated below.

**For Plaintiff and the Proposed Settlement Class.**

By: \_\_\_\_\_

Print Name: Carolyn Levin

Date: \_\_\_\_\_

By: \_\_\_\_\_

Print Name: Paul N. Philips  
LAW OFFICES OF PAUL N. PHILIPS, APLC,  
9255 W. Sunset Blvd., Suite 920  
Los Angeles, CA 90069

Date: 5-26-15

By: \_\_\_\_\_

Print Name: Thomas V. Girardi  
GIRARDI | KEESE  
1126 Wilshire Blvd.  
Los Angeles, CA 90071

Date: \_\_\_\_\_

**For Nike, Inc.**

By: \_\_\_\_\_

Date: \_\_\_\_\_

**For Apple Inc.**

By: \_\_\_\_\_

Date: \_\_\_\_\_

**IN WITNESS HEREOF**, the Parties have executed this Settlement Agreement by their duly authorized representatives on the dates stated below.

**For Plaintiff and the Proposed Settlement Class.**

By: \_\_\_\_\_

Print Name: Carolyn Levin

Date: \_\_\_\_\_

By: \_\_\_\_\_

Print Name: Paul N. Philips  
LAW OFFICES OF PAUL N. PHILIPS, APLC,  
9255 W. Sunset Blvd., Suite 920  
Los Angeles, CA 90069

Date: \_\_\_\_\_

By: \_\_\_\_\_ 

Print Name: Thomas V. Girardi  
GIRARDI | KEESE  
1126 Wilshire Blvd.  
Los Angeles, CA 90071

Date: 5-26-15

**For Nike, Inc.**

By: \_\_\_\_\_

Date: \_\_\_\_\_

**For Apple Inc.**

By: \_\_\_\_\_

Date: \_\_\_\_\_

**IN WITNESS HEREOF**, the Parties have executed this Settlement Agreement by their duly authorized representatives on the dates stated below.

**For Plaintiff and the Proposed Settlement Class.**

By: \_\_\_\_\_

Print Name: Carolyn Levin

Date: \_\_\_\_\_

By: \_\_\_\_\_

Print Name: Paul N. Philips  
LAW OFFICES OF PAUL N. PHILIPS, APLC,  
9255 W. Sunset Blvd., Suite 920  
Los Angeles, CA 90069

Date: \_\_\_\_\_

By: \_\_\_\_\_

Print Name: Thomas V. Girardi  
GIRARDI | KEESE  
1126 Wilshire Blvd.  
Los Angeles, CA 90071

Date: \_\_\_\_\_

**For Nike, Inc.**

By: \_\_\_\_\_

Date: \_\_\_\_\_

**For Apple Inc.**

By: *Thomas V. Girardi*

Date: *May 20, 2015*



**IN WITNESS HEREOF**, the Parties have executed this Settlement Agreement by their duly authorized representatives on the dates stated below.

**For Plaintiff and the Proposed Settlement Class.**

By: \_\_\_\_\_

Print Name: Carolyn Levin

Date: \_\_\_\_\_

By: \_\_\_\_\_

Print Name: Paul N. Philips  
LAW OFFICES OF PAUL N. PHILIPS, APLC,  
9255 W. Sunset Blvd., Suite 920  
Los Angeles, CA 90069

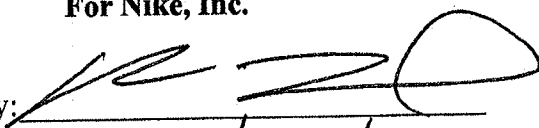
Date: \_\_\_\_\_

By: \_\_\_\_\_

Print Name: Thomas V. Girardi  
GIRARDI | KEESE  
1126 Wilshire Blvd.  
Los Angeles, CA 90071

Date: \_\_\_\_\_

**For Nike, Inc.**

By:  \_\_\_\_\_

Date: 5/25/15

**For Apple Inc.**

By: \_\_\_\_\_

Date: \_\_\_\_\_

# **EXHIBIT 1**

**GIRARDI | KEESE**

THOMAS V. GIRARDI, SBN 36603

tgirardi@girardikeese.com

1126 Wilshire Boulevard

Los Angeles, California 90017

Telephone: (213) 977-0211 / Facsimile: (213) 481-1554

**LAW OFFICES OF PAUL N. PHILIPS, APLC**

PAUL N. PHILIPS, CA Bar No. 187928

pnp@pnplegal.com

9255 West Sunset Boulevard, Suite 920

Los Angeles, California 90069

Telephone: (323) 813-1126 / Facsimile: (310) 854-6902

Attorneys for PLAINTIFF and the CLASS

**SUPERIOR COURT FOR THE STATE OF CALIFORNIA**

**COUNTY OF LOS ANGELES**

CAROLYN LEVIN, in Her Individual  
and Representative Capacity on Behalf  
of a Class of All Persons Similarly-  
Situating,

Plaintiff,

v.

NIKE, INC.; an Oregon Corporation;  
APPLE, INC., a California Corporation;  
and DOES 1 through 10, inclusive,

Defendants.

**CASE NO.: BC 509 363**

**SECOND AMENDED COMPLAINT**

1. VIOLATION OF CALIFORNIA  
BUSINESS & PROFESSIONS CODE  
§§ 17200, *ET SEQ.*;

2. VIOLATION OF CALIFORNIA  
BUSINESS & PROFESSIONS CODE  
§§ 17500, *ET SEQ.*

3. BREACH OF WARRANTY

4. VIOLATION OF CALIFORNIA CIVIL  
CODE §§ 1750, *ET SEQ.*

5. COMMON COUNTS

**DEMAND FOR JURY TRIAL**

**COMPLAINT FOR DAMAGES**

**COMES NOW PLAINTIFF** Carolyn Levin, in her individual and representative  
capacities and on behalf of herself and all persons similarly-situated, by her undersigned

1 counsel, and alleges as follows:

2 **PARTIES**

3 1. Plaintiff Carolyn Levin ("Levin") is an individual residing in Los Angeles  
4 County, California. Levin purchased several Nike+ FuelBands during the class period on or  
5 about the dates set forth herein.

6 2. Defendant Nike, Inc. ("Nike") is and was at all times relevant herein an Oregon  
7 corporation doing substantial business in the State of California, County of Los Angeles.

8 3. Defendant Apple, Inc. ("Apple") is and was at all times relevant herein a  
9 California corporation, and therefore a citizen of California, operating out of and doing  
10 substantial business in the State of California, County of Los Angeles.

11 4. Nike and Apple are referred to collectively herein as "Defendants." For at least  
12 some portion of and during the class period described below, each of the Defendants  
13 advertised, marketed and sold Nike's Nike+ FuelBand product to Plaintiff and others  
14 similarly-situated.

15 5. The true names and capacities of Defendants DOES ONE through TEN are  
16 unknown to Plaintiff, and Plaintiff will seek leave of court to amend this Complaint to  
17 allege such names and capacities as soon as they are ascertained. Each of the Defendants  
18 concerned herein was the agent, joint venturer or employee of each of the remaining  
19 Defendants, and in doing the things hereinafter alleged, each was acting in the course and  
20 scope of said agency, employment or joint venture with advance knowledge of,  
21 acquiescence in or subsequent ratification of the acts of each and every other remaining  
22 Defendant.

23 **CLASS ACTION ALLEGATIONS**

24 6. Plaintiff brings this action on behalf of herself and as a representative of all  
25 others who are similarly-situated and who fall within the following class definition: All  
26 individuals or entities who purchased a Nike+ FuelBand on or after January 19, 2012 (the  
27 "Class Period").

28 7. Those individuals and entities are herein referred to as "Class Members" or

1 “the Class.” The proposed “Class Representative” is Levin, who falls within the definition  
2 of a Class Member.

3 8. The Class Members are so numerous and geographically diverse that joinder is  
4 impracticable. On information and belief there have been hundreds of thousands of Nike+  
5 FuelBands sold throughout the world, and also on information and belief, there are hundreds  
6 of thousands of Class Members spread throughout the United States including, without  
7 limitation, throughout the State of California.

8 9. The Class Representative will fairly, adequately, and vigorously represent the  
9 interests of the Class, and is highly motivated to prosecute the within action.

10 10. Questions of law and fact common to all potential Class Members predominate  
11 over any questions affecting only individual Class Members. Among the questions of law  
12 and fact common to the Class Members are:

- 13 • Whether Defendants misrepresented the ability of the Nike+ FuelBand to  
14 accurately track every calorie burned and step taken by a FuelBand user  
15 engaged in physical activity while wearing the FuelBand;
- 16 • Whether Defendants violated California *Business & Professions Code*  
17 §§ 17200 *et seq.* by perpetrating unfair or fraudulent acts by means of  
18 misrepresentations to the effect that the Nike+ FuelBand could  
19 accurately track every calorie burned and step taken by a FuelBand user  
20 engaged in physical activity while wearing the FuelBand;
- 21 • Whether Defendants violated California *Business & Professions Code*  
22 §§ 17500 *et seq.* by affirmatively promulgating and implementing false  
23 and misleading advertising to the specific effect that the Nike+ FuelBand  
24 could accurately track every calorie burned and step taken by a  
25 FuelBand user engaged in physical activity while wearing the FuelBand;
- 26 • Whether Defendants breached warranties made as to the ability of the  
27 FuelBand to accurately track every calorie burned and step taken by a  
28 FuelBand user engaged in physical activity while wearing the FuelBand;

- 1 • Whether Defendants implemented unfair or deceptive acts or practices in  
2 affirmatively promulgating and implementing false and misleading  
3 advertising to the specific effect that the Nike+ FuelBand could  
4 accurately track every calorie burned and step taken by a FuelBand user  
5 engaged in physical activity while wearing the FuelBand, thereby  
6 violating California *Civil Code* §§ 1750 *et seq.*;
- 7 • Whether Defendants misrepresented the ability of the Nike+ FuelBand to  
8 implement algorithms to accurately track, calculate, and report NikeFuel  
9 generated by a user engaged in physical activity while wearing the  
10 FuelBand;
- 11 • Whether Defendants violated California *Business & Professions Code*  
12 §§ 17200 *et seq.* by perpetrating unfair or fraudulent acts by means of  
13 misrepresentations to the effect that the Nike+ FuelBand could  
14 implement algorithms to accurately track, calculate, and report NikeFuel  
15 generated by a user engaged in physical activity while wearing the  
16 FuelBand;
- 17 • Whether Defendants violated California *Business & Professions Code*  
18 §§ 17500 *et seq.* by affirmatively promulgating and implementing false  
19 and misleading advertising to the specific effect that the Nike+ FuelBand  
20 could implement algorithms to accurately track, calculate, and report  
21 NikeFuel generated by a user engaged in physical activity while wearing  
22 the FuelBand;
- 23 • Whether Defendants breached warranties made as to the ability of the  
24 FuelBand to implement algorithms to accurately track, calculate, and  
25 report NikeFuel generated by a user engaged in physical activity while  
26 wearing the FuelBand;
- 27 • Whether Defendants implemented unfair or deceptive acts or practices  
28 by affirmatively promulgating and implementing false and misleading

1 advertising to the specific effect that the Nike+ FuelBand could  
2 implement algorithms to accurately track, calculate, and report NikeFuel  
3 generated by a user engaged in physical activity while wearing the  
4 FuelBand, thereby violating California *Civil Code* §§ 1750 *et seq.*;

- 5 • Whether Defendants caused the Class Members damage by reason of  
6 their misrepresentations;
- 7 • Whether Defendants unfairly or fraudulently took money from the Class  
8 Members by conduct perpetrated in violation of California Business &  
9 Professions Code § 17200 *et seq.*;
- 10 • Whether Defendants unfairly or fraudulently took money from the Class  
11 Members by conduct perpetrated in violation of California Business &  
12 Professions Code § 17500 *et seq.*;
- 13 • The appropriate measures of legal and equitable relief due to the Class,  
14 and;
- 15 • Whether Defendants committed acts with fraud, oppression, and/or  
16 malice.

17 11. These common questions predominate over all Class Members' claims,  
18 including those of the Class Representative. Indeed, there is essentially no difference  
19 between the Class Representative's claims and the other Class Members' claims. As a  
20 result, the Class Representative's claims are typical of, if not identical to, claims owned by  
21 and to be asserted by the rest of the Class Members.

22 12. Class action treatment is superior to the alternatives, if any, for the fair and  
23 efficient adjudication of the controversy alleged herein. Such treatment will permit a large  
24 number of similarly-situated persons to prosecute their common claims in a single forum  
25 simultaneously, efficiently, and without duplication. Separate trials adjudicating  
26 Defendants' liability will be inefficient, and will create the risk of producing inconsistent  
27 verdicts. Consolidating the litigation of all Class Members will enhance judicial economy  
28 and promote substantial justice. Class treatment will also permit the adjudication of

1 relatively small claims by many of the Class Members who could not individually afford to  
2 litigate the claims asserted herein. There exist no difficulties that would preclude class  
3 action treatment of this lawsuit, and no superior alternative exists for the fair and efficient  
4 adjudication of the controversies asserted herein.

5 13. Concentrating the Class Members' claims in the Los Angeles Superior Court is  
6 preferable to maintaining this action in any other venue. This venue has a logical  
7 connection to the events underlying the action since a substantial number of the Class  
8 Members purchased their Nike+ FuelBands in Los Angeles County and reside here.

### 9 **VENUE & JURISDICTION**

10 14. Plaintiff files this action in Los Angeles Superior Court, where venue has been  
11 and remains proper under California *Code of Civil Procedure* § 395.

12 15. The California Superior Court is the proper jurisdiction for this case pursuant  
13 to 28 U.S.C. § 1332 because:

- 14 • A large number of the Class Members are California citizens;
- 15 • Apple is a California citizen from whom significant relief is sought by  
16 the proposed Class and whose conduct described herein forms a  
17 significant basis for the claims asserted by the proposed Class;
- 18 • Plaintiff's and many of the proposed Class Members' principal injuries  
19 resulting from the conduct of each Defendant were incurred in  
20 California, where this action is originally filed; and
- 21 • Plaintiff is unaware of any other predecessor class action that asserted  
22 the same or similar factual allegations against any of the defendants on  
23 behalf of the same or other persons. One other proposed action was filed  
24 against Nike several months after this action, but the Court has stayed it  
25 in favor of this action proceeding on its merits, and as of the time of this  
26 filing, the stay remains in effect.

### 27 **GENERAL ALLEGATIONS**

28 16. Nike has dominated the sports apparel and technology industries for decades,



1 and has established itself as a global leader in both the professional and consumer sports and  
2 fitness advertising and sales sectors. The Nike+ FuelBand has been a major component of  
3 Nike's overall equipment sales since its early 2012 release.

4 17. Apple has dominated the personal technology industries for decades,  
5 establishing itself as the most widely-known and prolific advertiser and distributor of  
6 personal technology items available to consumers today.

7 18. Since approximately 2006, Nike and Apple have embarked upon various  
8 partnership ventures in the sporting technology sector, forming a powerful alliance designed  
9 to massively increase profit for both companies, and to supply evolving sporting technology  
10 products to the purchasing consumer such as Levin and others similarly-situated.

11 19. The Nike+ FuelBand, one such product manufactured, advertised, marketed,  
12 and sold by Defendants, is wearable personal technology in the form of a wristband that  
13 Defendants advertise as capable of tracking every calorie burned and step taken by a  
14 FuelBand user engaged in physical activity while wearing the FuelBand. In particular, both  
15 Defendants consistently advertise to the general public in promotional materials and at  
16 points of sale that the FuelBand "measures each step taken and calorie burned," "[t]racks  
17 steps, calories, and time of day" and "tracks calories burned, steps taken and more." The  
18 FuelBand is also consistently promoted by Defendants as a device capable of using  
19 algorithms to accurately convert physical activity into NikeFuel, a conceptual measurement  
20 of movement, reduced to visual markers on the face of the FuelBand. Specifically, the  
21 FuelBand packaging, promotional materials, and point of sale items indicate that the "Nike  
22 + FuelBand measures your everyday activity and turns it into NikeFuel."

23 20. In truth, the Nike+ FuelBand cannot and does not track each calorie burned, or  
24 each step taken, nor does it accurately measure activity for conversion into NikeFuel, and  
25 users experience wildly inaccurate step, calorie burn, and NikeFuel readings when using the  
26 FuelBand. Defendants were aware when the FuelBand was first marketed, advertised and  
27 sold to Levin and the buying public, and remained aware throughout the Class Period, that  
28 the FuelBand was incapable of accurately tracking every calorie burned and step taken by

1 FuelBand users, that it was also unable to accurately reflect physical activity in any form of  
2 presentation, whether as NikeFuel or otherwise, and that their advertising was therefore  
3 false and misleading. As a result of Defendants' conduct, buyers of the FuelBand, including  
4 the Class Members, were each in fact misled into purchasing a device that Defendants  
5 purported would accurately perform the tasks referenced herein when it in fact does not and  
6 cannot do so, thereby misleading and damaging consumers including Plaintiff and all others  
7 similarly-situated.

8         21. Despite their knowledge of the FuelBand's inability to accurately track each of  
9 a user's calories burned, steps taken, or to read or measure physical activity sufficiently to  
10 provide any form of accurate measurement of that activity, during the Class Period  
11 Defendants promulgated and implemented the false and misleading advertising alleged  
12 herein as part of a business scheme designed to unfairly and unlawfully reap substantial  
13 profits at the expense of Levin and the Class.

14         22. To accomplish their scheme, Defendants each advertised and offered to the  
15 Class Members, by means of various media, the opportunity to purchase the Nike+  
16 FuelBand. Attached hereto as Exhibits 1-4 are some examples of Defendants'  
17 advertisements. Levin witnessed and received several such offers prior to purchasing any  
18 Nike+ FuelBand, and throughout the Class Period. Examples of the wording of  
19 advertisements and offers Levin witnessed and relied upon prior to purchasing any Nike+  
20 FuelBand included language identified in paragraph 19 above, indicating to Levin that the  
21 FuelBand would track a user's every calorie burned and step taken during activity  
22 undertaken while wearing the FuelBand, and that it would accurately read, measure, and  
23 report a user's level of physical activity in the form of NikeFuel. Levin was subjected to  
24 such advertisements by means of in-store advertising, product packaging, and product  
25 advertisements on the Defendants' respective websites. At all times before Levin purchased  
26 the FuelBands, their purported abilities to specifically track every step taken and calorie  
27 burned, and to accurately report a user's physical activity while wearing the FuelBand (in  
28 the form of NikeFuel), were to Levin the most important, if not only important, features of

1 the FuelBand.

2 23. Levin, like all FuelBand purchasers, reasonably expected that the FuelBands  
3 she purchased were capable of performing the tasks referenced herein, and in fact bought  
4 the devices because she believed, based upon her exposure to Defendants' marketing and  
5 advertisements, that they would in fact accurately perform the tasks referenced herein and in  
6 Defendants' marketing efforts. Based on that expectation, based further on the claims made  
7 by Defendants, and also based upon what Levin believed were trustworthy reputations  
8 enjoyed by Defendants, Levin purchased approximately nine (9) Nike+ FuelBands in Los  
9 Angeles County – one (1) for personal use and approximately eight (8) to give as gifts. Said  
10 FuelBands were purchased at the Nike store at the Grove Shopping Center in Los Angeles  
11 County, and at the Apple Store at the Grove Shopping Center in Los Angeles County.

12 24. Despite Defendants' promises to Levin, the FuelBands purchased by Levin,  
13 and in fact all of the FuelBands sold by Defendants, are and remain incapable of accurately  
14 performing the functions that Defendants represented at all times relevant they are able to  
15 perform, and Defendants' misrepresentations as such have continued throughout the Class  
16 Period.

17 25. Throughout the Class Period and continuing to this day, Defendants have  
18 dramatically increased their sales of the Nike+ FuelBand by means of utilizing the false and  
19 misleading representations and advertising promulgated and implemented by them as  
20 alleged herein, and Defendants have failed to remedy the inabilities of the FuelBand as  
21 alleged herein. As a result, despite Defendants' claims that the Nike+ FuelBand accurately  
22 tracks every calorie burned and step taken, and that it can accurately report a FuelBand  
23 user's physical activity in the form of NikeFuel or in any form, the FuelBand remains  
24 wholly unable to accurately perform the tasks referenced herein, no matter who the user of  
25 the FuelBand is, and no matter what type of activity that user engages in.

26 ///

27 ///

28 ///

1 **CAUSES OF ACTION**

2 **FIRST CAUSE OF ACTION: VIOLATION OF CALIFORNIA BUSINESS AND**  
3 **PROFESSIONS CODE §§ 17200 *ET SEQ.***

4 (Against All Defendants by Plaintiff in Her Individual and Representative Capacity on  
5 Behalf of the Class)

6 26. Plaintiff hereby incorporates by reference all of the above paragraphs as though  
7 set forth fully herein in form and substance.

8 27. By reason of the conduct alleged herein, Defendants engaged in unlawful,  
9 fraudulent and unfair business practices that included, but were not limited to:

- 10 • Misleading Levin and the Class into purchasing the FuelBand, that  
11 Defendants falsely represented was capable of accurately tracking every  
12 calorie burned and step taken as a result of physical activity undertaken  
13 while wearing the FuelBand, and that Defendants also falsely  
14 represented was capable of using algorithms to accurately read, measure,  
15 and report physical activity in the form of NikeFuel, knowing that these  
16 statements were false and likely to induce Levin and the Class Members  
17 into purchasing the FuelBand;
- 18 ■ Promulgating and implementing advertising that was false and was both  
19 designed to and likely to mislead Levin and the Class in order to reap a  
20 tremendous profit at the respective and collective expense of Levin and  
21 the Class, and;
- 22 • Accepting from Levin and the Class payment for Nike+ FuelBands that  
23 were sold under false pretenses and that Defendants knew were not as  
24 Defendants represented them to be, namely, that they could not  
25 accurately perform the functions advertised as Defendants represented  
26 they could.

27 28. Defendants' actions constitute unlawful business acts or practices within the  
28 meaning of California *Business & Professions Code* §§ 17200 *et seq.*

1       29. Accordingly, Plaintiff may obtain and is entitled to all remedies and penalties  
2 authorized by the statute, including without limitation restitution, disgorgement, injunctive  
3 relief, and other penalties for each illegal or fraudulent business act or practice, and  
4 attorneys' fees pursuant to statute and the Court's equitable powers, in amounts subject to  
5 proof.

6       **SECOND CAUSE OF ACTION: VIOLATION OF CALIFORNIA BUSINESS AND**  
7       **PROFESSIONS CODE §§ 17500 ET SEQ.**

8       (Against All Defendants by Plaintiff in Her Individual and Representative Capacity on  
9       Behalf of the Class)

10       30. Plaintiff hereby incorporates by reference all of the above paragraphs as though  
11 set forth fully herein in form and substance.

12       31. As alleged herein, Defendants engaged in false advertising practices that  
13 included, but were not limited to:

- 14       • Using false and misleading advertising to offer and induce Levin and the  
15       Class into purchasing the FuelBand, that Defendants falsely represented  
16       was capable of accurately tracking every calorie burned and step taken  
17       as a result of physical activity undertaken while wearing the FuelBand,  
18       and that Defendants also falsely represented was capable of using  
19       algorithms to accurately read, measure, and report physical activity in  
20       the form of NikeFuel, knowing that these statements were false and  
21       likely to induce Levin and the Class Members into purchasing the  
22       FuelBand;
- 23       • Promulgating and implementing advertising that was false and was both  
24       designed to and likely to mislead Levin and the Class in order to reap a  
25       tremendous profit at the respective and collective expense of Levin and  
26       the Class, and;
- 27       • Accepting from Levin and the Class payment for Nike+ FuelBands that  
28       were marketed and sold under false pretense and that Defendants knew

1                   were not as Defendants represented them to be, namely, that they could  
2                   not track every calorie burned by a FuelBand user as Defendants  
3                   represented they could.

4           32.   Defendants' actions constitute unlawful business acts or practices within the  
5 meaning of California Business & Professions Code §§ 17200, *et seq.*

6           33.   Accordingly, Plaintiff may obtain and is entitled to all remedies and penalties  
7 authorized by the statute, including without limitation restitution, disgorgement, and other  
8 penalties for each illegal or fraudulent business act or practice, and attorneys' fees pursuant  
9 to statute and the Court's equitable powers, in amounts subject to proof.

10                   **THIRD CAUSE OF ACTION: BREACH OF WARRANTY**

11           (Against All Defendants by Plaintiff in Her Individual and Representative Capacity on  
12                   Behalf of the Class)

13           34.   Plaintiff hereby incorporates by reference all of the above paragraphs as though  
14 set forth fully herein in form and substance.

15           35.   Defendants and each of them were sellers of the Nike+ FuelBand to Plaintiff  
16 and others similarly-situated, including the Class.

17           36.   As sellers of such products to Levin and the Class Members, Defendants  
18 implemented the sales, marketing, promotion, and advertising referenced herein, and made  
19 the representations during the sales transactions concerned herein as such are alleged in  
20 paragraph 19, above. Specifically, Defendants consistently advertised to the general public  
21 in promotional materials and at points of sale, and during the sales transaction from  
22 Defendants to Plaintiff and the Class Members, that the FuelBand "measures each step  
23 taken and calorie burned," "[t]racks steps, calories, and time of day" and "tracks calories  
24 burned, steps taken and more." The FuelBand was also consistently promoted by  
25 Defendants through the promotion and sales process as a device capable of relying on  
26 algorithms to accurately convert physical activity into NikeFuel, a conceptual measurement  
27 of movement, reduced to visual markers on the face of the FuelBand. Specifically, the  
28 FuelBand packaging, promotional materials, and point of sale items indicate that the "Nike

1 + FuelBand measures your everyday activity and turns it into NikeFuel.” All such  
2 representations were made to the buying public, including without limitation Plaintiff and  
3 the Class, as express warranties regarding the purported abilities of the FuelBand.

4 37. In making the representations alleged herein, including those regarding the  
5 FuelBand’s ability to count each step taken by a user, its ability to count each calorie burned  
6 by a user, and its ability to implement algorithms to accurately track, record, and report  
7 physical activity in the form of NikeFuel, Defendants made implied warranties of  
8 merchantability as to the subject products and warranted that they were fit for their  
9 particular and anticipated purposes.

10 38. As alleged herein, the Nike+ FuelBand is unable and was never able to perform  
11 the tasks it was represented and warranted to be capable of performing, and in making the  
12 representations made as alleged herein with knowledge that the product was unable to  
13 perform in conformity with the warranties made, Defendants breached said warranties.

14 39. Nike has developed and maintained a network of authorized distributors and  
15 retailers, including without limitation Defendant Apple, all of which were at relevant times  
16 authorized Nike resellers of the FuelBand, and none of which was, or was ever intended to  
17 be, an ultimate consumer of the FuelBand. Instead, Plaintiff and those similarly-situated  
18 were the intended ultimate consumers of the FuelBand, and Defendants intended the  
19 warranties alleged herein to inure only to those ultimate consumers.

20 40. Within a reasonable time after Plaintiff knew of the warranty breaches alleged  
21 herein, Plaintiff provided the manufacturer with notice of the same, and of Plaintiff’s intent  
22 to look to Defendants for damages.

23 41. As a direct and proximate result of the conduct of Defendants, in making the  
24 misrepresentations alleged herein, and in failing to replace the FuelBands Plaintiff  
25 purchased, or any of them, with devices conforming to the warranties and representations  
26 made, Defendants breached their warranties as to the FuelBand.

27 42. As a direct and proximate result of the warranty breaches alleged herein,  
28 Plaintiff and the Class Members suffered damage, injury, loss, and harm, all according to

1 proof.

2 **FOURTH CAUSE OF ACTION: VIOLATION OF CALIFORNIA CIVIL CODE**

3 **§§ 1750, *ET SEQ.***

4 43. Plaintiff hereby incorporates by reference all of the above paragraphs as though  
5 set forth fully herein in form and substance.

6 44. The FuelBands that are the subject of this action qualify as “goods” within the  
7 meaning of California Civil Code section 1761, subsection (a), of the Consumers Legal  
8 Remedies Act, codified at California Civil Code sections 1750 *et seq.*

9 45. Defendants are “persons” within the meaning of California Civil Code section  
10 1761, subsection (c), and Plaintiff and the Class Members are “consumers” within the  
11 meaning of subsection (d) of section 1761.

12 46. The purchase and sale agreements between Plaintiff and the Class Members on  
13 the one hand, and Defendants on the other, qualify as “transactions” within the meaning of  
14 California Civil Code section 1761, subsection (e).

15 47. Defendants’ conduct as alleged herein constituted unfair, false, misleading and  
16 deceptive practices, and was undertaken unlawfully, with the intent of inducing Plaintiff and  
17 the Class Members to enter into transactions which would result in unjust pecuniary and  
18 other loss to them, and unjust pecuniary and other gain to Defendants.

19 48. As a direct and proximate result of the conduct of Defendants as alleged herein,  
20 Plaintiff and the Class Members were damaged, and are entitled to and seek relief including  
21 but not limited to restitution, and an injunction prohibiting Defendants from engaging in  
22 unfair, false, misleading and deceptive practices as alleged herein, in addition to those other  
23 remedies the Court may deem proper according to proof;

24 **FIFTH CAUSE OF ACTION: COMMON COUNTS**

25 49. Plaintiff hereby incorporates by reference all of the above paragraphs as though  
26 set forth fully herein in form and substance.

27 50. Defendants’ conduct as alleged herein is such that, and has created such  
28 damage to Plaintiff and the Class that, no adequate remedy at law exists, and Plaintiff and



1 the Class are thus entitled to and seek remedies at equity as alleged herein.

2 51. The purchase and sale transactions between Defendants on the one hand, and  
3 Plaintiff and the Class Members on the other, constituted quasi-contracts implied in law,  
4 and were backed and supported by the promises of Defendants made in assumpsit.

5 52. Inasmuch Defendants deceived Plaintiff and the Class Members into entering  
6 the agreements alleged herein, and as Defendants enjoyed pecuniary gain at the expense of  
7 Plaintiff and the Class Members as a proximate result thereof, Defendants were unjustly  
8 enriched, entitling Plaintiff and the Class Members to an injunction, restitution of ill-gotten  
9 gains, and disgorgement of Defendants' profits.

10 53. Plaintiff and the Class Members expended funds to purchase the FuelBands  
11 and therefore a disputed *res* is at issue. Insofar as said funds rightfully belong to Plaintiff  
12 and the Class Members as a result of the unlawful means by which Defendants obtained  
13 them, the funds and Defendants are subject to, and Plaintiff seeks, the imposition and  
14 equitable remedy of a constructive trust over the funds, to prevent their waste and to prevent  
15 Defendants' continued unjust enrichment.

16  
17 **PRAYER FOR RELIEF**  
18

19 **WHEREFORE**, Plaintiff prays for judgment and relief as follows:

- 20 1. For a declaration that this lawsuit may properly be maintained as a class action,  
21 and a declaration certifying the Class Representative's claims herein;  
22 2. For general damages in an amount to be proven at trial;  
23 3. For special damages in an amount to be proven at trial;  
24 4. For disgorgement of profits and for restitution in amounts to be proven at trial;  
25 5. For injunctive relief;  
26 6. For any other available penalties for each illegal or fraudulent business act or  
27 practice;  
28 7. For attorneys' fees pursuant to statute and the Court's equitable powers, in

- 1 amounts subject to proof;
- 2 8. For exemplary damages pursuant to California *Code of Civil Procedure* §3294;
- 3 9. For prejudgment interest; and
- 4 10. For such other and further relief as may be just and proper.
- 5

6 Dated: April 27, 2015

**LAW OFFICES OF PAUL N. PHILIPS, APLC**

7

8

9 By: \_\_\_\_\_

10 PAUL N. PHILIPS  
11 Attorneys for Plaintiff

12

13 **DEMAND FOR JURY TRIAL**

14 Plaintiff hereby demands trial of the within causes by jury.

15

16

17 Dated: April 27, 2015

**LAW OFFICES OF PAUL N. PHILIPS, APLC**

18

19

20 By: \_\_\_\_\_

21 PAUL N. PHILIPS  
22 Attorneys for Plaintiff

23

24

25

26

27

28

## **EXHIBIT 2**

**Levin et al. v. Nike, Inc. et al., Case No. BC509363 (L.A. Super. Ct.)**

**CLAIM FORM**

To receive benefits from this Settlement, your  
claim form must be postmarked or received on or before [Date], 2015.  
You must submit your claim form online on this website

You must complete all sections in order to receive any benefits from this Settlement unless otherwise indicated.

**1. CLAIMANT INFORMATION:**

FIRST NAME \_\_\_\_\_ MI \_\_\_\_\_ LAST NAME \_\_\_\_\_  
STREET ADDRESS \_\_\_\_\_  
CITY \_\_\_\_\_ STATE \_\_\_\_\_ ZIP \_\_\_\_\_ ZIP4 (optional) \_\_\_\_\_  
EMAIL ADDRESS \_\_\_\_\_

**2. Provide the Class Member ID from email notice (leave blank if you do not have it):** \_\_\_\_\_

**3. Provide the serial number(s) for the Nike+ FuelBand(s) that you purchased from January 12, 2012 to [date].**  
The serial number is an 11- or 13-digit number located on a visible metal plate on the back of your Nike+ FuelBand device (the portion that faces your wrist when the band is worn). You must enter a serial number for your claim to be processed.

Serial Number: \_\_\_\_\_

Serial Number: \_\_\_\_\_

Serial Number: \_\_\_\_\_

Serial Number: \_\_\_\_\_

Serial Number: \_\_\_\_\_

If you have more than five serial numbers to enter, fill out this form completely and attach a piece of paper with the serial numbers and mail it to Gilardi & Co., [insert address].

**4. Selection of Settlement Benefit.** For each Nike+ FuelBand you purchased from January 12, 2012 to [date], you can select either a \$15 payment in the form of a check that will be mailed to the address you provided above OR a \$25 gift card redeemable at Nike-owned stores in the U.S. and Puerto Rico and online at Nike.com. The gift card will be freely transferable and will not expire.

Make your selection:

☐ Check

☐ Gift Card

By submitting this form, you are declaring, under penalty of perjury, that you purchased a Nike+ FuelBand between January 19, 2012 and [date], and that you have accurately filled out the information above to the best of your knowledge. **[CLICK TO SUBMIT]**

## **EXHIBIT 3**

1  
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7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF LOS ANGELES  
10

11 CAROLYN LEVIN, in Her Individual and  
12 Representative Capacity on Behalf of a Class  
of All Persons Similarly-Situated,

13 Plaintiff,

14 v.

15 NIKE, INC., an Oregon Corporation; APPLE  
16 INC., a California Corporation; and DOES 1  
through 10, inclusive,

17 Defendant.  
18  
19  
20

CASE NO. BC509363

**[PROPOSED] ORDER PRELIMINARILY  
APPROVING CLASS ACTION  
SETTLEMENT AGREEMENT,  
CONDITIONALLY CERTIFYING  
SETTLEMENT CLASS, DIRECTING  
NOTICE OF PROPOSED CLASS  
SETTLEMENT, AND SCHEDULING A  
FAIRNESS HEARING DATE**

Assigned to Hon. William F. Highberger

Place: Department 322

21 WHEREAS, Carolyn Levin and Defendants Nike, Inc. and Apple Inc. have reached a  
22 proposed settlement and compromise of the claims in the above-captioned matter, which arise from  
23 the Nike+ FuelBand, as embodied in the Settlement Agreement filed with the Court; and

24 WHEREAS, the parties have applied to the Court for preliminary approval of the proposed  
25 Settlement, the terms and conditions of which are set forth in the Settlement Agreement;

26 WHEREAS, the Capitalized Terms herein shall have the same meaning as in the Settlement  
27 Agreement;  
28

1 NOW, THEREFORE, the Court, having read and considered the Settlement Agreement and  
2 accompanying documents, as well as the Motion for Preliminary Settlement Approval and supporting  
3 papers, and the parties to the Settlement Agreement having consented to the entry of this order, AND  
4 GOOD CAUSE APPEARING,

5 IT IS HEREBY ORDERED AS FOLLOWS:

6 1. Subject to further consideration by the Court at the time of the Fairness Hearing, the  
7 Court preliminarily approves the Settlement as fair, reasonable, and adequate to the Settlement Class,  
8 as falling within the range of possible final approval, and as meriting submission to the Settlement  
9 Class for its consideration.

10 2. For purposes of the Settlement only, the Court certifies the Settlement Class, which  
11 means: All people and entities in the United States who purchased a Nike+ FuelBand from the time  
12 period from and including January 19, 2012, through the date of this Order granting preliminary  
13 approval of the settlement. Excluded from the class are all persons who elect to exclude themselves  
14 from the class, the Court and staff to whom this case is assigned, and any member of the Court's or  
15 Court staff's immediate family.

16 3. The Second Amended Complaint, attached as Exhibit 1 to the Settlement Agreement  
17 and previously filed with this Court on [date], in connection with the parties' stipulation requesting  
18 leave to amend the operative complaint, is the operative complaint in this action.

19 4. The Court preliminarily finds, solely for purposes of considering this Settlement, that  
20 the requirements of California Code of Civil Procedure sections 382 and 1781 appear to be satisfied,  
21 including requirements for the existence of an ascertainable class, a community of interest, and  
22 manageability of a settlement class, that common issues of law and fact predominate, and that a  
23 settlement class is superior to alternative means of resolving the claims and disputes at issue in this  
24 Action.

25 5. Carolyn Levin shall serve as class representative of the Settlement Class.

26 6. The Court appoints the following counsel as Class Counsel for purposes of this  
27 settlement:

28 Thomas V. Girardi  
GIRARDI | KEESE

1 1126 Wilshire Blvd.  
2 Los Angeles, CA 90071; and

3 Paul N. Philips  
4 LAW OFFICES OF PAUL N. PHILIPS, APLC,  
5 9255 W. Sunset Blvd., Suite 920  
6 Los Angeles, CA 90069.

7 The Court preliminarily finds that the Class Representative and Class Counsel fairly and  
8 adequately represent and protect the interests of the absent Settlement Class Members in accordance  
9 with California Code of Civil Procedure section 382.

10 7. The Court approves the nomination of Gilardi & Co. to administer the Settlement.

11 8. A Fairness Hearing shall be held before this Court at \_\_\_\_\_ a.m. on \_\_\_\_\_,  
12 2015 in Department 322 of the Los Angeles Superior Court at 600 South Commonwealth Ave., Los  
13 Angeles, CA 90005, to address: (a) whether the proposed Settlement should be finally approved as  
14 fair, reasonable and adequate; (b) whether the Final Approval Order and Judgment should be entered;  
15 (c) whether Class Counsel's application for attorney's fees, expenses, and Class Representative's  
16 service award should be approved; and (d) any other matters that the Court deems appropriate.

17 9. With the exception of such proceedings as are necessary to implement, effectuate and  
18 grant final approval to the terms of the Settlement Agreement, all proceedings with respect to the  
19 claims in this Action are stayed and all Settlement Class Members are enjoined from commencing or  
20 continuing any action or proceeding in any court or tribunal asserting any claims encompassed by the  
21 Settlement Agreement, unless the Settlement Class Member timely files a valid Request for  
22 Exclusion as defined in the Settlement Agreement.

23 10. The Court has reviewed and approves, as to form and content, the Long Form Notice  
24 to be e-mailed to Class Members where possible, the Post Card Notice to be mailed to Class  
25 Members where e-mail is not possible, and the Publication Notice, attached as Exhibits 4-6 to the  
26 Settlement Agreement, respectively. On or before 60 days after the date of this Order, the  
27 Publication Notice shall be posted on the Settlement Administrator's website and published in the  
28 Legal Section of USA Today in at least an 1/8 page ad. No later than thirty (30) days after the



1 completion of the Publication Notice, the Settlement Administrator shall file with the Court  
2 declarations attesting to compliance with this Order.

3 11. The Court finds that the Parties' plan for providing notice to the Settlement Class  
4 described in Section VIII of the Settlement Agreement constitutes the best notice practicable under  
5 the circumstances and shall constitute due and sufficient notice to the Settlement Class of the  
6 pendency of the Action, certification of the Settlement Class, the terms of the Settlement Agreement,  
7 and the Fairness Hearing, and complies fully with the requirements of the California Rules of Court,  
8 the California Code of Civil Procedure, the Constitution of the State of California, and the United  
9 States Constitution, and any other applicable law.

10 12. The Court further finds that the notice plan described in Sections VIII and IX of the  
11 Settlement Agreement will adequately inform members of the Settlement Class of their right to  
12 exclude themselves from the Settlement Class so as not to be bound by the terms of the Settlement  
13 Agreement. Any member of the Settlement Class who desires to be excluded from the Settlement  
14 Class, and therefore not be bound by the terms of the Settlement Agreement, must submit to the  
15 Settlement Administrator, pursuant to the instructions set forth in the Notice, a timely and valid  
16 written Request for Exclusion within 60 days of the date of this Order consistent with the Opt-Out  
17 form at Exhibit 7 to the Settlement Agreement.

18 13. Any member of the Settlement Class who elects to be excluded shall not be entitled to  
19 receive any of the benefits of the Settlement, shall not be bound by the release of any claims pursuant  
20 to the Settlement Agreement, and shall not be entitled to object to the Settlement or appear at the  
21 Fairness Hearing. The names of all Persons timely submitting valid Requests for Exclusion shall be  
22 provided to the Court at the time that the motion for final approval of the settlement is filed.

23 14. Any Settlement Class Member who does not submit a valid and timely Request for  
24 Exclusion may object to the Settlement Agreement, to Class Counsel's application for attorney's fees  
25 and costs, to the Class Representative's service award, or to the proposed Order and Judgment. All  
26 objections must be postmarked by the Objection Deadline. All objections must be filed with the  
27 Court 30 days before the Fairness Hearing. No Class Member shall have the right to appear and be  
28 heard at the Fairness Hearing, either personally or through an attorney, unless written notice of the

1 Class Member's objection and any brief in support of the objection have been filed with the Court  
2 and served upon Class Counsel and Nike's and Apple's Counsel in conformance with the procedure  
3 set out in the Long Form Notice, which is Exhibit 4 to the Settlement Agreement.

4 15. Service of all papers on counsel for the Parties shall be made as follows: for Class  
5 Counsel to the counsel listed in paragraph 6 above, and for Nike's and Apple's Counsel, to Austin V.  
6 Schwing, Gibson Dunn & Crutcher LLP, 555 Mission Street, San Francisco, CA 94105.

7 16. Any Settlement Class Member who does not make an objection in the time and  
8 manner provided in the Long Form Notice, which is Exhibit 4 to the Settlement Agreement, shall be  
9 deemed to have waived such objection and be forever foreclosed from making any objection to the  
10 fairness or adequacy of the proposed settlement as incorporated in the Settlement Agreement, the  
11 payment of attorney's fees and costs, the Class Representative's service award, the Settlement, or the  
12 Final Approval Order and Judgment.

13 17. In the event that the proposed Settlement is not approved by the Court, or in the event  
14 that the Settlement Agreement becomes null and void pursuant to its terms, this Order and all orders  
15 entered in connection therewith shall become null and void, shall be of no further force and effect,  
16 and shall not be used or referred to for any purposes whatsoever in this Action or in any other case or  
17 controversy; in such event the Settlement Agreement and all negotiations and proceedings directly  
18 related thereto shall be deemed to be without prejudice to the rights of any and all of the Parties, who  
19 shall be restored to their respective positions as of the date and time immediately preceding the  
20 execution of the Settlement Agreement.

21 18. The Court may, for good cause, extend any of the deadlines set forth in this Order  
22 without further notice to the Settlement Class Members. The Fairness Hearing may, from time to  
23 time and without further notice to the Settlement Class, be continued by order of the Court.

24 **IT IS SO ORDERED.**

25  
26 Dated:

27  
28 

---

Honorable William F. Highberger  
Judge of the Superior Court

## **EXHIBIT 4**

## **LEGAL NOTICE BY ORDER OF THE COURT**

**IF, AT ANY TIME BETWEEN JANUARY 19, 2012 AND [DATE], 2015, YOU PURCHASED A NIKE+ FUEL BAND, THIS NOTICE DESCRIBES YOUR RIGHTS IN CONNECTION WITH THE SETTLEMENT OF A LAWSUIT**

**You May be Eligible for a Payment from a Class Action Settlement.**

*A California state court authorized this Notice.*

*This is not a solicitation from a lawyer.*

*This is not a legal action against you.*

This notice describes a proposed settlement in a class action lawsuit brought against Nike, Inc. and Apple Inc. regarding the Nike+ FuelBand.

If you purchased a Nike+ FuelBand and you fit the description of the settlement class:

- You can make a claim for either a Fifteen Dollar (\$15) payment or a Twenty-Five Dollar (\$25) gift card redeemable at Nike-owned stores in the U.S. or Puerto Rico, and online at Nike.com. The \$25 gift card is freely transferable and will not expire. The number of claims that you may submit depends on the number of Nike+ FuelBands that you purchased. To receive a Settlement payment or gift card, you must complete and submit a claim form, as described in part 4 below, by **[DATE]**;
- You can exclude yourself from the Settlement (and receive no money from the Settlement but retain your right to bring a lawsuit). Your request to exclude yourself must be submitted no later than **[DATE]**. You must follow the process described in part 8 below. If the Settlement is approved and you do not exclude yourself, you will be bound by the Settlement and will release certain claims described below.
- You can object to the Settlement. The deadline for objecting to the Settlement is **[DATE]**. All objections must be filed with the Court by that day and mailed to Counsel of Record in the case. See part 7 below for details.

Please read this notice carefully. It describes your rights and options under the Settlement, which are affected whether or not you act.

**NOTE: DO NOT CALL OR WRITE THE COURT, THE COURT CLERK'S OFFICE, NIKE, APPLE, OR NIKE'S OR APPLE'S COUNSEL FOR MORE INFORMATION.**

### **BASIC INFORMATION**

In a class action case known as *Levin v. Nike, Inc. et al.*, Case No. BC509363 (L.A. Super. Ct.), the Plaintiff alleged that Nike, Inc. (“Nike”) and Apple Inc. (“Apple”) engaged in violations of consumer protection laws and warranty obligations in connection with the Nike+ FuelBand. Nike and Apple deny Plaintiff’s allegations and deny that they did anything wrong. The Court has not decided who is right.

A settlement of this lawsuit (“Settlement”) has been negotiated which, if approved by the Court, may entitle you to a payment. By entering into the Settlement, Nike and Apple have not admitted the truth or validity of any of the claims against them. Your rights and options under the Settlement—and the deadlines to exercise them—are explained below.

#### **YOUR LEGAL RIGHTS AND OPTIONS**

<b>SUBMIT A CLAIM</b>	Class members who properly submit a claim form by the deadline of [DATE] will receive a payment and will give up certain rights to sue Releasees as described in parts 4 and 6 below.
<b>DO NOTHING</b>	If you do nothing, you will receive no money from the Settlement, but <i>you will still give up your rights to sue Releasees</i> as described in parts 6 and 10 below.
<b>EXCLUDE YOURSELF FROM THE CASE</b>	This is the only option that allows you to sue Nike or Apple on your own regarding the Nike+ FuelBand, but you will not receive a payment from the Settlement. The deadline for excluding yourself is: [DATE]. See part 8 below.
<b>OBJECT</b>	Write to the Court if you do not like the Settlement. The deadline to object to the settlement is [DATE]. See part 7 below.
<b>GO TO A HEARING</b>	Ask to speak in Court about the fairness of the Settlement. The Court has set a hearing for [DATE], subject to change. See part 11 below.

These rights and options—and the deadlines to exercise them—are explained in this notice.

The Court in charge of this case still has to decide whether to approve the Settlement. If it does and any appeals are resolved, benefits will be distributed to those who qualify. Please be patient.

## WHAT THIS NOTICE CONTAINS

1. WHO IS IN THE SETTLEMENT? .....	4
2. WHAT IS THIS LITIGATION ABOUT?.....	4
3. WHO REPRESENTS ME? .....	4
4. WHAT BENEFITS CAN I RECEIVE FROM THE SETTLEMENT?.....	5
5. DO I HAVE TO PAY THE LAWYERS REPRESENTING ME?.....	5
6. WHAT AM I AGREEING TO BY REMAINING IN THE SETTLEMENT CLASS IN THIS CASE? .....	5-6
7. WHAT IF I DO NOT AGREE WITH THE SETTLEMENT? .....	6
8. HOW DO I EXCLUDE MYSELF FROM THE SETTLEMENT CLASS?.....	7
9. WHAT IS THE DIFFERENCE BETWEEN OBJECTING AND ASKING TO BE EXCLUDED? .....	7
10. WHAT IF I DO NOTHING AT ALL? .....	7
11. WHAT WILL BE DECIDED AT THE FAIRNESS HEARING? .....	7-8
12. IS THIS THE ENTIRE SETTLEMENT AGREEMENT? .....	8
13. WHERE CAN I GET MORE INFORMATION? .....	8

## 1. WHO IS IN THE SETTLEMENT CLASS?

The Superior Court of the State of California for the County of Los Angeles has certified, for settlement purposes only, a class action in *Levin v. Nike, Inc. et al.*, Case No. BC509363 (L.A. Super. Ct.).

If you received notice of the Settlement by an email addressed to you, then you may be a member of the Settlement Class. But even if you did not receive an e-mail, you may be a member of the Settlement Class.

The "Settlement Class" is defined as:

All people and entities in the United States who purchased a Nike+ FuelBand from the time period from and including January 19, 2012, through **[INSERT DATE OF THE ORDER PRELIMINARILY APPROVING THE SETTLEMENT]**.

Nike+ FuelBand refers to the wristband offered by Nike and Apple that utilizes an accelerometer to track steps taken, calories burned, NikeFuel, and the time of day.

If you are not sure whether you are in the Settlement Class, or have any other questions about the Settlement, visit the Settlement website at **[INSERT WEB ADDRESS]** or call the toll free number **[INSERT PHONE NUMBER]**.

## 2. WHAT IS THIS LAWSUIT ABOUT?

This case was brought as a class action alleging that Nike and Apple engaged in violations of consumer protection laws and warranty obligations in connection with the Nike+ FuelBand. More specifically, the lawsuit alleges, among other things, that false and/or misleading statements were made regarding the Nike+ FuelBand and that there was a failure to honor the warranty terms of the Nike+ FuelBand. This is just a summary of the allegations. The complaint in the lawsuit is posted at **[INSERT WEB ADDRESS]**, and contains all of the allegations and claims asserted. Nike and Apple deny these allegations; however, in order to avoid the expense, inconvenience, and distraction of continued litigation, Nike and Apple have agreed to the settlement described herein.

## 3. WHO REPRESENTS ME?

In a class action, one or more people or entities called class representatives sue on behalf of people and entities who have similar claims. In this case, Carolyn Levin sued Nike and Apple in a representative capacity, and the Court has appointed her the Settlement Class Representative for all class members, including you, in this case.

The Court also approved the law firms of Girardi|Keese and the Law Offices of Paul N. Philips, APLC, to represent you and the other Settlement Class Members. If you want to be represented by your own lawyer, you may hire one at your own expense.

#### 4. WHAT BENEFITS CAN I RECEIVE FROM THE SETTLEMENT?

Under the Settlement, Nike has agreed to provide either a Fifteen Dollar (\$15) payment or a Twenty-Five Dollar (\$25) gift card redeemable at Nike-owned stores in the U.S. and Puerto Rico, and online at Nike.com, for each Nike+ FuelBand purchased by members of the Settlement Class during the class period for which a valid claim is timely submitted. Each class member who timely submits a valid claim may choose between the monetary payment or the gift card. The gift card is freely transferable and does not expire.

**You cannot receive a payment unless you submit a claim form.** Claim forms are available at [INSERT WEB ADDRESS]. Claim forms must be submitted online at [INSERT WEB ADDRESS].

If you timely submit a claim form, your claim will be paid by a check mailed to you or gift card e-mailed to you. Claims will only be paid after the Court grants Final Approval of the Settlement and after any appeals are resolved (see part 11 below). If there are appeals, resolving them can take time. Please be patient.

#### 5. DO I HAVE TO PAY THE LAWYERS REPRESENTING ME?

No. Class Counsel will apply to the Court for an award of attorneys' fees and costs in an amount not greater than Two Million, Four Hundred Thousand Dollars (\$2,400,000.00). To date, Class Counsel have not received any payment for their services in conducting this Litigation on behalf of the Settlement Class Representatives and the Members of the Settlement Class; nor have Class Counsel been reimbursed for their costs and expenses directly relating to their representation of the Settlement Class. Class Counsel are also moving the Court to award a service award of \$1,000.00 to the Settlement Class Representative in recognition of her service to the Settlement Class. The amount of any fee or service award will be determined by the Court.

#### 6. WHAT AM I AGREEING TO BY REMAINING IN THE SETTLEMENT CLASS IN THIS CASE?

Unless you exclude yourself, you will be part of the Settlement Class, and you will be bound by the release of claims in the Settlement. This means that if the Settlement is approved, you cannot sue, continue to sue, or be party of any lawsuit against Nike, Apple or Releasees asserting a "Released claim," as defined below. It also means that the Court's Order approving the settlement and the judgment in this case will apply to you and legally bind you.

The Released Claims that you will not be able to assert against Nike, Apple, or Releasees if you remain a part of the Settlement Class are as follows: Except as specifically provided for below, "Released Claims" shall mean any and all claims against Releasees whatsoever arising out of, related to, or connected with the design, manufacturing, pricing, advertising, describing, representing, marketing, offering, promoting, facilitating, providing, warranting, replacing, repairing, or selling of the Nike+ FuelBand in the United States that relate to the Nike+ FuelBand. "Released Claims" include all claims that were or could have been asserted in the Litigation, regardless of whether such claims are known or unknown, filed or unfiled, asserted or as yet unasserted, existing or contingent, and regardless of the legal theory or theories of damages involved.

"Released Claims" expressly excludes any warranty claims that are in no way related to the Nike+ FuelBand's ability to monitor, track, record, display, calculate, estimate, compute and/or report a user's activity or calories burned.

"Released Claims" expressly excludes any claims and/or damages for personal injuries in any way related to the Nike+ FuelBand.



If you remain a part of the Settlement Class, you will not be able to assert these claims against Nike, Apple, or Releasees. Releasees shall refer jointly and severally, and individually and collectively, to Nike and Apple, their past and present parents, predecessors, successors, affiliates, holding companies, subsidiaries, employees, agents, assigns, contractors, joint venturers, third-party agents with which they have or have had contracts or their affiliates relating to the Nike+ FuelBand, and any resellers of the Nike+ FuelBand.

#### 7. WHAT IF I DO NOT AGREE WITH THE SETTLEMENT?

If you are a Settlement Class Member, you may object to the Settlement or any part of the Settlement that you think the Court should reject, and the Court will consider your views. To object, send a letter setting forth:

- (1) the name and case number of this lawsuit (*Levin et al. v. Nike, Inc. et al.*, Case No. BC509363 (L.A. Super. Ct.)),
- (2) your full name, current address and phone number;
- (3) proof of purchase of a Nike+ FuelBand;
- (4) the reasons why you object to the Settlement along with any supporting materials;
- (5) Information about other objections you or your lawyer have made in other class action cases in the last four years, including the case name, case number, and jurisdiction of the other class action cases; and
- (6) your signature.

The requirements to object to the Settlement are described in detail in the Settlement Agreement in paragraph [INSERT]. **Your objection must be postmarked no later than [DATE].** Objections should be mailed to all four (4) of the following:

Clerk of the Court  
Central Civil West Courthouse  
600 South Commonwealth Ave.  
Los Angeles, CA 90005

Thomas V. Girardi  
Girardi | Keese  
1126 Wilshire Blvd.  
Los Angeles, CA 90071

Paul N. Philips  
Law Offices of Paul N. Philips, APLC  
9255 West Sunset Boulevard, Suite 920  
West Hollywood, California 90069

Austin V. Schwing  
Gibson, Dunn & Crutcher LLP  
555 Mission Street San Francisco, CA 94105

#### 8. HOW DO I EXCLUDE MYSELF FROM THE SETTLEMENT CLASS?

If you want to keep the right to sue or continue to sue Nike, Apple or Releasees on your own about any of the Released Claims, you must exclude yourself from the Settlement Class, sometimes referred to as "opting-out." If you exclude yourself, you will not be eligible to recover any benefits as a result of this Settlement.

To exclude yourself from the Settlement Class, you must fill out an Exclusion Form available at [website], which requires:

- (1) the name and case number of this lawsuit (*Levin et al. v. Nike, Inc. et al.*, Case No. BC509363 (L.A. Super. Ct.));
- (2) your full name, current address, and telephone number;
- (3) a statement that you wish to exclude yourself from the Settlement Class; and
- (4) your signature.

If you wish to exclude yourself, you must submit your Exclusion Form to the following address so that it is postmarked no later than [DATE]:

Nike+ FuelBand Settlement Administrator: [ADDRESS].

**REQUESTS FOR EXCLUSION FROM THE CLASS THAT ARE NOT POSTMARKED ON OR BEFORE [DATE] WILL NOT BE HONORED.**

You cannot exclude yourself from the Settlement Class by telephone, by email, or at the website. You cannot exclude yourself by mailing a request to any other location or after the deadline. Your Exclusion Form must be signed by you. You cannot exclude yourself by having an actual or purported agent or attorney acting on your behalf of you or a group of Settlement Class members sign the letter. **You must personally sign the Exclusion Form to exclude yourself from the Settlement Class.**

#### **9. WHAT IS THE DIFFERENCE BETWEEN OBJECTING AND ASKING TO BE EXCLUDED?**

Objecting is simply telling the Court that you do not like something about the Settlement. You can object to the Settlement only if you do not exclude yourself. Excluding yourself is telling the Court that you do not want to be part of the Settlement. If you exclude yourself, you have no basis to object to the Settlement because it no longer affects you.

#### **10. WHAT IF I DO NOTHING AT ALL?**

You will remain a member of the Settlement Class. *However, you must file a claim form in order to receive a benefit in this Settlement.* See part 4, above.

#### **11. WHAT WILL BE DECIDED AT THE FAIRNESS HEARING?**

The Court will hold a hearing to decide whether to approve the Settlement and any requests for fees, service awards, and expenses ("Fairness Hearing"). The Fairness Hearing is currently set for [DATE] at [TIME] [pm/am], at the Superior Court of the State of California for the County of Los Angeles, located in Department 322, Central Civil West Courthouse, 600 South Commonwealth Ave., Los Angeles, CA 90005. The hearing may be moved to a different date or time without additional notice, so it is a good idea to check [WEBSITE] for updates.

At this hearing, the Court will consider whether the Settlement is fair, reasonable, and adequate. The Court will also consider the request by Class Counsel for attorneys' fees and expenses and for the class representative's service award. If there are objections, the Court will consider them at that time. After the

hearing, the Court will decide whether to approve the Settlement. We do not know how long these decisions will take.

You may attend the hearing, but you do not have to do so. If you choose to attend, it will be at your own expense.

You may ask the Court for permission to speak at the hearing. To do so, you must send a letter saying that you intend to appear and wish to be heard. Your notice of intention to appear must include the following:

- (1) your full name, current address and telephone number;
- (2) proof of purchase of a Nike+ FuelBand;
- (3) A statement that this is your "Notice of Intention to Appear" at the Fairness Hearing for this lawsuit (*Levin et al. v. Nike, Inc. et al.*, Case No. BC509363 (L.A. Super. Ct.)), along with copies of any papers, exhibits, or other evidence or information that you will present to the Court;
- (4) The reasons you want to be heard; and
- (5) your signature.

You must send copies of your notice of intention to appear, postmarked by [DATE], to all four (4) addresses listed in the answer to Question 7 above. You cannot speak at the hearing if you exclude yourself from the Settlement.

#### **12. DOES THIS NOTICE CONTAIN THE ENTIRE SETTLEMENT AGREEMENT?**

No. This is only a summary of the Settlement. If the Settlement is approved and you do not exclude yourself from the Settlement Class, you will be bound by the release contained in the Settlement Agreement, and not just by the terms of this Notice. Capitalized terms in this Notice are defined in the Settlement Agreement. You can view the full Settlement (including the Settlement Agreement) online at [WEBSITE], or you can write to the address below for more information.

#### **13. WHERE CAN I GET MORE INFORMATION?**

For more information, you may visit [WEBSITE] or you may call the Nike+ FuelBand Settlement Administrator at [PHONE NUMBER].

**NOTE: DO NOT CALL OR WRITE THE COURT, THE COURT CLERK'S OFFICE, NIKE, APPLE, OR NIKE'S OR APPLE'S COUNSEL FOR MORE INFORMATION.**

## **EXHIBIT 5**

Class Member ID Number: \_\_\_\_\_

(Legal Notice)  
SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

**If You Purchased a Nike+ FuelBand Between January 19, 2012 and \_\_\_\_\_,  
You May Be Eligible for a Payment from a Class Action Settlement.**

A proposed settlement has been reached in a class action lawsuit against Nike, Inc. and Apple Inc. regarding the Nike+ FuelBand's ability to accurately track steps taken, calories burned, and NikeFuel. *Levin et al. v. Nike, Inc. et al.*, Case No. BC509363 (L.A. Super. Ct.) Nike and Apple deny the claims in the lawsuit. The Court has not decided which side is right.

**Who's Included In The Class?** Nike's or Apple's records show you may be a Settlement Class Member. The Settlement Class includes anyone who purchased a Nike+ FuelBand from January 19, 2012 through \_\_\_\_\_.

**What Are the Settlement Terms?** You can make a claim for either a Fifteen Dollar (\$15) payment or a Twenty-Five Dollar (\$25) gift card redeemable at Nike-owned stores in the U.S. or Puerto Rico, and online at Nike.com. The \$25 gift card is freely transferable and will not expire. The number of claims that you may submit depends on the number of Nike+ FuelBands that you purchased. To receive a Settlement payment or gift card, you must complete and submit a claim form by [date]. Information regarding how to fill out and submit claim forms can be found online at [www.\\_\\_\\_\\_\\_.com](http://www._____.com) or by calling \_\_\_\_\_. If you remain in the class you will release your claims against Nike and Apple.

**Your Rights May Be Affected.** If you do not want to be legally bound by the settlement, you must exclude yourself by \_\_\_\_\_, 2015. If you stay in the settlement, you may object to it by \_\_\_\_\_, 2015. Instructions on how to exclude yourself or object are contained in the detailed notice at the website listed below. The Court is scheduled to hold a hearing on \_\_\_\_\_, 2015, at \_\_\_\_\_ to consider whether to approve the settlement, Class Counsel's request for attorneys' fees of up to Two Million, Four Hundred Thousand Dollars (\$2,400,000.00), and service award for the Class Representative. You can appear at the hearing, but you do not have to. You can hire your own attorney, at your own expense, to appear or speak for you at the hearing. For more information visit the website.

[www.\\_\\_\\_\\_\\_.com](http://www._____.com)

## **EXHIBIT 6**

**(Legal Notice)**  
**SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
**FOR THE COUNTY OF LOS ANGELES**

**If You Purchased a Nike+ FuelBand, You May be Eligible  
for a Payment from a Class Action Settlement.**

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A California state court has authorized this notice. This is not a solicitation from a lawyer.

A proposed settlement has been reached in a class action lawsuit against Nike, Inc. and Apple Inc. regarding the Nike+ FuelBand. The Nike+ FuelBand is a wristband that utilizes an accelerometer to track physical activity, measure NikeFuel, and tell the time of day. The lawsuit is pending in the Superior Court of the State of California for the County of Los Angeles, Case No. BC509363, before the Honorable William F. Highberger.

**What Is This Case About?**

The lawsuit claims that Nike and Apple engaged in violations of consumer protection laws in connection with the Nike+ FuelBand. More specifically, the lawsuit alleges, among other things, that false and/or misleading statements were made regarding the Nike+ FuelBand and that there were breaches of the warranty terms of the Nike+ FuelBand. Nike and Apple deny the claims in the lawsuit and maintain that they did nothing wrong or illegal. The Court has not decided which side is right.

**Who Is Included?**

The Settlement includes anyone who purchased a Nike+ FuelBand, from January 19, 2012 through **[date of order granting preliminary approval of settlement]**.

To be included in the Settlement Class, you must have, during the time period listed above, purchased a Nike+ FuelBand. If you are not sure whether you are in the Settlement Class, visit the Settlement website **[WEBSITE]** or call the number listed below.

**What Are The Settlement Terms?**

Class members who submit valid, timely claims by **[insert date]** will receive, at their option, either a \$15 payment or a \$25 gift card redeemable at Nike-owned stores in the U.S. and Puerto Rico, and online at Nike.com, for each Nike+ FuelBand they purchased.

**How And When Do I Get Paid?**

Upon timely submitting a valid Claim Form, which is available on the website **[WEBSITE]**, you will be eligible to receive a payment by check or gift card after the settlement is approved and any appeals are addressed. Payment can take time. Please be patient.

**What Will Be Decided At The Fairness Hearing?**

The Court will have a hearing, currently set for \_\_\_\_\_, 2015 but subject to change, to consider whether to approve the Settlement, a request for attorneys' fees, costs and expenses, as well as a service award for the class representative. You can appear at the hearing (see instructions below), but you don't have to. You can hire your own attorney at your own expense to appear or speak for you at the hearing. You can call the toll-free number or visit the website to learn more about how to exclude yourself from or object to the Settlement.

**What Are My Legal Rights?**

You have three options:



- **Remain in the settlement class.** If you are a class member and you do not exclude yourself from the settlement class, you will be bound by the terms of the settlement and give up your right to sue regarding issues in this case. **To obtain a payment under the Settlement Agreement, you must submit a Claim Form.** You can obtain and submit a Claim Form at the website below. All Claim Forms must be received by [date].
- **Request to be excluded.** The Court will exclude you from the settlement class only if you submit a request for exclusion to the Settlement Administrator. The specific details for excluding yourself from the settlement are in the detailed notice available at the website below. Requests must be received by [date]. *If you do not exclude yourself, you will release claims that were or could have been made.*
- **Object to the Settlement, the Attorney's Fees and Expenses, or the Class Representative's Service Award.** If you do not exclude yourself from the settlement class, you may object to it by yourself or through an attorney who you hire at your own expense. The specific details for filing an objection are in the detailed notice available at the website below. Any objection must be postmarked no later than [date]. You will be bound by the terms of the settlement if your objection is rejected.

#### **How Can You Get More Information?**

If you have questions or want a detailed notice or other documents about this lawsuit and your rights, visit [WEBSITE]. You may also contact the Settlement Administrator by calling [insert toll-free phone number]. Please do not contact the Court, Nike, or Apple with questions regarding this lawsuit.

By the Order of the Honorable William F. Highberger, Los Angeles Superior Court Judge.

## **EXHIBIT 7**

***Levin et al. v. Nike, Inc. et al.*, Case No. BC509363 (L.A. Super. Ct.)**

**EXCLUSION FORM**

Fill out this form only if you wish to exclude yourself from the class in *Levin et al. v. Nike, Inc. et al.*, Case No. BC509363 (L.A. Super. Ct.). If you exclude yourself, you will not share in any benefit of the Settlement Agreement in this case and you will not have the ability to object to the Settlement.

I hereby exclude myself from the class in *Levin et al. v. Nike, Inc. et al.*, Case No. BC509363 (L.A. Super. Ct.).

Full Name: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone number: \_\_\_\_\_

Date: \_\_\_\_\_

Signature: \_\_\_\_\_

Mail this Exclusion Form to

**[INSERT NAME AND ADDRESS OF SETTLEMENT ADMINISTRATOR]**

**DO NOT WRITE BELOW HERE**

## **EXHIBIT 8**

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3  
4  
5  
6  
7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF LOS ANGELES  
10

11 CAROLYN LEVIN, in Her Individual and  
12 Representative Capacity on Behalf of a Class  
of All Persons Similarly-Situated,

13 Plaintiff,

14 v.

15 NIKE, INC., an Oregon Corporation; APPLE  
16 INC., a California Corporation; and DOES 1  
through 10, inclusive,

17 Defendant.  
18  
19

CASE NO. BC509363

**[PROPOSED] FINAL ORDER AND  
JUDGMENT GRANTING APPROVAL TO  
PROPOSED SETTLEMENT**

Assigned to Hon. William F. Highberger

Place: Department 322

20 WHEREAS, on \_\_\_\_\_, 2015, this Court entered an Order Granting Preliminary  
21 Approval of Proposed Settlement (the "Preliminary Approval Order"), preliminarily approving the  
22 proposed settlement of the Action pursuant to the terms of the Settlement Agreement and directing  
23 that notice be given to the members of the Settlement Class;

24 WHEREAS, pursuant to the Parties' plan for providing notice to the Settlement Class (the  
25 "Notice Plan"), the Settlement Class was notified of the terms of the proposed Settlement and of a  
26 Final Approval Hearing to determine, inter alia, whether the terms and conditions of the Settlement  
27 Agreement are fair, reasonable and adequate for the release and dismissal of the Released Claims  
28 against the Released Parties; and

1 WHEREAS, a Fairness Hearing was held on \_\_\_\_\_. Prior to the Fairness  
2 Hearing, proof of completion of the Notice Plan was filed with the Court, along with declarations of  
3 compliance. Settlement Class Members were therefore notified of the terms of the proposed  
4 settlement and their right to appear at the hearing in support of or in opposition to the proposed  
5 Settlement;

6 NOW, THEREFORE, the Court, having heard the oral presentations made at the Final  
7 Approval Hearing, and having reviewed all of the submissions presented with respect to the proposed  
8 Settlement, and having determined that the Settlement is fair, adequate, and reasonable and entered  
9 into in good faith, and having reviewed the materials in connection therewith, it is hereby  
10 ORDERED, ADJUDGED AND DECREED THAT:

11 1. The capitalized terms used in this Order and Judgment shall have the same meaning as  
12 defined in the Settlement Agreement except as may otherwise be ordered.

13 2. The Court has jurisdiction over the subject matter of this Action and over all claims  
14 raised therein and all Parties thereto, including the Settlement Class.

15 3. The Court finds, solely for purposes of this Settlement, that the requirements of  
16 California Code of Civil Procedure sections 382 and 1781 are satisfied, including requirements for  
17 the existence of an ascertainable class, a community of interest, and manageability of a settlement  
18 class, that common issues of law and fact predominate, and that a settlement class is superior to  
19 alternative means of resolving the claims and disputes at issue in this Action.

20 4. The Settlement Class, which will be bound by this Final Approval Order and  
21 Judgment, shall include all members of the Settlement Class who did not submit a timely and valid  
22 Request for Exclusion. The members of the Class who have requested exclusion are identified on  
23 Exhibit A hereto.

24 5. For purposes of the Settlement and this Final Approval Order and Judgment, the Class  
25 shall consist of all customers in the United States who purchased or received a Nike+ FuelBand from  
26 the time period from and including January 19, 2012, through **[insert date of the Order granting**  
27 **preliminary approval of the settlement]**. Excluded from the class are all persons who timely  
28

1 elected to exclude themselves from the class and the Court and staff to whom this case is assigned,  
2 and any member of the Court's or Court staff's immediate family.

3 6. The Court finds that the Notice Plan set forth in the Settlement Agreement and  
4 effectuated pursuant to the Preliminary Approval Order constitutes the best notice practicable under  
5 the circumstances and shall constitute due and sufficient notice to the Class of the pendency of this  
6 Action, certification of the Class for settlement purposes only, the terms of the Settlement  
7 Agreement, and the Final Approval Hearing, and satisfies the requirements of California law and  
8 federal due process of law.

9 7. The Settlement, as set forth in the Settlement Agreement and this Order is in all  
10 respects fair, reasonable, adequate and in the best interests of the Class, and it is approved. The  
11 Parties shall effectuate the Settlement Agreement according to its terms. The Settlement Agreement  
12 and every term and provision and exhibit thereof shall be deemed incorporated herein as if explicitly  
13 set forth and shall have the full force of an Order of this Court.

14 8. Upon the Effective Date, the Releasors shall have, by operation of this Final Approval  
15 Order and Judgment, fully, finally and forever released, relinquished, and discharged the Releasees  
16 from all Released Claims pursuant to Section VI of the Settlement Agreement.

17 9. Settlement Class Members, including the Class Representative, and the successors,  
18 assigns, parents, subsidiaries, affiliates or agents of any of them, are hereby permanently barred and  
19 enjoined from instituting, commencing or prosecuting, either directly or in any other capacity, any  
20 Released Claim against any of the Releasees.

21 10. This Final Approval Order and Judgment, the Settlement Agreement, the Settlement  
22 which it reflects, and any and all acts, statements, documents or proceedings relating to the  
23 Settlement are not, and shall not be construed as, or used as an admission by or against Nike or Apple  
24 or any other Releasee of any fault, wrongdoing, or liability on their part, or of the validity of any  
25 Released Claim or of the existence or amount of damages.

26 11. Except as otherwise provided in this Order and/or in this Court's Order Awarding  
27 Attorneys' Fees and Expenses in this Action, entered in response to Class Counsel's motion therefor  
28 brought in connection with the Settlement, the parties shall bear their own costs and attorneys' fees.

12. Without affecting the finality of the Judgment hereby entered, the Court reserves jurisdiction over the parties and implementation, administration, construction, supervision, and enforcement of the Settlement Agreement, including any releases in connection therewith, and any other matters related or ancillary to the foregoing.

**IT IS SO ORDERED.**

Dated:

Honorable William F. Highberger  
Judge of the Superior Court