

**IN THE UNITED STATES DISTRICT COURT
FOR WESTERN DISTRICT OF PENNSYLVANIA**

STACIE KOBYLANSKI, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

MOTOROLA MOBILITY, INC.,
a Delaware corporation.

Defendant.

Civil Action No.

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

Plaintiff Stacie Kobylanski (“Plaintiff”), by her attorneys, brings this class action on behalf of herself and similarly-situated others (the “Class) who purchased Motorola Mobility, Inc.’s (“Motorola” or the “Defendant”) MOTOACTV “GPS sports watch” (“MOTOACTV product”), and make the following assertions pursuant to the investigations of counsel and upon information and belief, except as to the assertions specifically pertaining to herself and her counsel, which are based on personal knowledge:

NATURE OF THE ACTION

1. This is a class action against Motorola arising out of the marketing and sale of its MOTOACTV “GPS sports watch” (“MOTOACTV product”).¹ Defendant’s marketing and promotion of the MOTOACTV product relies on false and misleading claims about durability and suitability of the MOTOACTV product as a wearable fitness performance tracker product designed to be used outdoors and/or during physical activity.

¹ The MOTOACTV product comes in several memory capacities including 8GB and 16GB models.

2. Through an extensive, nationwide marketing and advertising campaign, Motorola has conveyed the message that its MOTOACTV product is a rugged and durable device that is sweat-proof and rain-resistant.

3. Defendant's representations are false and misleading. The MOTOACTV product is neither sweat-proof nor rain-resistant and thus not suitable to be used as a wearable fitness performance tracker as advertised. When used as instructed, the MOTOACTV product will come into contact with sweat and moisture, causing the product to malfunction.

4. Additionally, despite its representations that the MOTOACTV product is sweat-proof and rain-resistant, Motorola has exhibited a uniform and nationwide policy of routinely denying warranty claims for water damage to the MOTOACTV product resulting from its exposure to sweat and moisture.

5. Plaintiff seeks relief in this action individually, and as a class action on behalf of similarly situated purchasers of the MOTOACTV product for breach of express warranty, for breach of the implied warranty of merchantability, and for violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.*

THE PARTIES

6. Plaintiff Kobylanski is a citizen of Pennsylvania. Plaintiff Kobylanski purchased a MOTOACTV product (8GB) from a retailer, 800 Photo Video in July of 2012. Plaintiff Kobylanski saw and read the representations concerning the MOTOACTV product (including the product's label) prior to and at the time of purchase and understood them as a representation and warranty by Motorola that the MOTOACTV was a rugged device that was sweat-proof and rain-resistant. She relied on these representations and warranties in deciding to purchase the MOTOACTV product, and these representations and warranties were part of the basis of the

bargain, in that she would not have purchased the MOTROACTV product if she had known that it was not, in fact, sweat-proof and rain-resistant. She also understood that in making the sale, the retailer was acting with the knowledge and approval of Motorola and/or as the agent of Motorola. Plaintiff purchased the MOTOACTV product, and paid a premium over comparable fitness performance tracking products, in reliance on Defendant's promises that MOTOACTV was sweat-proof and rain resistant, as well as the promise that it was fit for use as a wearable fitness performance tracker. In return, she received a product that was neither durable nor suitable as a wearable fitness performance tracker product designed to be used outdoors and/or during physical activity and exercise. In fact, even though Plaintiff used the MOTOACTV as advertised, the product malfunctioned weeks after the purchase of the MOTOACTV product.

7. Defendant Motorola is a Delaware corporation with a principal place of business at 600 N. U.S. Highway 45, Libertyville, Illinois 60048. Motorola is a leading manufacturer and seller of mobile devices, including smartphones, tablets and a broad range of wireless or mobile accessories, end-to-end video and data delivery, and set-tops and data access devices. Motorola manufactures, produces, and sells the MOTOACTV product.

JURISDICTION AND VENUE

8. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332(d) because there are more than 100 Class members and the aggregate amount in controversy exceeds \$5,000,000.00, exclusive of interest, fees, and costs, and at least one Class member is a citizen of a state different from Defendant.

9. This Court has jurisdiction because Plaintiff is a resident of Pennsylvania and because Defendant is an Illinois corporation (diversity jurisdiction).

10. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391 because Defendant does business throughout this district, and a substantial part of the events giving rise to Plaintiff Kobylanski's claims took place within this judicial District.

FACTS COMMON TO ALL CAUSES OF ACTION

A. Mobile Fitness Device Market

11. In the 1960's various militaries around the world began developing headgear with displays for aviators in combat. Thereafter, companies began experimenting with various forms of wearable devices integrating microchips and sensors. These devices, however, were not only bulky and obtrusive, but they were plagued with a multitude of problems, including technological limitations, power management, and heat dissipation issues.

12. Significant developments in sensor and microelectronic technology as well as advances in material science and battery power have led to a rapidly evolving market for wearables. Furthermore, an increasing number of low-cost sensors available for many different kinds of applications and functionality have only added to the pace. Some of the recent developments in sensors that have become commonplace include movement (via accelerometer), sound, light, electrical potential (via potentiometer), temperature, moisture, location (via GPS), heart rate and heart rate variability, and GSR (galvanic skin response or skin conductivity). Other sensors include ECG/EKG (electrocardiography to record the electrical activity of the heart), EMG (electromyography to measure the electrical activity of muscles), EEG (electroencephalography to read electrical activity along the scalp), and PPG (photoplethysmography to measure blood flow volume).

13. With the growth of sensors and microelectronics, the potential uses of wearable-computing technologies have evolved into the health and fitness market. In fact, ABI Research

estimates the market for wearables in health and fitness/sports sectors will grow to nearly 170 million devices by 2017, an annual growth rate of 41%.

B. Defendant Introduces The MOTOACTV Product To Capitalize On Growing Mobile Fitness Market

14. In the fall of 2011, Defendant announced it was entering the fast growing market for mobile fitness and health devices. Specifically, on October 18, 2011, Motorola issued a press release² announcing it was releasing the “WORLD’S FIRST GPA FITNESS TRACKER AND MP3 PLAYER, IN ONE,”³ which it billed as “[t]he Ultimate Fusion of Music and Fitness.” The device, a wearable fitness performance tracker product, or “GPS sports watch” known as the MOTOACTV was directly marketed towards the outdoor segment of consumers seeking to wear the product while exercising or working out. According to the press release:

Scorch more calories, shatter personal records and train even harder with MOTOACTV™, the new fitness device from Motorola, Inc. (NYSE:MMI). MOTOACTV is a lightweight, wearable fitness performance tracker and smart music player in one. Sync MOTOACTV with your PC, so you can check out the music you perform to best or track your workouts over extended time periods, set goals and even create workout competitions with your friends via the MOTOACTV Web Portal.

Run. Ride. Jam

Heart pumping, thighs burning and five laps to go. You need a serious soundtrack to get you through. MOTOACTV can rock up to 4,000 of your favorite songs while tracking your every move, from the Rockies to the gym. Ultra-portable, you choose the way you want to wear MOTOACTV: strap it on your wrist or arm, clip it to your shirt or mount it on your bike during an outdoor ride.

²See <http://mediacenter.motorola.com/Press-Releases/Motorola-Mobility-Unveils-MOTOACTV-The-Ultimate-Fusion-of-Music-and-Fitness-3871.aspx> (last accessed August 1, 2013).

³ See <https://motoactv.com/> (last accessed on August 1, 2013).

15. Moreover, to reinforce this perception, Defendant's press release touts that the MOTOACTV product is "sweat-proof" and "rain-resistant." According to the October 18, 2011, press release:

MOTOACTV will rock your fitness goals with the following features:

- Sports a 1.6" full-color touch-screen display that is sweat-proof, rain-resistant and scratch-resistant Corning® Gorilla® Glass that auto-adjusts for indoor or outdoor lighting

16. Moreover, the "Fact Sheet" accompanying the October 18, 2011 initial press release⁴ states:

Feel the burn and the beat with MOTOACTV™, a cutting-edge GPS fitness tracker, heart rate monitor-enabled* and smart music player packed into a small, sweat proof and stylish device.

Designed for Champions

Breaking a sweat? Don't worry about it. MOTOACTV is sweat-proof, rain-resistant and features a scratch-resistant Corning® Gorilla® Glass display so you can work out anywhere.

17. The MOTOACTV product, which was offered in 8G and 16G memory capacity versions, was initially available online at www.motorola.com, Amazon.com, Bestbuy.com®, REI.com and SportsAuthority.com and at the following national retailers Best Buy®, Eastern Mountain Sports, REI, The Sports Authority. Moreover, at time of its initial product offering, the manufacturer's suggested retail price ("MSRP") was \$249 for 8G model and \$299 for 16G model. Furthermore, Motorola offered the SF700 and Motorola SF500 sports headphones, sold separately at \$149 and \$99 MSRP respectively.

⁴ See <https://mediacenter.motorola.com/Fact-Sheets/MOTOACTV-Fact-Sheet-3870.aspx> (last accessed August 1, 2013).

C. Defendant's False And Misleading Advertising Campaign

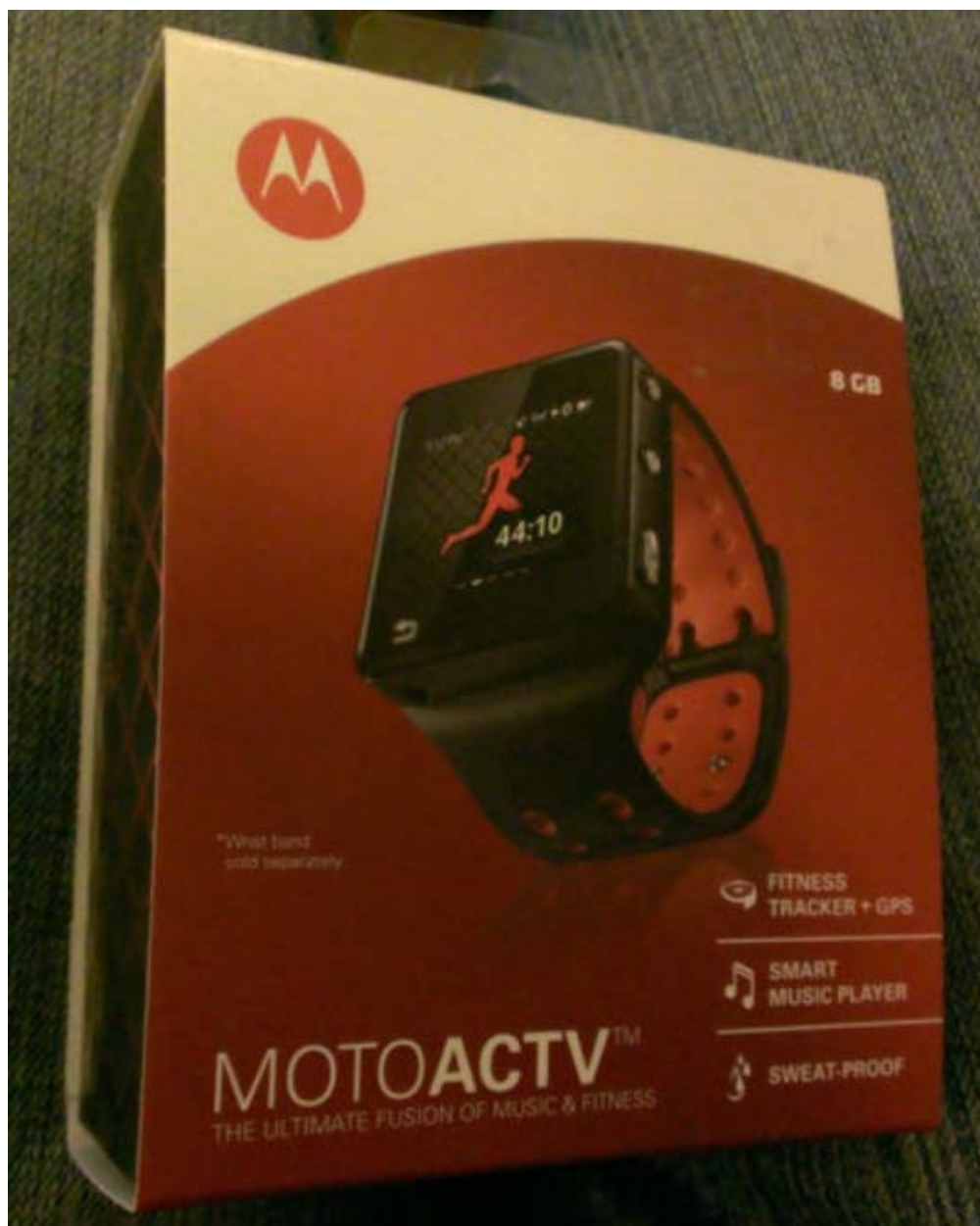
18. Defendant has engaged in a massive, uniform marketing and advertising campaign designed to convince consumers that the MOTOACTV product is a rugged, durable device that is "sweat-proof" and "rain-resistant." This long-term campaign, which occurred over several years and several forms of media, involved the dissemination of materially false and misleading statements which represent, both expressly and by implication, that the MOTOACTV is "sweat-proof" and "rain-resistant."

19. Furthermore, Defendant's false statements about the MOTOACTV product's ability to not be damaged by sweat or moisture also amounts to a false and misleading promise that the MOTOACTV product is fit for use as a wearable fitness performance tracker during physical activity and in various climates.

20. Defendant's MOTOACTV packaging, television advertisements, and Internet sites are replete with false and misleading statements about the nature, characteristics, and qualities of the MOTOACTV product. Specifically, Defendant repeatedly makes claims that the MOTOACTV product is not only "rugged", but more specifically "sweat proof" and "rain resistant."

21. For example, MOTOACTV's packaging label prominently states that the MOTOACTV is "Sweat-Proof."

22. Furthermore, the MOTOACTV's package label also includes a false and misleading graphic showing a running figure on the screen of the product, indicating that the MOTOACTV device is intended for use during a workout, where sweating is virtually guaranteed. These misrepresentations are visible on the product packaging below:



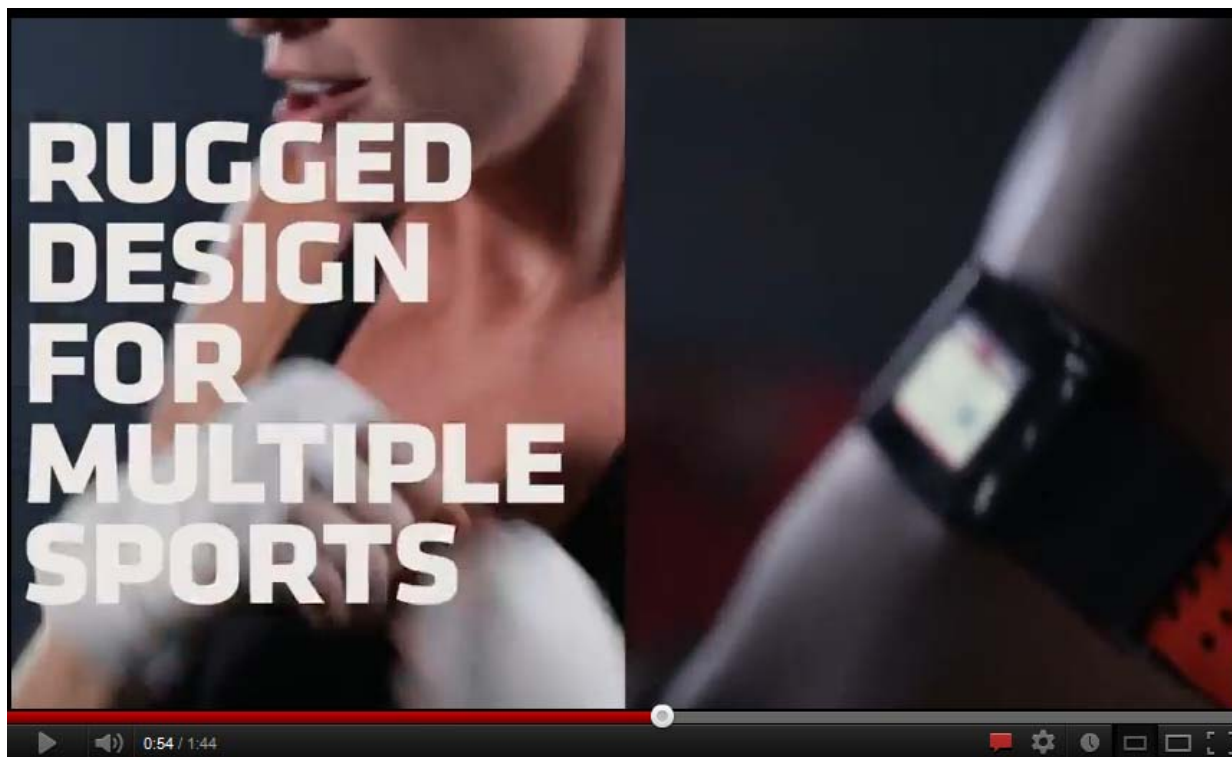
23. Similarly, Defendant has featured these false and misleading representations in television and online commercials. For example, Defendant's produced a one minute, forty-four second video advertisement for the MOTOACTV product that makes false and misleading representations about the product's durability⁵ and suitability as a wearable fitness performance

⁵ Available at http://www.youtube.com/watch?feature=player_embedded&v=C3SIbokHetQ (last accessed August 1, 2013).

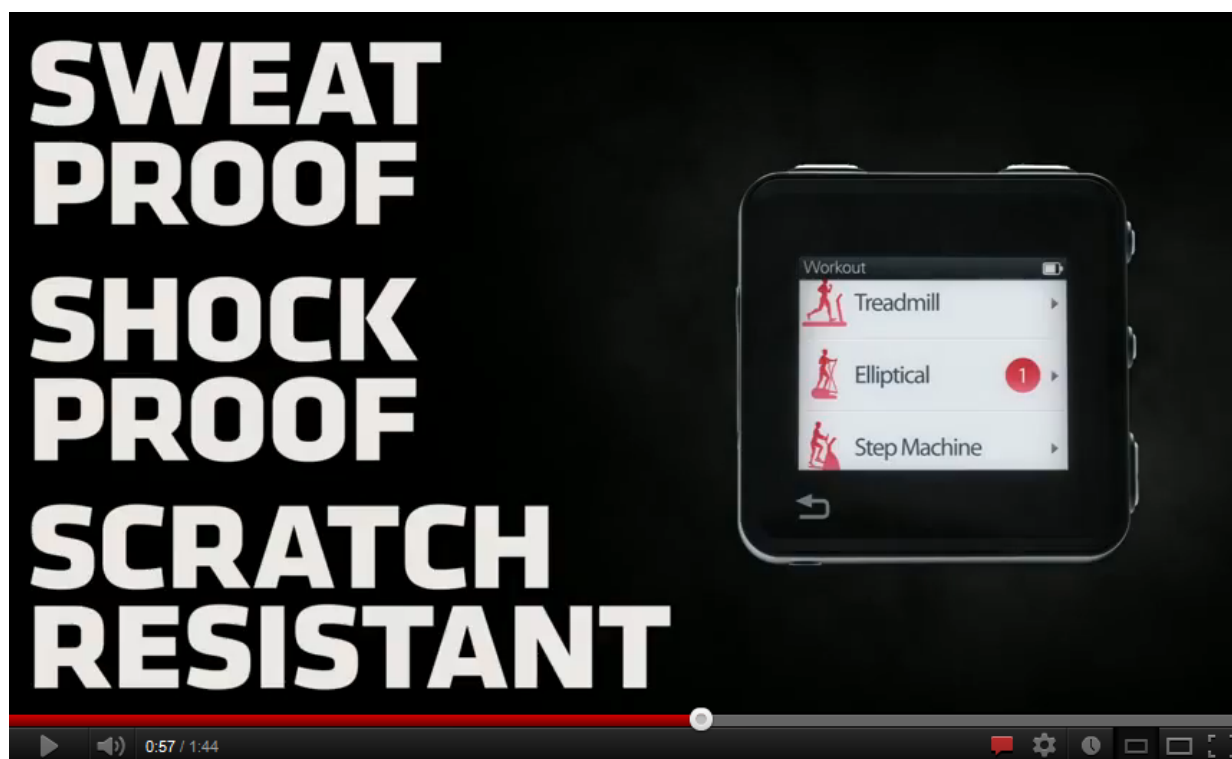
tracker. The commercial, marketed to towards consumers who want to use and wear the product while exercising, repeatedly represents that the device is designed to be worn and used while exercising. The MOTOACTV commercial is replete with images of sweaty athletes and/or actors working out while wearing the MOTOACTV product.







24. The commercial prominently states that the MOTOACTV product is “***SWEAT PROOF***,” “SHOCK PROOF,” and “SCRATCH RESISTANT.” (emphasis added)



25. Furthermore, Motorola's deceptive and misleading marketing campaign includes misrepresentations made on billboards and in retailer advertisements, including retailers' websites.

26. Motorola uses a series of billboards to advertise the MOTOACTV product, depicting famous entertainers side-by-side with sweaty athletes. For example, a billboard in New York depicts Gene Simmons from the band *KISS* side-by-side with a sweaty cyclist:



27. Another billboard in New York depicts guitarist Slash next to a sweaty boxer athlete:



28. National retailers utilize the same promotional materials on their websites. For example, Best Buy's webpage dedicated to the MOTOACTV product⁶ contains the same image of rock guitarist Slash and a sweaty athlete, highlighting prominent features including that the product is "Sweat proof, rain resistant and shock proof":

⁶ See

<http://www.bestbuy.com/site/olstemplatemapper.jsp?id=pcat17080&type=page&qp=cpcmcat242800050021%23%23-1%23%23-1~q70726f63657373696e6774696d653a3e313930302d30312d3031~nf1151%7C%7C4d6f746f726f6c61&list=y&nrp=15&sc=HealthFitnessSP&sp=-bestsellingsort+skuid&usc=pcmcat242800050021> (last accessed August 1, 2013).



29. Additionally, Motorola advertises MOTOACTV on the Internet at <https://motoactv.com/> and http://www.motorola.com/us/consumers/8GB-or-16GB-MOTOACTV/79070,en_US,pd.html. The websites contain multiple representations that MOTOACTV is sweat-proof, rain-resistant, and fit for use as a wearable fitness performance tracker. For example, in the “Our Technology” section of the MOTOACTV website,⁷ Motorola states:

Who wants to futz with confusing controls? MOTOACTV’s touch screen display is totally clear, indoors and out. And the MOTOACTV device is built for your toughest training, so it's sweat proof, rain resistant, and scratch resistant - just like you.

⁷ See <https://motoactv.com/default/ourtechnology.fil> (last accessed August 1, 2013).

30. Motorola's website represents that the MOTOACTV product is fit for use as a wearable fitness performance tracker for several activities including cycling, fitness, running, coaching and golf, and depicts athletes wearing the MOTOACTV while exercising.⁸

WORLD'S FIRST GPS FITNESS TRACKER AND MP3 PLAYER, IN ONE



WHO'S TRAINING WITH MOTOACTV?



Dean Karnazes - Marathoner



Danielle Dupree - Trainer



Chris Carmichael - Coach

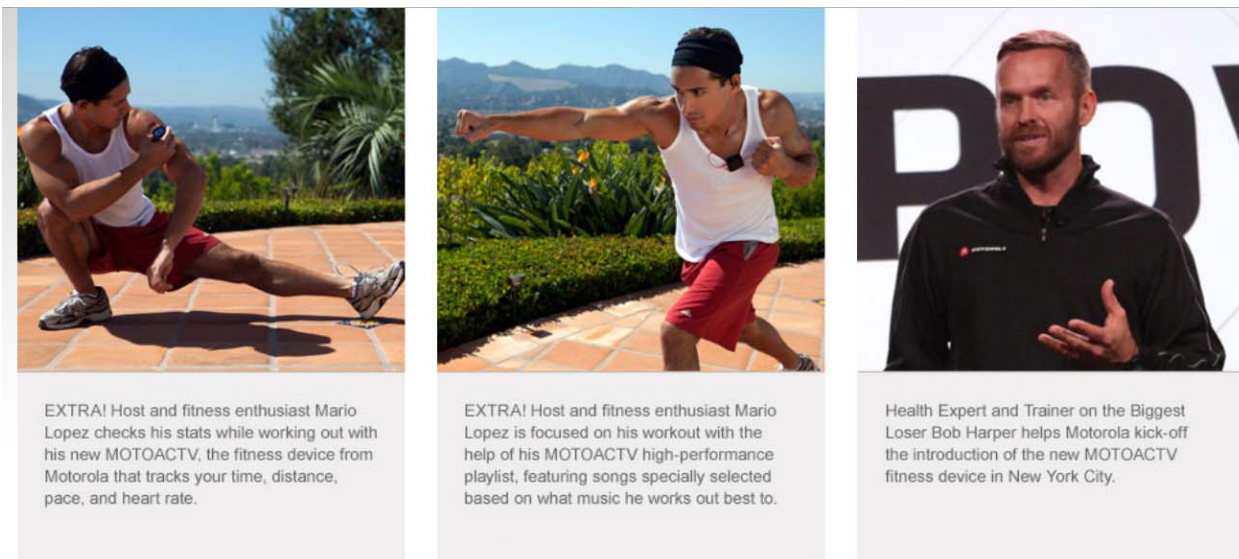


Bubba Watson - Pro Golfer

31. Another Motorola website depicts celebrities using the MOTOACTV while exercising.⁹

⁸ See <https://motoactv.com/> (last accessed on August 1, 2013).

⁹ See http://www.motorola.com/us/consumers/8GB-or-16GB-MOTOACTV/79070.en_US.pd.html?selectedTab=tab-4&cgid=fitness-devices#tab (last accessed on August 1, 2013).



32. Moreover, on the specifications or “Specs” tabs of the MOTOACTV websites, Motorola states the product is “rain resistant” and “sweat-proof.”¹⁰

33. However, the claim that that MOTOACTV is “sweat-proof” and “rain resistant,” is false and misleading. Exposing the MOTOACTV product to sweat or moisture in the exact manner as advertised, causes the device to malfunction and renders it useless.

34. Plaintiff Kobylanski’s experience illustrates the falsity of Defendant’s claims. Kobylanski’s MOTOACTV device was used as directed (worn during an exercise session) and malfunctioned after coming into contact with sweat.

35. Indeed, multiple complaints on consumer websites and on Motorola’s website describe similar experiences of sweat damaging the MOTOACTV product. For example, the following complaints appear on internet web sites regarding the MOTOACTV:

¹⁰ See <https://motoactv.com/home/page/specs.html> and http://www.motorola.com/us/consumers/8GB-or-16GB-MOTOACTV/79070.en_US.pd.html?selectedTab=tab-2&cgid=fitness-devices#tab (last accessed on August 1, 2013).

My Motoactv doesn't seem to be sweat proof. The headphone jack is now dead and when sweat rolls off my face on the face of the unit it will changes displays and will not allow me to change it back. Is this normal? **¹¹

Another consumer wrote:

A few months ago my Motoactv stopped working. I sent it in for repair. It was not warrantied/fixed due to "liquid damage".**¹²

Another consumer wrote:

After several calls to Motorola's support line (totaling about four hours at least), I was directed to send in the device. Today, I received an email from their support team advising the device was damaged by water and could not be repaired. ** I don't particularly understand how I could have subjected the Motoactv to water damage. When I used it outside on my runs, it was always precipitation-free except for one day when it rained lightly. It was hot in Virginia during these days so I did get sweaty but not ridiculously so. I never used it as a MP3 player on a run so I never removed the headphone plug and made sure the USB seal was tight..¹³

Another consumer wrote:

I bought my Motoactv in January 2012. Since then I've been using it lightly for running and biking. ** A couple of weeks ago I noticed that the accelerometer was not working. I could not wake up the device shaking my wrist and the tap wouldn't read the metrics while working out. I decided to send it to repair since I was still under warranty. **Well, turns out that the device has liquid damage and they returned it unrepared. I have never put the Motoactv in contact with water. **So, basically, they are selling a fitness device that is not designed to withstand sweat while working out. GREAT.**¹⁴

Another consumer wrote:

I purchased my Motoactv at the end of March. I saw it on display at a 10k race in Florida. Stopped by Best Buy on the way home and bought it. Started using it for a couple runs a week. Noticed a few glitches here and there but, overall I was

¹¹ See <https://forums.motorola.com/posts/5d850d2f76> (last accessed August 1, 2013).

¹² See <https://forums.motorola.com/posts/6077c20c41> (last accessed August 1, 2013).

¹³ See <https://forums.motorola.com/posts/e4f561728e> (last accessed August 1, 2013).

¹⁴ See. <https://forums.motorola.com/posts/841f08cf4c> (last accessed August 1, 2013).

pretty satisfied with the product. Then, about a month ago the device on/off button stopped working. I finally got around to sending it in for repair. Got it back today - unrepaired. Motorola is citing liquid damage as the reason for invalidating warranty. I am blown away that this “cutting edge fitness device” is so easily damaged by liquid. I sweat quite a bit (Florida is hot/humid) and have gotten caught in the rain a couple times, but have never had the device in a body of water. In the letter the warranty department sent me it states they do not recommend continued use of the device. Well, I will take [their] advice and go back to using my Garmin! No more [M]otorola products for me. If you are still inclined to buy a Motoactv, do yourself a favor and purchase the stores warranty/insurance or just make sure you take it easy on your runs so you don't sweat.¹⁵

Another consumer wrote:

I have been using my new MotoActv 8GB GPS-enabled device a lot and enjoyed it very much. I run 4-5 times per week and have found it to be a great tool for my training. However, I'm sorry to say I can no longer endorse the product. In fact, do not buy it! I've had the device for about 6 months and then it started acting strangely. After several weeks, it would no longer charge (the battery would get very hot when charging) and then it just stopped working altogether.

I contacted Motorola customer service and returned the device for repair. To my utter amazement, I've just been informed that it will not be repaired or replaced because it “suffered liquid damage” which voids the warranty. Moto advertises (on their website, no less) that this device is rain resistant and sweat resistant. I have only used the device for running. It has gotten wet from sweat (i.e. wearing it on my wrist) and perhaps once in light rain. I always kept the plugs in place for the headphone jack and mini-USB. In no case was it ever submerged in water. The device is meant for use while exercising - if it cannot handle some exposure to moisture, then the DESIGN of the device is defective. I feel I am owed a refund for this product. But, Motorola is refusing to replace the device. This is baffling to me. Their response is the worst example of terrible customer service I have ever experienced.¹⁶

Another consumer wrote:

**I used it on 7 runs, with no rain, and always used grommet in the headphone jack when the headphones weren't connected. It stopped coming on. When I sent

¹⁵ See. <https://forums.motorola.com/posts/c4836f75f2> (last accessed August 1, 2013).

¹⁶ See http://www.amazon.com/review/R2V1VU79BXXBJ0K/ref=cm_cr_rdp_perm?ie=UTF8&ASIN=B005Q3144W&linkCode=&nodeID=&tag= (last accessed on August 1, 2013).

it back, this “NEW” unit is supposedly liquid damage and is not being replaced or repaired.**¹⁷

Another consumer wrote:

I sent mine in for repair over a week ago because the workout button stopped working. I NEVER had mine out in the rain once. Closest it has ever gotten near to water was when I would wash my hands. Just got the e-mail saying it had liquid damage and it isn't covered**¹⁸

Another consumer wrote:

Has anyone had their motoactv unit replaced after it receiving “liquid damage”? I am curious because Motorola touts the units being “sweatproof” in the manual, yet after getting a considerable amount of sweat on mine I found mine to stop working. I wouldn't call this sweatproof, and it sounds like a lot of other customers are having problems even with light rain killing their watches. I've already received mine back from tech support saying that this voids the warranty and I'm out of luck, which is incredibly frustrating. I now have a \$200 paperweight that I was able to use for about a month before it stopped working.¹⁹

Another consumer wrote:

I've had my Motoactv for about four months. Unfortunately, after a recent run with copious perspiration, it stopped working. It simply would no longer turn on. After repeated e-mails and phone calls to Motorola I was able to get an RMA number for its return. Unfortunately, Motorola decided that it was not repairable and not covered by the warranty; moisture damage.**²⁰

Another consumer wrote:

** I paid the full retail back when it was \$250. I'm not a rich man (still in college) and this is the most expensive thing I was allowing myself to buy for the year. As such, I planned on taking great care of it, because 250 is a huge investment for

¹⁷ See <https://forums.motorola.com/posts/490b24e91d?commentId=641361#641361> (last accessed on August 1, 2013).

¹⁸ See <https://forums.motorola.com/comment/655670> (last accessed August 1, 2013).

¹⁹ See <https://forums.motorola.com/posts/93855c54b3> (last accessed August 1, 2013).

²⁰ See http://www.amazon.com/review/R3D9ZEEQ3JUZQJ/ref=cm_cr_pr_perm?ie=UTF8&ASIN=B005Q3144W&linkCode=&nodeID=&tag= (last accessed on August 1, 2013).

me. ** The workout button stopped working a few weeks ago, so motorola asked me to send it to them for repair. After over a week of them holding it, they opened it up and discovered that it had liquid damage. I am not a sweaty man by many standards. I barely drip during a half marathon. To be told that it had liquid damage blew my mind!!! They sent the broken unit back to me to dispose of. ** Apparently it's not sweat proof regardless of if you use the grommet or the usb cover, and they won't cover the damage under warranty. The product says it is sweat proof. The head of motoactv forums assured me (in my previous review) that this product could handle light rain and sweat no problem as long as you use the heaphone grommet and usb cover ...well it didn't. Now I'm out \$250 plus the wrist band and bike sensors I purchased ... Plus I gotta find a new gps to keep up with my marathon training.²¹

36. Yet, after receiving a significant number of complaints from purchasers of MOTOACTV products, describing similar problems, Defendant has refused to disclose or correct the misrepresentations and/or problems.

37. Moreover, despite knowing and being fully aware of the misrepresentations, Defendant omitted and/or concealed the moisture issue from unsuspecting MOTOACTV purchasers at the time of sale and did not repair or upgrade the MOTOACTV units to correct the misrepresentations.

38. Defendant's false and misleading claims are in willful and wanton disregard of the interests of the consuming public, and constitute a knowing attempt by Defendant to deceive consumers.

39. Furthermore, not only is the MOTOACTV product not sweat-proof or rain resistant, and thus not fit for its advertised use, but exposing the MOTOACTV to sweat or rain excludes the product from coverage under Motorola's limited warranty.

²¹ See

http://www.amazon.com/review/R5SKOB6QPYOBI/ref=cm_cr_pr_perm?ie=UTF8&ASIN=B005Q3144W&linkCode=&nodeID=&tag= (last accessed August 1, 2013).

D. Motorola's Uniform and Nationwide Policy of Routinely Denying Class Members Their Bargained-For Warranty Rights

40. Motorola has established a uniform and nationwide policy of routinely denying all warranty claims when the MOTOACTV product malfunctions after it is exposed to sweat or rain.

41. Defendant claims that MOTOACTV is “sweat-proof,” “rain-resistant” and that it is an effective “lightweight, wearable fitness performance tracker and smart music player in one.” Defendant makes an express written warranty that the MOTOACTV product will be free from defects in materials and workmanship under normal consumer usage for one year after purchase. However, Motorola routinely denies consumers warranty coverage for MOTOACTV devices that malfunction after coming into contact with sweat.

42. Motorola fails to disclose to consumers prior to their purchasing a MOTOACTV device that Motorola's uniform and nationwide policy is to exclude the product from coverage under Motorola's limited warranty because exposure to sweat is defined therein as “Abuse & Misuse.”

43. This information is not disclosed to consumers until after they purchase the MOTOACTV product. Buried in the back of the product's user manual, is a warning against using MOTOACTV in precisely the manner it is advertised.²² Specifically, in the troubleshooting section, under the heading “Use & Care,” there is a warning to keep the MOTOACTV device from “liquids of any kind,” and to not expose the MOTOACTV device “to water, rain, extreme humidity, **sweat**, or other moisture” (emphasis added). Moreover, in listing

²² *Id.*

exclusions to the limited warranty, MOTOACTV's user manual characterizes "contact with liquid, water, rain, extreme humidity or heavy perspiration..." as "Abuse & Misuse."

Use & Care

To care for your Motorola product, please keep it away from:



liquids of any kind

Don't expose your product to water, rain, extreme humidity, sweat, or other moisture. If it does get wet, don't try to accelerate drying with the use of an oven or dryer, as this may damage the product.

Exclusions (Products and Accessories)

Normal Wear and Tear. Periodic maintenance, repair and replacement of parts due to normal wear and tear are excluded from coverage.

Batteries. Only batteries whose fully charged capacity falls below 80% of their rated capacity and batteries that leak are covered by this limited warranty.

Abuse & Misuse. Defects or damage that result from: (a) improper operation, storage, misuse or abuse, accident or neglect, such as physical damage (cracks, scratches, etc.) to the surface of the product resulting from misuse; (b) contact with liquid, water, rain, extreme humidity or heavy perspiration, sand, dirt or the like, extreme heat, or food; (c) use of the Products or Accessories for commercial purposes or subjecting the Product or Accessory to abnormal usage or conditions; or (d) other acts which are not the fault of Motorola, are excluded from coverage.

44. Indeed, Motorola has refused to refund, repair, or replace Plaintiff and Class members' MOTOACTV products once they have been damaged by exposure to sweat.

45. In fact, Plaintiff Kobylanski sought a refund, repair, or replacement for her purchase of a MOTOACTV product pursuant to Motorola's limited warranty, after the product malfunctioned after a light exercise routine. Specifically, Plaintiff returned the MOTOACTV product to Motorola in August of 2012, however, Defendant refused to refund, repair or replace the defective MOTOACTV device, citing water damage resulting from the product's exposure to Plaintiff's sweat while exercising.

46. Moreover, as seen in the above-cited consumer complaints, internet message boards are replete with complaints illustrating that Motorola routinely denies purchasers of the

defective MOTOACTV devices warranty coverage because the device has come into contact with water. *See supra* ¶ 36.

E. Defendant's False and Misleading Claims are Material

47. The representations at issue are ubiquitous. On billboards, commercial videos, in retail stores, on their respective internet websites, and on Defendant's website, Motorola makes the same representations about the MOTOACTV product, namely that the MOTOACTV product is sweat-proof, rain-resistant and fit for use as a wearable fitness performance tracker. Moreover, every package of the product contains these representations.

48. All of Defendant's claims challenged herein relate to matters that are material and important to a consumer's purchasing decision, as they concern core claims about the product which are likely to and did influence consumers' purchase of the MOTOACTV product.

49. Defendant's marketing, advertising, and packaging materials intended to, and did, induce Plaintiff and members of the Class to rely upon Defendant's representations that MOTOACTV was effective for its intended use, and in the way described. These representations were a substantial factor in causing Plaintiff and members of the Class to purchase the MOTOACTV product at a significant price increase instead of comparable GPS sports watches or wearable fitness performance trackers.

50. At the time Plaintiff and members of the Class purchased the MOTOACTV device, they were unaware of the fact that: (1) MOTOACTV was neither sweat-proof nor rain-resistant; (2) MOTOACTV was not fit for use as a wearable fitness performance tracker; and (3) using MOTOACTV for its intended use, and in the exact way as advertised by Motorola, caused MOTOACTV to not be covered by Motorola's limited warranty.

CLASS ACTION ALLEGATIONS

51. Plaintiff brings this action on behalf of themselves and all other similarly situated Pennsylvania residents pursuant to Rule 23(a), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure and seeks certification of the following Class: all consumers and entities who, within the applicable statute of limitations period, purchased the MOTOACTV product. Excluded from the Class are Motorola, its parents, subsidiaries, affiliates, officers and directors, and those who purchased these products for resale.

52. The members of the Class are so numerous that joinder of all members of the Class is impracticable. Plaintiff is informed and believes that the proposed Class contains thousands of purchasers of the Products who have been damaged by MOTOROLA's conduct as alleged herein. The precise number of Class members is unknown to Plaintiff.

53. This action involves common questions of law and fact, which predominate over any questions affecting individual Class members. These common legal and factual questions include, but are not limited to, the following:

(1) whether the claims discussed above are true, or are misleading, or objectively reasonably likely to deceive;

(2) whether Motorola's conduct violates public policy;

(3) whether the conduct constitutes violations of the laws asserted;

(4) whether Motorola engaged in false or misleading advertising;

(5) whether Plaintiff and Class members have sustained monetary loss and the proper measure of that loss; and

(6) whether Plaintiff and Class members are entitled to other appropriate remedies, including corrective advertising and injunctive relief.

2. Plaintiff's claims are typical of the claims of the members of the Class because,

inter alia, all Class members were injured through the uniform misconduct described above having been exposed to Motorola's false representations regarding the efficacy of MOTOACTV. Plaintiff is advancing the same claims and legal theories on behalf of himself and all members of the Class.

3. Plaintiff will fairly and adequately protect the interests of the members of the Class, has retained counsel experienced in complex consumer class action litigation, and intends to prosecute this action vigorously. Plaintiff has no adverse or antagonistic interests to those of the Class.

4. A class action is superior to all other available means for the fair and efficient adjudication of this controversy. The damages or other financial detriment suffered by individual Class members is relatively small compared to the burden and expense that would be entailed by individual litigation of their claims against Motorola. It would thus be virtually impossible for the Class, on an individual basis, to obtain effective redress for the wrongs done to them. Individualized litigation would create the danger of inconsistent or contradictory judgments arising from the same set of facts and would also increase the delay and expense to all parties and the courts. By contrast, the class action device provides the benefits of adjudication of these issues in a single proceeding, ensures economies of scale and comprehensive supervision by a single court, and presents no unusual management difficulties under the circumstances here.

5. Plaintiff seeks preliminary and permanent injunctive and equitable relief on behalf of the entire Class, preventing Motorola from further engaging in the acts described and requiring Motorola to provide full restitution to Plaintiff and Class members.

6. Unless a Class is certified, Motorola will retain monies received as a result of its conduct that were taken from Plaintiff and Class members. Unless a Class-wide injunction is

issued, Motorola will continue to commit the violations alleged, and the members of the Class and the general public will continue to be deceived.

7. Motorola has acted and refused to act on grounds generally applicable to the Class, making appropriate final injunctive relief with respect to the Class as a whole.

8. MOTOROLA has acted and refused to act on grounds generally applicable to the Class, making appropriate final injunctive relief with respect to the Class as a whole.

COUNT I
(For Breach Of Express Warranty)

54. Plaintiff repeats the allegations contained in the above paragraphs as if fully set forth herein.

55. Plaintiff brings this Count individually and on behalf of the members of the Class against Defendant.

56. Defendant expressly warranted through advertisements, online marketing, and the product packaging and labeling that MOTOACTV is sweat-proof and rain-resistant.

57. Defendant's warranty was expressly disclosed to Plaintiff and Class members on the product packaging and in advertisements and promotional materials. Plaintiff and Class members purchased the MOTOACTV device based upon the above said express warranties. Plaintiff and Class members relied on the truthfulness of the express warranties asserted by Defendant in deciding to purchase MOTOACTV product.

58. Defendant expressly warranted its goods to the ultimate consumers and the express warranties were the basis of the bargain.

59. Defendant breached their express warranties by selling a product that is not sweat-proof or rain-resistant.

60. As a direct and proximate result of Defendant's breach of its express warranty, Plaintiff and the Class Members were injured because: (a) they would not have purchased MOTOACTV on the same terms if the true facts concerning MOTOACTV's actual abilities to be sweat-proof and rain-resistant had been known; (b) they paid a price premium due to the misrepresentation of MOTOACTV's abilities to be sweat-proof and rain-resistant; and (c) MOTOACTV is not sweat-proof or rain-resistant as promised.

COUNT II
(For Breach Of Implied Warranty of Merchantability)

61. Plaintiff and Class members repeat and reallege each and every allegation above, as if set forth in full herein.

62. Plaintiff brings this Count individually and on behalf of the members of the Class against Defendant.

63. Defendant, as the designer, manufacturer, marketer, distributor, and/or seller impliedly warranted through advertisements and online marketing that MOTOACTV was fit for its intended purpose in that MOTOACTV is a sweat-proof, rain-resistant wearable fitness performance tracker. Defendant did so with the intent to induce Plaintiff and members of the Class to purchase the product.

64. Defendant breached its implied warranties in the contract for the sale of MOTOACTV in that MOTOACTV could not pass without objection in the trade under the contract description, the goods were not of fair average quality within the description, and the goods were unfit for their intended and ordinary purpose. As a result, Plaintiff and Class members did not receive the goods as impliedly warranted by Defendant to be merchantable.

65. In reliance upon Defendant's skill and judgment and the implied warranties discussed above, Plaintiff and Class members purchased MOTOACTV for use as a wearable fitness performance tracker to wear while exercising.

66. The MOTOACTV products were not altered by Plaintiff or Class members.

67. The MOTOACTV products were defective when they left the exclusive control of Defendant.

68. Defendant knew that MOTOACTV would be purchased and used without additional testing for efficacy by Plaintiff and Class members.

69. The MOTOACTV product was defectively designed and unfit for its intended purpose, and Plaintiff did not receive the goods as warranted. Had Plaintiff and the members of the Class known the true facts, they would not have purchased the MOTOACTV product on the same terms.

70. Plaintiff and Class members were injured as a direct and proximate result of Defendant's breach because (a) they would not have purchased MOTOACTV on the same terms if the true facts concerning MOTOACTV's actual abilities to be sweat-proof and rain-resistant had been known; (b) they paid a price premium due to the misrepresentation of MOTOACTV's abilities to be sweat-proof and rain-resistant; and (c) MOTOACTV is not sweat-proof, rain-resistant, nor fit for use as a wearable fitness tracker.

COUNT III
**(Violation of the Pennsylvania Unfair Trade Practices
and Consumer Protection Law, 73 P.S. § 201-1, *et seq.*)**

71. Plaintiff repeats the allegations contained in the above paragraphs as if fully set forth herein.

72. Plaintiff brings this claim individually and on behalf of the members of the Class against Defendant.

73. This count is predicated on allegations of deceptive conduct, and not on any allegation of fraud or fraudulent conduct.

74. Plaintiff and the members of the Class were harmed by Defendant's deceptive conduct as described herein.

75. Motorola's deceptive conduct, as described above, violates 73 P.S. § 201-2 (xxi), in particular, "engaging in any other ... deceptive conduct which creates a likelihood of confusion or of misunderstanding." Such deceptive conduct is "unlawful" as set forth in 73 P.S. § 201-3.

76. As a direct and proximate result of Motorola's deceptive conduct, Plaintiff and the Class have suffered damages provided for under the Consumer Protection Law, including statutory and treble damages, in an amount to be determined at trial.

WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, seeks judgment against Motorola, as follows:

A. For an order certifying the Class under Rule 23 of the Federal Rules of Civil Procedure and naming Plaintiff Kobylanski as Class Representative and her attorneys as Class Counsel to represent the Class members;

B. For an order declaring that Motorola's conduct violates the statute referenced herein;

C. For an order finding in favor of the Plaintiff and the Class on all counts asserted herein;

D. For an order awarding compensatory, treble, and/or punitive damages in amounts to be determined by the Court and/or jury;

E. For prejudgment interest on all amounts awarded;

- F. For an order of restitution and all other forms of equitable monetary relief;
- G. For injunctive relief as pleaded or as the Court may deem proper; and
- H. For an order awarding Plaintiff, the Class their reasonable attorneys' fees and expenses and costs of suit.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all claims so triable in this action.

Dated: August 16, 2013

Respectfully submitted,

/s/ R. Bruce Carlson

R. Bruce Carlson
Gary F. Lynch
Stephanie K. Goldin
Jamisen A. Etzel
CARLSON LYNCH LTD
PNC Park
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Tel: (412) 322-9243
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/s/ Benjamin J. Sweet

Benjamin J. Sweet
Edwin J. Kilpela, Jr.
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Pittsburgh, PA 15222
Tel: (412) 261-2393
Fax: (412) 261-2110

CIVIL COVER SHEET

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

I. (a) PLAINTIFFS

STACIE KOBYLANSKI, individually and on behalf of all others similarly situated,

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

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

Benjamin J. Sweet, Edwin J. Kilpela, Jr.
DEL SOLE CAVANAUGH STROYD LLC, 200 First Avenue, Suite 300
Pittsburgh, PA 15222 -- Tel: (412) 261-2393

DEFENDANTS

MOTOROLA MOBILITY, LLC,

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

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

Attorneys (If Known)

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

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

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

- | | PTF | DEF | | PTF | DEF |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
| Citizen of This State | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

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

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

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

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
73 P.S. § 201-1, et seq.

Brief description of cause:

Breach of express warranty, breach of implied warranty of merchantability and violation of PA Trade Practices

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

08/16/2013

SIGNATURE OF ATTORNEY OF RECORD

/s/ Benjamin J. Sweet

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

JS 44AREVISED June, 2009
IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
THIS CASE DESIGNATION SHEET MUST BE COMPLETED

PART A

This case belongs on the (☐ Erie ☐ Johnstown ☒ Pittsburgh) calendar.

1. **ERIE CALENDAR** - If cause of action arose in the counties of Crawford, Elk, Erie, Forest, McKean, Venang or Warren, OR any plaintiff or defendant resides in one of said counties.
2. **JOHNSTOWN CALENDAR** - If cause of action arose in the counties of Bedford, Blair, Cambria, Clearfield or Somerset OR any plaintiff or defendant resides in one of said counties.
3. Complete if on **ERIE CALENDAR**: I certify that the cause of action arose in _____ County and that the _____ resides in _____ County.
4. Complete if on **JOHNSTOWN CALENDAR**: I certify that the cause of action arose in _____ County and that the _____ resides in _____ County.

PART B (You are to check ONE of the following)

1. ☐ This case is related to Number _____. Short Caption _____.
2. ☒ This case is not related to a pending or terminated case.

DEFINITIONS OF RELATED CASES:

CIVIL: Civil cases are deemed related when a case filed relates to property included in another suit or involves the same issues of fact or it grows out of the same transactions as another suit or involves the validity or infringement of a patent involved in another suit
EMINENT DOMAIN: Cases in contiguous closely located groups and in common ownership groups which will lend themselves to consolidation for trial shall be deemed related.

HABEAS CORPUS & CIVIL RIGHTS: All habeas corpus petitions filed by the same individual shall be deemed related. All pro se Civil Rights actions by the same individual shall be deemed related.

PART C

I. CIVIL CATEGORY (Place **x** in only applicable category).

1. ☐ Antitrust and Securities Act Cases
2. ☐ Labor-Management Relations
3. ☐ Habeas corpus
4. ☐ Civil Rights
5. ☐ Patent, Copyright, and Trademark
6. ☐ Eminent Domain
7. ☐ All other federal question cases
8. ☐ All personal and property damage tort cases, including maritime, FELA, Jones Act, Motor vehicle, products liability, assault, defamation, malicious prosecution, and false arrest
9. ☒ Insurance indemnity, contract and other diversity cases.
10. ☐ Government Collection Cases (shall include HEW Student Loans (Education), V A Overpayment, Overpayment of Social Security, Enlistment Overpayment (Army, Navy, etc.), HUD Loans, GAO Loans (Misc. Types), Mortgage Foreclosures, SBA Loans, Civil Penalties and Coal Mine Penalty and Reclamation Fees.)

I certify that to the best of my knowledge the entries on this Case Designation Sheet are true and correct

Date: 08-16-2013

/s/ Benjamin J. Sweet

ATTORNEY AT LAW

NOTE: ALL SECTIONS OF BOTH FORMS MUST BE COMPLETED BEFORE CASE CAN BE PROCESSED.

Western District of Pennsylvania

Signature of Clerk or Deputy Clerk