



## **PRELIMINARY MOTION FOR CLASS CERTIFICATION**

Plaintiffs Andrea Katz and Joel Katz (“Plaintiffs”), on behalf of a class of similarly situated known and unknown consumers, request that this Court, pursuant to Fed.R.Civ. P. 23(a), (b)(3) and (g), and after a period for the parties to engage in class certification discovery and after Plaintiffs file supplemental evidentiary materials and a supporting memorandum of law, grant their Motion for Class Certification.

### **MEMORANDUM IN SUPPORT OF PRELIMINARY MOTION FOR CLASS CERTIFICATION**

#### **I. INTRODUCTION**

On March 6, 2014 Plaintiffs filed in this District a Class Action Complaint against Defendants for their ongoing, intentional, and deceptive course of business conduct with respect to the design, manufacture, marketing, distribution, sales and servicing of its watch, the Forerunner 610, which it sold to the general public in the United States (“Complaint”). On March 31, 2014, Defendants filed a Motion to Transfer Venue. The motion is fully briefed and scheduled for oral argument before this Court on September 26, 2014 [D.E.16]. Local Rule DUCivR 23-1(d) states that unless the Court rules otherwise, class certification motions need to be filed within 90 days of serving a Complaint. As the Motion to Transfer Venue is pending, and the defendants have not yet answered the Complaint, the parties have not yet commenced any discovery at this time. In compliance with the local rules of this Court, Plaintiffs now bring this preliminary motion for class certification.<sup>1</sup> Plaintiffs request leave to further supplement their

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<sup>1</sup>The 10<sup>th</sup> Circuit has specifically held that a nascent interest attaches to the proposed class upon the filing of a class complaint such that a rejected offer of judgment for statutory damages and costs made to a named plaintiff does not

preliminary motion, after a ruling from the Court on Defendant's pending Motion to Transfer Venue and also after formal discovery has been completed between the parties which will assist in defining the size and scope of the putative class.

## **II. PROPOSED CLASS DEFINITION**

Plaintiffs seek to certify a class of similarly situated individuals under Fed. R. Civ.

P. 23 defined as:

All persons and entities who purchased and used Forerunner watches, including, but not limited to, the Forerunner 610 series of watches, in the State of Utah and the United States and were damaged thereby due to the inferior quality of the product designed, manufactured and/or sold.

Plaintiffs request leave to further modify and amend their class definition after formal discovery has been exchanged and completed between the parties which will assist in further defining the scope of the putative class.

## **III. STANDARD FOR CLASS CERTIFICATION**

After a period of time which allows for formal discovery, Plaintiffs will supplement their Motion for Class Certification with supplemental evidentiary materials demonstrating that class certification of Plaintiffs' claims is appropriate because a group of similarly situated persons has been damaged by Defendants' actions. The Class Members were uniformly harmed.

A determination of class certification requires a two-step analysis. Fed. R. Civ. P. 23; *Pueblo of Zuni v. United States*, 243 F.R.D. 436 (D.N.M. 2007); *Spano v. Boeing Co.*, 633 F.3d 574, 582 (7th Cir. 2011). First, a plaintiff must demonstrate that the action satisfies the four threshold requirements of Rule 23(a): (1) Numerosity (the class must be so large that individual

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render the case moot under Article III. See *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1249-50 (10<sup>th</sup> Cir. 2011).

joinder is ‘impracticable’); (2) commonality (questions of law or fact common to the class); (3) typicality (named plaintiff’s claims are typical of the class’s claims); and (4) adequacy of representation (class representative must be able to fairly and adequately protect class interests). Fed. R. Civ. P. 23(a)(1) – (4); *Milonas v. Williams*, 691 F.2d 931, 938 (10th Cir. 1982).

Second, the action must qualify under one of the three subsections of Rule 23(b). Fed. R. Civ. P. 23(b); *Shook v. El Paso Cnty.*, 386 F.3d 963, 971 (10th Cir. 2004) (If the court finds that the plaintiffs have met these threshold requirements, “it must then examine whether the action falls within one of three categories of suits set forth in Rule 23(b).”) Rule 23(b) is satisfied on a showing of one of three circumstances: (1) Separate lawsuits would create the risk of inconsistent judgments or would be dispositive of the interests of nonparty class members; or (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) questions of law or fact common to the class predominate over questions affecting individual members, and the class action is superior to other available methods. Fed. R. Civ. P. 23(b)(1) – (3). Plaintiffs satisfy all four requirements of Rule 23(a) and satisfy the showing of predominance under Rule 23(b)(3).

**A. Numerosity.**

A class must be “so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). There is no ‘bright line’ test for numerosity. The class simply needs to be composed of a substantial number. *Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 276 (10th Cir. 1977)(proposed class of 48 was sufficient). On information and belief, there are thousands of members of the Class. On Amazon.com alone, more than 300 reviews of the Forerunner 610

exist. Nearly 10% of those reviews report problems with the Garmin Watches, including the Forerunner 610, identical or similar to that experienced by Plaintiffs.

**B. Commonality.**

Rule 23(a) also requires “questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). Commonality is satisfied by showing “a common nucleus of operative fact.” *J.B. ex. rel. Hart v. Valdez*, 186 F.3d 1280, 1288 (10th Cir.1999). These questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. The common questions of law and fact include but are not limited to:

- a. Whether the Defendants’ conduct breached the material terms of the contracts entered into with Class members, with specific regard to defects in design, manufacturing and servicing, as alleged herein;
- b. Whether Defendants expressly or impliedly warranted the Forerunner 610 at the time Class members purchased said watches and, if so, whether any such warranties were breached;
- c. Whether Defendants violated the covenants of good faith and fair dealing implied in its contract with the Class members;
- d. Whether Defendants actions amount to willful and wanton misconduct; and
- e. Whether Plaintiffs and the Class sustained damages, and if so, the proper measure and amount thereof.

**C. Typicality.**

Rule 23(a)’s third requirement is that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). Plaintiffs’ claims are

typical of the claims of all other Class Members inasmuch as all members of the Class are similarly affected by Defendants' breaches of contract and warranty. Thus, all Class Member claims arise from the same or similar transactions or occurrences.

**D. Adequacy of Representation.**

Rule 23(a)'s final requirement is that the class representative must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4).

Plaintiffs will fairly and adequately protect the interests of the Class and have retained counsel experienced in complex class litigation and consumer class motions. There is no antagonism between the interests of Plaintiffs and those of the other Class Members. Plaintiffs' counsel are experienced lawyers in the class action field, and they are adequate counsel for the Class.

**E. Predominance.**

Rule 23(b)(3) requires that common questions of law or fact predominate over individual questions. Common legal issues predominate because the class members' claims arise under the same theories regarding breach of contract and express and implied warranties, while common factual issues predominate because the proposed class of consumers all purchased substandard Garmin Forerunner watches which did not perform to the standards promised and advertised.

**F. Superiority.**

Rule 23(b)(3) also requires that a class action be the superior method for adjudicating the claims. Certifying a class is the "superior" way when the "class action would achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."

*Amchem Prods. v. Windsor*, 521 U.S. 591, 615 (1997). Based on the foregoing, class treatment is the superior method here.

#### **IV. CONCLUSION**

The proposed class meets the requirements of Rules 23(a), (b)(3) and (g). Plaintiffs request that the Court grant leave to the Plaintiffs to supplement this Motion upon the completion of discovery and to certify the class, appoint Plaintiffs as the Class representatives, and appoint Plaintiffs' attorneys as class counsel.

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Respectfully submitted,

/s/ Mark F. James

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