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Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

JAMES P. BRICKMAN, individually and as a
representative of all others similarly situated,

and

Margaret Clingman, individually and as a
representative of all others similarly situated,
527 Sandpiper Circle, Lodi
California, 95240

Plaintiffs,

v.

FITBIT, INC.,

Defendant.

Case No. 3:15-cv-02077-JD

FOURTH AMENDED COMPLAINT
CLASS ACTION

DEMAND FOR JURY TRIAL

1 Now come Plaintiffs James P. Brickman and Margaret Clingman, individually and as
2 representatives of all others similarly situated, and for this Fourth Amended Class Action Complaint
3 state:

4 **INTRODUCTION**

5
6 1. This is a class action brought by James P. Brickman and Margaret Clingman
7 (“Plaintiffs”), individually and as putative class representatives, against Fitbit, Inc. (“Defendant”
8 and/or “Fitbit”).

9
10 2. Defendant sells wearable, wireless-enabled devices that purportedly track exercise and
11 other fitness and physical activity to measure data such as the number of steps walked, calories
12 burned, and other similar personal metrics.

13 3. This lawsuit does not challenge any of those functions. Recently however, Defendant has
14 made specific advertisement claims that for an extra charge, the customer can purchase a device
15 which also contains a "sleep-tracking" function which will track "hours slept," "times woken up,"
16 and “sleep quality.”

17 4. In fact, the sleep-tracking function does not and cannot do these things because the Fitbit
18 devices can only measure movement and not sleep.

19 5. These devices do not perform as advertised.

20 6. Defendant represents a material fact: that these devices track sleep.

21 7. That material representation is false.

22 8. The device does not, and cannot, track sleep.

23 9. The Fitbit devices do not record anything other than movement, while Polysomnography,
24 the accepted scientific standard for sleep tracking, accurately tracks sleep by monitoring many body
25 functions during sleep including brain waves, eye movements, muscle activity, heart rhythm, and
26 more, to diagnose and/or rule out sleep disorders.

1 10. Further, customer reviews reiterate the fact that the sleep tracking function does not
2 work.¹

3 11. A doctor with the London Sleep Center reiterated that Fitbit's representation of ability to
4 measure sleep is false. Devices such as Fitbit's are "not measuring sleep, simply motion – not
5 muscle tone, brain waves, heart rate or eye movement. You cannot infer quality of sleep from
6 motion and tell what is crucial REM [rapid eye movement] sleep and what is not." See *Sleep*
7 *sensors: Waking up to the need to study our night's rest*, THE GUARDIAN, Aug. 22, 2014 available
8 at (<http://www.theguardian.com/lifeandstyle/2014/aug/22/sleep-trackers-to-boost-health-fitness>)
9 (last visited Nov. 24, 2015) (quoting Dr. Irshaad Ebrahim).

10 12. Similarly, Plaintiff Brickman personally avers that the representation of the Fitbit
11 device's ability to track sleep is false. Plaintiff Brickman wore the device after his purchase to track
12 his daily activity as well as his sleep. After a short period of wearing the device, it became obvious
13 to Plaintiff Brickman that the device only tracked his motion and did not actually track the hours he
14 slept, the times he awoke during sleep, or the quality of his sleep.

15 13. Plaintiff Clingman similarly avers that the representation of the Fitbit device's ability to
16 track sleep is false. Clingman wore the device after her purchase to track her daily activity as well as
17 her sleep. After a short period of wearing the device, it became obvious to Plaintiff Clingman that
18 the device only tracked her motion and did not actually track the hours she slept, the times she
19 awoke during sleep, or the quality of her sleep.

20 14. Thus, consumers who purchase these products and pay the extra amount for the function
21 being factually represented by Defendant as able to track sleep are being lied-to, and do not receive
22 the function for which they paid.

23 ¹ A significant amount of anecdotal evidence from consumers as well as sleep-scientists criticizes the Fitbit devices' sleep-tracking
24 function as not tracking sleep. See <http://www.theguardian.com/lifeandstyle/2014/aug/22/sleep-trackers-to-boost-health-fitness> (last
25 visited October 28, 2014); <http://www.livescience.com/42710-fitness-trackers-sleep-monitoring-accuracy.html> (last visited October
26 28, 2014); http://www.huffingtonpost.com/2014/01/22/fitness-trackers-sleep_n_4637328.html (last visited October 28, 2014);
27 <http://www.usatoday.com/story/news/nation/2013/03/24/sleep-tracking-devices/2007085/> (last visited October 28, 2014);
28 <http://techcrunch.com/2012/11/18/fitbit-one-review-slightly-flawed-but-still-a-great-way-to-quantify-yourself/> (last visited October
28, 2014); <http://gizmodo.com/fitbit-force-review-a-health-tracker-you-d-actually-ke-1454962288> (last visited October 28, 2014);
<http://gizmodo.com/5954563/fitbit-one-review-a-great-way-to-monitor-your-wretched-laziness> (last visited October 28, 2014).

INTRODUCTION AND FACTS OF MISREPRESENTATION

25. Plaintiffs reallege and incorporate herein all previous paragraphs of this Complaint.

26. Defendant markets and sells to consumers, directly and through large retail stores in California and Florida, distinctly branded personal fitness-tracking devices. These are called the Fitbit Force, Fitbit Flex, Fitbit One, Fitbit Zip, and Fitbit Ultra; as well as Fitbit's second-generation products, the Fitbit Charge, Fitbit Charge HR, and Fitbit Surge.

27. The basic model of the devices, the Fitbit Zip, does not have the 'sleep-tracking function' and the price for this base-model device does not reflect any extra charge for that function.

28. In contrast, the non-Zip Fitbit devices – the Fitbit Force, Fitbit Flex, Fitbit One, Fitbit Ultra, Fitbit Charge, Fitbit Charge HR, and Fitbit Surge (herein “Fitbit devices”) – charge at least an additional \$30 for the 'sleep tracker' function which is not available on the Fitbit Zip. The Fitbit Force, Fitbit Flex, Fitbit One, Fitbit Ultra, Fitbit Charge, Fitbit Charge HR, and Fitbit Surge all represent factually that they specifically track “hours slept,” “times woken up”, and the “quality of sleep” of the individual wearing the device. These claims are on the actual physical packaging of the device itself.

29. Fitbit claims that these sleep-tracking devices will “measure your sleep quality. Once the data syncs, graphs on your (device) dashboard will reveal how long you slept and the number of times you woke up, giving you a ‘sleep quality score.’”

30. The Fitbit devices' packaging includes factual representations in the form of pictures and examples of the “dashboard” which is used by individuals after they purchase the Fitbit device. The pictures and examples of the dashboard demonstrate that the Fitbit is advertised as specifically tracking the amount of time an individual wearing such device sleeps, the times an individual awakens, and the quality of the individual's sleep.



TRACK YOUR DAY
Steps
Distance
Calories burned
Active minutes

TRACK YOUR NIGHT
Hours slept
Times woken up
Sleep quality
Silent vibrating alarm

SET A GOAL & GET MOVING
LED lights show you how your day is stacking up against your goal.



SYNC YOUR STATS REAL-TIME
Automatically syncs wirelessly to select smartphones & computers.



1 31. The images of the “dashboard” on the packaging depict specific numbers presented to the
2 consumer as exact times.

3 32. However, the Fitbit sleep-tracking technology cannot and does not perform these
4 functions as represented.

5 Measurement of Sleep versus Measurement of Movement

6 33. Polysomnography is a scientifically accepted form of sleep-monitoring technology. In
7 polysomnography, a patient is hooked up to electrodes which report information back to a technician
8 or doctor who, in real time, monitors the scientific equipment. This method accurately monitors
9 many body functions during sleep, including brain waves, eye movements, muscle activity, heart
10 rhythm, and more, to diagnose and/or rule out sleep disorders.

11 34. The Fitbit devices do not record any of those functions, and only uses an accelerometer (a
12 “3-axis accelerometer” according to the device specs). But, that only tracks a wearer’s movement,
13 not sleep and as indicated above by scientists in this field, tracking movement is “not measuring
14 sleep, simply motion.”

15 35. Fitbit’s packaging affirmatively represents to consumers that Fitbit’s “sleep-tracking”
16 function will track “hours slept,” “times woken up,” and “sleep quality,” but movement is not sleep.

17 36. Fitbit does not tell consumers that the device cannot actually track an individual’s sleep
18 length, number of times an individual wakes up, or the quality of an individual’s sleep. Despite
19 Fitbit’s specific representations that the Fitbit sleep-tracking function can and does track and provide
20 precise and accurate numbers, down to the minute, of how much sleep a user gets, the Fitbit sleep-
21 tracking function simply does not and cannot accurately provide these numbers.

22 37. Fitbit goes beyond even those exact, mathematical misrepresentations and further
23 represents to consumers that the sleep-tracking function can take those numbers and determine the
24 quality of the consumer’s sleep.

25 38. Facts exist to allow a reasonable fact finder to conclude that the Fitbit misrepresents to
26 customers what the device will do, and that the devices cannot track sleep and rather only
27 movement:
28

- a. Dr. Irshaad Ebrahim, of the London Sleep Center, noted that devices such as Fitbit's are "not measuring sleep, simply motion – not muscle tone, brain waves, heart rate or eye movement. You cannot infer quality of sleep from motion and tell what is crucial REM [rapid eye movement] sleep and what is not." See *Sleep sensors: Waking up to the need to study our night's rest*, THE GUARDIAN, Aug. 22, 2014 available at <http://www.theguardian.com/lifeandstyle/2014/aug/22/sleep-trackers-to-boost-health-fitness> (last visited Nov. 24, 2015).
- b. A tested Fitbit device with the sleep tracking function never provided reviewer with informative sleep tracking data. *Fitbit One Review: Slightly Flawed, But Still A Great Way to Quantify Yourself*, TECH CRUNCH, Nov. 18, 2012 available at <http://techcrunch.com/2012/11/18/fitbit-one-review-slightly-flawed-but-still-a-great-way-to-quantify-yourself> (last visited Nov. 24, 2015).
- c. The Fitbit device does not measure sleep and only "guesses" the amount of time that a user sleeps. *Fitbit One Review: A great way to monitor your wretched laziness*, GIZMODO, Oct. 24, 2012 available at <http://gizmodo.com/5954563/fitbit-one-review-a-great-way-to-monitor-your-wretched-laziness> (last visited Nov. 24, 2015).

39. Fitbit has misrepresented the ability of the Fitbit sleep-tracking function to perform as advertised. Defendant has also failed to disclose and/or has concealed material facts from consumers, namely, the limitations of the sleep-tracking function of these devices.

40. Reasonable consumers are likely to be deceived by Defendant's representations, because they represent that the device would track sleep, customers paid extra for that function, but the device does not track sleep.

41. Moreover, Plaintiffs and the putative class members have been harmed in that they paid extra for this sleep-tracking function, which was promised to them by Defendant through advertising, packaging, and other public and direct representations, but have not received the function for which they have paid.

PLAINTIFF BRICKMAN'S PURCHASE

42. Plaintiff realleges and incorporates herein all previous paragraphs of this Complaint.

43. On or about November 29, 2013, Plaintiff Brickman purchased a Fitbit Flex device, which includes the sleep-tracking function challenged in this action.

1 44. Plaintiff Brickman purchased said device for \$99.00, which Defendant had represented
2 through advertising, especially on the packaging of the device itself, and other public and direct
3 representations, to include a sleep-tracking function as described above.

4 45. Plaintiff Brickman's receipt is attached hereto as Exhibit A and incorporated herein.

5 46. Images of the packaging for Plaintiff Brickman's purchased Fitbit Flex are attached
6 hereto as Exhibit B and incorporated herein.

7 47. Plaintiff Brickman encountered and relied on Defendant's representations as to the Fitbit
8 Flex's sleep-tracking function, as described above, including, but not limited to, Defendant's
9 representations through advertising, especially on the packaging of the device he purchased, and
10 other public and direct representations including that the device would track his "hours slept," "times
11 woken up," and/or his "sleep quality." See ¶¶ 10 – 15, above.

12 48. Plaintiff Brickman began wearing the device after his purchase to track his daily activity
13 as well as his sleep.

14 49. After a short period of wearing the device, it became obvious to Plaintiff Brickman that
15 the device only tracked his motion and did not actually track the hours he slept, the times he awoke
16 during sleep, or the quality of his sleep.

17 50. Defendant's representations that Plaintiff Brickman would receive a working and
18 functional sleep-tracking feature were false. The product Plaintiff Brickman purchased did not
19 perform as advertised.

20 51. Defendant's representations as to the Fitbit Flex's sleep-tracking function, as described
21 above, played a substantial role in Plaintiff Brickman's decision to purchase the Fitbit Flex, and
22 Plaintiff would not have purchased the Fitbit Flex in the absence of Defendant's misrepresentations.

23
24 **PLAINTIFF CLINGMAN'S PURCHASE**

25 52. Plaintiffs reallege and reincorporate herein all previous paragraphs of this Complaint.

26 53. In or around June of 2014, Plaintiff Clingman purchased a Fitbit Flex which includes the
27 sleep tracking function challenged in this action.
28

54. Plaintiff Clingman purchased said device for approximately \$120, which Defendant had represented through advertising, especially on the packaging of the device itself, and other public and direct representations, to include a sleep-tracking function as described above.

55. Plaintiff Clingman began using the device and signed up for a Fitbit account in June of 2014. A screenshot of the date that Plaintiff Clingman activated her Fitbit account is attached hereto as Exhibit C and incorporated herein.

56. Plaintiff Clingman encountered and relied on Defendant's representations as to the Fitbit Flex's sleep-tracking function, as described above, including, but not limited to, Defendant's representations through advertising, especially on the packaging of the device she purchased, and other public and direct representations. See ¶¶ 10 – 15, above.

57. Defendant's representations that Plaintiff Clingman would receive a working and functional sleep-tracking feature were false. The product Plaintiff Clingman purchased did not perform as advertised.

58. Defendant's representations as to the Fitbit Flex's sleep-tracking function, as described above, played a substantial role in Plaintiff Clingman's decision to purchase the Fitbit Flex, and Plaintiff would not have purchased the Fitbit Flex in the absence of Defendant's misrepresentations.

CLASS ALLEGATIONS

59. Plaintiffs reallege and incorporate herein all previous paragraphs of this Complaint.

60. Plaintiff Clingman brings this action on behalf of herself and all other similarly situated persons (hereinafter referred to as "California class members"), to wit:

All California residents who have purchased and registered online with Fitbit a Fitbit Force, a Fitbit Flex, a Fitbit One, a Fitbit Ultra, a Fitbit Charge, a Fitbit Charge HR, and/or a Fitbit Surge, in the State of California, before October 27, 2014 and within the applicable statute of limitations.

61. Plaintiff Brickman brings this action on behalf of himself and all other similarly situated persons (hereinafter referred to as "Florida class members"), to wit:

All Florida residents who have purchased and registered online with Fitbit a Fitbit Force, a Fitbit Flex, a Fitbit One, a Fitbit Ultra, a Fitbit Charge, a

Fitbit Charge HR, and/or a Fitbit Surge, in the State of Florida, before October 27, 2014 and within the applicable statute of limitations.

62. The classes number over one-hundred (100) persons and are so numerous that joinder of all members is impracticable, and it is further impracticable to bring all such persons before this Court.

63. The injuries and damages to these class members present questions of law and fact that are common to each class member, and that are common to the class as a whole.

64. Defendant has engaged in the same conduct regarding all of the other members of the Florida and California classes.

65. The claims, defenses, and injuries of the representative Plaintiffs are typical of the claims, defenses, and injuries of all those in the Florida and California classes that they respectively represent, and the claims, defenses, and injuries of each class member are typical of those of all other members in the respective classes.

66. The representative Plaintiffs will fully and adequately protect and represent the entire Florida and California classes, and all of each classes' putative class members.

67. The identity of all members of each respective class cannot be determined at this time, but will be so determined at a later time upon obtaining discovery from Defendant and others.

68. The prosecution of separate actions by each member of the Florida and California classes would create a substantial risk of inconsistent or varying adjudications with regard to individual members of each respective class that would establish incompatible standards of conduct for Defendant.

69. The prosecution of separate actions would also create a substantial risk of adjudication with respect to individual members of each respective class which, as a practical matter, would be dispositive of the interest of other members not parties to the adjudication, thereby substantially impairing and impeding their ability to protect these interests. Further, the maintenance of this suit as a class action is the superior means of disposing of the common questions which predominate herein.

FIRST CLAIM FOR RELIEF

**California's Unfair Competition Law
Bus & Prof. Code, § 17200 *et seq.*
California Class**

70. Plaintiff Clingman realleges and incorporates herein all previous paragraphs of this Complaint.

71. At all times relevant hereto, Defendant's alleged actions constitute a business practice under California law.

72. The California Unfair Competition Law ("UCL") defines unfair business competition to include "unlawful, unfair, or fraudulent" acts or practices, as well as any unfair, deceptive, untrue, or misleading advertising. Bus & Prof. Code, § 17200.

73. The California Supreme Court has emphasized that the "[s]ubstantive right extended to the public by the UCL is the right to protection from fraud, deceit, and unlawful conduct, and the focus of the statute is on the defendant's conduct."

a. "Unlawful" Prong of the UCL

74. Plaintiff Clingman realleges and incorporates herein all previous paragraphs of this Complaint.

75. A business act or practice is "unlawful" if it violates any established state or federal law.

76. The Federal Trade Commission Act prohibits unfair methods of competition, and unfair or deceptive acts or practices in or affecting commerce, which includes, inter alia, false advertising. 15 U.S.C. § 41 *et seq.*; 15 U.S.C. § 52(a) & (b).

77. Defendant has violated and continues to violate the "unlawful" prong of the UCL by violating the FTC Act's prohibition on false advertising and deceptive acts and practices when it represented to consumers that the sleep-tracking function of its Fitbit devices can and does make specific, mathematical measurements and calculations as to the amount and quality of the wearer's sleep, as stated above.

78. As detailed in Plaintiffs' Second Claim for Relief, below, Cal. Bus. & Prof. § 17500 (California False Advertising Law aka "FAL") prohibits unfair, deceptive, untrue, or misleading advertising, including, but not limited to, making untrue or misleading statements in advertising.

79. Defendant has violated and continues to violate the "unlawful" prong of the UCL by violating the FAL. See ¶¶ 87 – 91, below.

80. Moreover, as detailed in Plaintiffs' Third Claim for Relief, below, Cal. Civ. Code §1770 (California Legal Remedies Act aka "CLRA") section (a)(5) prohibits a business from "representing that goods... have... characteristics,... uses, [or] benefits... which they do not have"; Section (a)(7) prohibits a business from representing that its devices are "of a particular standard or quality, when they are of another"; and §1770(a)(9) prohibits a business from "advertising goods or services with intent not to sell them as advertised."

81. Defendant has violated and continues to violate the "unlawful" prong of the UCL by violating the CLRA. See ¶¶ 92 – 97, below.

82. As a direct and proximate result of Defendant's violations, Plaintiff Clingman and the California class members have suffered injury in fact in an amount to be established at trial. For instance, Defendant markets and sells the Fitbit Zip, which contains the same fundamental features of the other Fitbit devices EXCEPT the sleep-tracking function. The Fitbit devices with the sleep-tracking function are at least \$30 more than the Fitbit device without the sleep-tracking function.

83. Through its unlawful acts and practices, Defendant has obtained, and continues to unfairly obtain, money from members of the putative class. As such, Plaintiff Clingman requests that this Court restore this money to Plaintiff and all putative class members, to disgorge the profits Defendant has made on its sleep-tracking function, and to enjoin Defendant from continuing to violate the UCL as discussed herein.

b. "Unfair" Prong of the UCL

84. Plaintiffs reallege and incorporate herein all previous paragraphs of this Complaint.

85. A business act or practice is "unfair" if the reasons, justifications, and motives of the alleged wrongdoer are outweighed by the gravity of the harm to the alleged injured party.

1 86. Defendant has violated and continues to violate the “unfair” prong of the UCL by
2 falsely representing that the sleep-tracking function of its Fitbit devices can make specific,
3 mathematical measurements and calculations as to the amount and quality of the wearer’s sleep as
4 stated above.

5 87. These acts and practices are unfair because they are likely to cause consumers to
6 falsely believe that Defendant is offering a function that will track, to the minute, the amount they
7 sleep and the quality and efficiency, to an exact percentage point, of that sleep.

8 88. The gravity of the harm to Plaintiff Clingman and the California class members
9 outweighs any conceivable reasons, justifications, and/or motives of Defendant to overstate the Fitbit
10 devices’ sleep function capabilities (i.e. Defendant’s profit motive).

11 89. As a direct and proximate result of Defendant’s violations, Plaintiff Clingman and the
12 California class members have suffered injury in fact in an amount to be established at trial. For
13 instance, Defendant markets and sells the Fitbit Zip, which contains the same fundamental features
14 of the other Fitbit devices EXCEPT the sleep-tracking function. The Fitbit devices with the sleep-
15 tracking function are at least \$30 more than the Fitbit device without the sleep-tracking function.

16 90. Through its unfair acts and practices, Defendant has obtained, and continues to
17 unfairly obtain, money from members of the putative class. As such, Plaintiff requests that this court
18 restore this money to Plaintiff and all putative class members, to disgorge the profits Defendant has
19 made on its sleep-tracking function, and to enjoin Defendant from continuing to violate the UCL as
20 discussed herein.

21 c. “Fraudulent” Prong of the UCL

22 91. Plaintiffs reallege and incorporate herein all previous paragraphs of this Complaint.

23 92. A business act or practice is “fraudulent” under the UCL if it is likely to deceive
24 members of the consuming public.

25 93. Defendant’s acts and practices of overstating the Fitbit sleep function’s capabilities
26 and misrepresenting that the function will track, to the minute, the amount a user sleeps and the
27
28

1 efficiency, to an exact percentage point, of that sleep have the likely effect of misleading consumers
2 into believing, simply, that the function can do things it cannot. See ¶¶ 10 – 15.

3 94. To reiterate, Defendant makes numerous very specific representations that the devices
4 can and do track and provide precise and accurate numbers, down the minute, of how much sleep a
5 user would get. The Fitbit sleep-tracking function simply does not and cannot accurately provide
6 these numbers. See ¶¶ 10 – 15.

7 95. What's more, Defendant goes beyond even those exact, mathematical representations,
8 and represents to consumers that the sleep-tracking function can actually take those numbers that the
9 function itself carefully worked out to determine, to an exact percentage, the quality of the
10 consumer's sleep. See ¶¶ 10 – 15.

11 96. The Fitbit sleep function cannot and does not do this.

12 97. As a direct and proximate result of Defendant's violations, Plaintiff Clingman and the
13 California class members have suffered injury in fact in an amount to be established at trial. For
14 instance, Defendant markets and sells the Fitbit Zip, which contains the same fundamental features
15 of the other Fitbit devices EXCEPT the sleep-tracking function. The Fitbit devices with the sleep-
16 tracking function are at least \$30 more than the Fitbit device without the sleep-tracking function.

17 98. Through its fraudulent acts and practices, Defendant has obtained, and continues to
18 unfairly obtain, money from members of the putative class. As such, Plaintiff requests that this court
19 restore this money to Plaintiff and all putative class members, to disgorge the profits Defendant has
20 made on its sleep-tracking function, and to enjoin Defendant from continuing to violate the UCL as
21 discussed herein.

22 **SECOND CLAIM FOR RELIEF**
23 **California False Advertising Law, Cal. Bus. & Prof. Code § 17500 et seq.**
24 **California Class**

25 99. Plaintiffs reallege and incorporate herein all previous paragraphs of this Complaint.

26 100. The California False Advertising Law (FAL) prohibits unfair, deceptive, untrue, or
27 misleading advertising.
28

101. Defendant's practice of overstating the Fitbit sleep function's capabilities and misrepresenting that the function will track, to the minute, the amount a user sleeps and the quality and efficiency of that sleep is an unfair, deceptive, and misleading advertising practice because it gives the false impression that the Fitbit sleep-tracking function can do things that it simply cannot do.

102. As a direct and proximate result of Defendant's violations, Plaintiff Clingman and the California class members have suffered injury in fact in an amount to be established at trial. For instance, Defendant markets and sells the Fitbit Zip, which contains the same fundamental features of the other Fitbit devices EXCEPT the sleep-tracking function. The Fitbit devices with the sleep-tracking function are at least \$30 more than the Fitbit device without the sleep-tracking function.

103. Through its deceptive advertising practices, Defendant has obtained, and continues to unfairly obtain, money from members of the putative class. As such, Plaintiff requests that this court restore this money to Plaintiff Clingman and all California class members, to disgorge the profits Defendant has made on its sleep-tracking function, and to enjoin Defendant from continuing to violate the FAL as discussed herein.

THIRD CLAIM FOR RELIEF
Consumer Legal Remedies Act, Cal Civ. Code § 1750 et seq.
California Class

104. Plaintiff realleges and incorporates herein all previous paragraphs of this Complaint.

105. At all relevant times hereto, including at all times during the transactions between Plaintiff Clingman and Defendant, and the consumer transactions between the California class members and Defendant, Plaintiff Clingman and each of the California class members were "consumers", and the transactions were "consumer transactions", within the meaning of the CLRA.

106. In connection with the consumer transactions alleged herein, including the consumer transaction between Plaintiff Clingman and Defendant, and the consumer transactions between the putative class members and Defendant, Defendant's representations, acts, and/or practices regarding the Fitbit sleep-tracking function's purported abilities were unfair and deceptive, to wit:

- a. Defendant made very specific representations that the Fitbit sleep function will precisely track, to the minute, the amount a user sleeps and the quality and efficiency, to an exact percentage point, of that sleep.
- b. Defendant goes beyond even those exact, mathematical representations, though, and represents to consumers that the sleep-tracking function can actually take those numbers, the numbers that the function itself purportedly carefully works out, to determine the quality of the consumer's sleep.
- c. Defendant specifically represents and provides to consumers exact numbers for "actual sleep time, X hrs X mins," "bed time XX:XX p.m.," "fell asleep in X minutes," "awakened X times," "sleep efficiency X%," "X minutes awake," "X restless minutes," and how many times the user was awake and/or restless over the course of the wearer's night of sleep.

107. Defendant's deceptive representations were material to the consumer transaction between Plaintiff Clingman and Defendant, as well as the California class members and Defendant.

108. As a result of the conduct described herein, Defendant has engaged in unfair and deceptive sales practices in violation of the CLRA, to wit:

- a. Defendant, by advertising that the Fitbit sleep-tracking function could perform tasks that it in fact could not, was thus representing that its goods had characteristics, uses, and/or benefits that they did not have, which is a violation of CLRA §1770(a)(5);
- b. Defendant, by advertising that the Fitbit sleep-tracking function could perform tasks that it in fact could not, and not being able to provide consumers with a product with a function that could perform as advertised, Defendant was thus representing that its devices were of a particular standard or quality, when they are of another, which is a violation of CLRA §1770(a)(7).
- c. Defendant, by advertising that the Fitbit sleep-tracking function could perform tasks that it in fact could not, and not being able to provide consumers with a product with a function that could perform as advertised, Defendant was thus advertising goods or services with intent not to sell them as advertised, which is a violation of CLRA §1770(a)(9).

109. As a direct and proximate result of Defendant's violations, Plaintiff Clingman and the California class members have suffered injury in fact in an amount to be established at trial. For instance, Defendant markets and sells the Fitbit Zip, which contains the same fundamental features of the other Fitbit devices EXCEPT the sleep-tracking function. The Fitbit devices with the sleep-tracking function are at least \$30 more than the Fitbit device without the sleep-tracking function.

FOURTH CLAIM FOR RELIEF
Violation of the Magnuson-Moss Warranty Act,
15 U.S.C. § 2301, et. seq.
California Class

110. Plaintiffs reallege and incorporate herein all previous paragraphs of this Complaint.

111. At all times relevant hereto, there was in full force and effect the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, et seq. (the “MMWA”).

112. The Fitbit products are consumer products within the meaning of 15 U.S.C. § 2301(1).

113. Plaintiff Clingman and the California class members are consumers as defined in 15 U.S.C. § 2301(3). They are consumers because they are persons entitled under applicable state law to enforce against the warrantor the obligations of its warranties.

114. Defendant is a supplier and warrantor within the meaning of 15 U.S.C. § 2301(4) and (5).

115. Pursuant to 15 U.S.C. § 2310(e), Plaintiff Clingman is entitled to bring this class action and is not required to give Defendant notice or an opportunity to cure until such time as the Court determines the representative capacity of Plaintiff pursuant to Rule 23 of the Federal Rules of Civil Procedure.

116. In connection with its sale of the Fitbit products, Defendant gave an implied warranty as defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. As a part of the implied warranty of merchantability, Defendant warranted that the sleep-tracking function of the Fitbit devices were fit for their ordinary purpose, would pass without objection in the trade as designed, manufactured and marketed, and were adequately contained, packaged and labeled. Cal. Civ. Code § 1790 et seq. (Song-Beverly Consumer Warranty Act); UCC 2-314.

117. Defendant is liable to Plaintiff and the putative class members pursuant to 15 U.S.C. § 2310(d)(1), because it breached its implied warranty of merchantability.

118. Defendant breached its implied warranty of merchantability to Plaintiff and putative class members because the sleep-tracking function of the Fitbit devices were not fit for the ordinary purposes for which they are used – accurately tracking the user’s sleep.

119. Defendant further breached its implied warranty of merchantability to Plaintiff and the putative class members because the Fitbit devices were not adequately contained, packaged, and labeled. The representations that accompanied the sleep-tracking function of the Fitbit devices did not adequately instruct Plaintiff or the putative class members on the proper use of the sleep-tracking function in light of the function’s inability to accurately give exact, mathematical representations, as well as the sleep-tracking function’s inability to take those supposedly precise numbers, the numbers that the function itself purportedly carefully works out, to determine, to an exact percentage, the quality and efficiency of the consumer’s sleep.

120. Pursuant to 15 U.S.C. § 2310(d)(1), Defendant caused Plaintiff and the putative class members foreseeable harm, to wit: the difference in value between the Fitbit devices as sold and the Fitbit devices as actually delivered – without a functioning sleep-tracking device (i.e. a partial refund of the purchase price of the Fitbit devices equal to the value of the sleep-tracking function each consumer should have received).

121. In addition, pursuant to 15 U.S.C. § 2310(d)(2), Plaintiff and the putative class members are entitled to recover a sum equal to the aggregate amount of costs and expenses (including attorneys’ fees based on actual time expended) determined by the Court to have been reasonably incurred by Plaintiff and the putative class members in connection with the commencement and prosecution of this action.

FIFTH CLAIM FOR RELIEF
Breach of Implied Warranties
Common Law, UCC, and/or Cal. Civ. Code § 1790 et seq.
California Class

122. Plaintiffs reallege and incorporate herein all previous paragraphs of this Complaint.

1 123. At all times relevant, Defendant was a “merchant” and/or a “manufacturer,” and the
2 Fitbit products were “consumer goods” “sold” at retail.

3 124. At no relevant time did Defendant state, orally or in writing, “as is” or “with all
4 faults” on the Fitbit products or the product packaging.

5 125. Defendant made promises and affirmations of fact through its marketing campaign, as
6 alleged above, including, but not limited to, representing that the product had a sleep-tracking
7 function that would perform as advertised.

8 126. This product advertising constitutes promises and assurances including, but not
9 limited to, implied warranties of merchantability and fitness for a particular purpose.

10 127. Defendant’s advertising constitutes warranties, became part of the basis of the
11 bargain, and is part of the contract between Plaintiff and the putative members of the class on the
12 one hand, and Defendant on the other.

13 128. The affirmations of fact made by Defendant were made to induce Plaintiff Clingman
14 and the California class members to purchase the products.

15 129. Plaintiff Clingman and the California class members have relied on Defendant’s
16 affirmations of fact.

17 130. All conditions precedent to Defendant’s liability under the warranties have been
18 performed by Plaintiff Clingman and the California class members or have been waived.

19 131. Defendant breached the terms of the implied warranty of merchantability because the
20 Fitbit products were not adequately packaged or labeled, nor did the promises or affirmations found
21 on the packaging conform to the actual efficacy of the sleep-tracking function.

22 132. Moreover, the Fitbit devices were designed for, inter alia, the particular purpose of
23 tracking the consumer’s sleep. As such, by failing to provide a sleep-tracking function that performs
24 as represented, Defendant has breached its implied warranty that the product is fit for that purpose.

25 133. As a direct and proximate result of Defendant’s breach of warranties, Plaintiff
26 Clingman and the California class members have been damaged in an amount to be established at
27 trial. For instance, Defendant markets and sells the Fitbit Zip, which contains the same fundamental
28

1 features of the other Fitbit devices EXCEPT the sleep-tracking function. The Fitbit devices with the
 2 sleep-tracking function are at least \$30 more than the Fitbit device without the sleep-tracking
 3 function.

4 **SIXTH CLAIM FOR RELIEF**
 5 **Violation of Florida's Deceptive and Unfair Trade Practices Act**
 6 **Fla. Stat. 501.201 et. seq.**
 7 **Florida Class**

8 134. Plaintiffs reallege and incorporate herein all previous paragraphs of this complaint.

9 135. Plaintiff Brickman and the Florida class members are consumers as defined under the
 10 Florida Deceptive and Unfair Trade Practices Act, § 501.203(7).

11 136. Under the Florida Deceptive and Unfair Trade Practices Act, a business act or
 12 practice is unlawful if it violates any established state or federal law.

13 137. The Federal Trade Commission Act prohibits unfair methods of competition, and
 14 unfair or deceptive acts or practices in or affecting commerce, which includes that a seller or
 15 manufacturer should advertise that its product is warranted or contained a guarantee, if the seller
 16 and/or manufacturer intends to fully perform said guarantee. See 16 CFR § 239.5.

17 138. Defendant has violated and continues to violate the FTC Act's prohibition on failing
 18 to fulfill advertised guarantees with respect to a product when it represented to consumers that the
 19 sleep-tracking function of its Fitbit devices can and does make specific, mathematical measurements
 20 and calculations as to the amount and quality of the wearer's sleep, as stated above, which it does
 21 not.

22 139. As a direct and proximate result of Defendant's violations, Plaintiff Brickman and the
 23 Florida class members have suffered injury in fact in an amount to be established at trial. For
 24 instance, Defendant markets and sells the Fitbit Zip, which contains the same fundamental features
 25 of the other Fitbit devices except the sleep-tracking function. The Fitbit devices with the sleep-
 26

1 tracking function are at least \$30 more expensive than the devices without the sleep-tracking
2 function.

3 140. Through its unlawful acts and practices, Defendant has obtained, and continues to
4 unfairly obtain, money from members of the putative class. As such, Plaintiff requests that this court
5 restore this money to Plaintiff Brickman and all Florida class members, to disgorge the profits
6 Defendant has made on the sleep-tracking function, and to enjoin Defendant from continuing to
7 violate the Florida Deceptive and Unfair Trade Practices Act as discussed herein.
8

9 **SEVENTH CLAIM FOR RELIEF**
10 **Common Law Fraud**
Florida and California Class

11 141. Plaintiffs reallege and incorporate herein all previous paragraphs of this Complaint.

12 142. Defendant willfully, falsely, and knowingly misrepresented material facts relating to
13 the character and quality of the sleep-tracking function, as stated above. These misrepresentations
14 are contained in various media advertising and packaging disseminated or caused to be disseminated
15 by Defendant, and such misrepresentations were reiterated and disseminated by officers, agents,
16 representatives, servants, or employees of Defendant, acting within the scope of their authority, and
17 employed by Defendant to merchandise and market Fitbit products.

18 143. Defendant's misrepresentations were the type of misrepresentations that are material
19 (i.e., the type of misrepresentations to which a reasonable person would attach importance and
20 would be induced to act thereon in making purchase decisions).

21 144. Defendant knew that the misrepresentations alleged herein were false at the time it
22 made them and/or acted recklessly in making such misrepresentations.

23 145. Defendant intended that Plaintiff and the putative class members rely on the
24 misrepresentations alleged herein and purchase the Fitbit products containing a sleep-tracking
25 function.

26 146. Plaintiffs and the California and Florida class members reasonably and justifiably
27 relied on Defendant's misrepresentations when purchasing the Fitbit products containing a sleep-
28

1 tracking function, were unaware of the existence of facts that Defendant suppressed and failed to
2 disclose, and, had the facts been known, would not have purchased products and/or would not have
3 purchased them at the prices at which they were offered.

4 147. As a direct and proximate result of Defendant's fraudulent misrepresentations,
5 Plaintiffs and the California and Florida class members have been damaged in an amount to be
6 established at trial. For instance, Defendant markets and sells the Fitbit Zip, which contains the same
7 fundamental features of the other Fitbit devices EXCEPT the sleep-tracking function. The Fitbit
8 devices with the sleep-tracking function are at least \$30 more than the Fitbit device without the
9 sleep-tracking function.

10 148. Moreover, in that, at all times herein mentioned, Defendant intended to cause or acted
11 with reckless disregard of the probability of causing damage to Plaintiff and the putative class
12 members, and because Defendant was guilty of oppressive, fraudulent, and/or malicious conduct,
13 Plaintiff and the putative class members are entitled to an award of exemplary or punitive damages
14 against Defendant in an amount adequate to deter such conduct in the future.

15
16 **EIGHTH CLAIM FOR RELIEF**
Negligent Misrepresentation
Florida and California Classes
17

18 149. Plaintiffs reallege and incorporate herein all previous paragraphs of this Complaint.

19 150. Defendant, directly or through its agents and employees, made false representations
20 of material facts, as described above, to Plaintiffs and the Florida and California class members.

21 151. Defendant had no reasonable grounds for believing these representations to be true
22 when it made them.

23 152. In making these representations, Defendant intended to induce the reliance of
24 Plaintiffs and the Florida and California class members.

25 153. Plaintiffs and the Florida and California class members reasonably and justifiably
26 relied on Defendant's misrepresentations when purchasing the products and, had the facts been
27
28

known, they would not have purchased a Fitbit product with a sleep-tracking function at the price at which they were offered.

154. As a direct and proximate result of Defendant's negligent misrepresentations, Plaintiffs and the Florida and California class members have been damaged in an amount to be established at trial. For instance, Defendant markets and sells the Fitbit Zip, which contains the same fundamental features of the other Fitbit devices EXCEPT the sleep-tracking function. The Fitbit devices with the sleep-tracking function are at least \$30 more than the Fitbit device without the sleep-tracking function.

NINTH CLAIM FOR RELIEF
Unjust Enrichment/Restitution/Quasi-Contract
California and Florida Classes

155. Plaintiffs reallege and incorporate herein all previous paragraphs of this Complaint.

156. This claim asserts that it is unjust to allow Defendant to retain profits from its deceptive, misleading, and unlawful conduct alleged herein.

157. Defendant charged Plaintiffs and the Florida and California class members for the sleep-tracking function.

158. Defendant represented that this function would perform as stated in its advertising and as alleged above.

159. As detailed above, the sleep-tracking function does not actually work as represented by Defendant.

160. Because the sleep-tracking function was advertised as being able to perform in very specific ways when, in reality, it cannot, Defendant collected profit for this ineffective function.

161. As a result of these actions, Defendant received benefits under circumstances where it would be unjust to retain these benefits.

162. Defendant has knowledge or an appreciation of the benefit conferred upon it by Plaintiff and the putative class members.

163. Defendant has been unjustly enriched.

1 164. Plaintiffs and the Florida and California class members are entitled to restitution
2 and/or disgorgement of all profits, benefits, and other compensation obtained and retained by the
3 Defendant from its deceptive, misleading, and unlawful conduct. For instance, Defendant markets
4 and sells the Fitbit Zip, which contains the same fundamental features of the other Fitbit devices
5 EXCEPT the sleep-tracking function. The Fitbit devices with the sleep-tracking function are at least
6 \$30 more than the Fitbit device without the sleep-tracking function.

7 **PRAYER FOR RELIEF**

8 **WHEREFORE** Plaintiffs demand judgment as follows:

9 1. For an Order determining at the earliest possible time that this matter may proceed as
10 a class action under Civil Rule 23 and certifying this case as such;

11 2. For compensatory damages, restitution, and/or recovery of such relief as permitted by
12 law in kind and amount;

13 3. For punitive damages pursuant to common law and/or statutory law;

14 4. For reasonable costs and attorney fees necessarily incurred herein pursuant to
15 common law and/or statutory law;

16 5. For trial by jury on all issues;

17 For such other or further relief as this Honorable Court deems Plaintiffs and the putative
18 classes are entitled.

19 DATED: December 22, 2015

DWORKEN & BERNSTEIN CO., L.P.A.;
LAW OFFICES OF JOHN A. KITHAS;
LAW OFFICE OF CHRISTOPHER J.
MOROSOFF

Attorneys for Plaintiffs

24
25 /s/ Patrick J. Perotti
By Patrick J. Perotti

Most items are priced to sell at a low price.



BRANDON - 813-654-4955
11/29/2013 11:16 AM EXPIRES 02/27/14



ENTERTAINMENT-ELECTRONICS

057010796 BEATS T \$119.00
#1BLB7273PDHN

057002576 SPECIAL PROMOTION
FIIBIT \$99.00
Refund Value \$79.00 T
790011255 GIFT CARDS \$20.00
041-212-101-919-779
NEW BAL: \$20.00

PACKAGE SUBTOTAL \$119.00
GIFTCARD FREE \$20.00-

PACKAGE TOTAL \$99.00

ALL ITEMS MUST BE RETURNED FOR FULL REFUND

SUBTOTAL \$218.00
Your REDcard Savings 5% \$9.90-
T = FL TAX 7.0000% on \$188.10 \$13.17
TOTAL \$221.27

*9223 TARGET CHECK CARD TOTAL \$221.27

↓ INDICATES SAVINGS

Today's
REDcard
Savings



REDcard
Savings
This Year

\$9.90 \$13.09
Congratulations! Use your 20% Off
Storewide Purchase Coupon 12/1 - 12/7/13.

Target Pharmacy We're here to help!

9am - 7pm M-F
9am - 5pm Sat
11am - 5pm Sun

REC#2-3333-0812-0112-1057-2 VCD#701-158-93



TRACK YOUR DAY

Steps
Distance

Calories burned
Active minutes



TRACK YOUR NIGHT

Hours slept
Times woken up

Sleep quality
Silent vibrating alarm



SET A GOAL & GET MOVING

LED lights show you how your day is stacking up against your goal.



Lights indicate progress to goal



SYNC YOUR STATS REAL-TIME

Automatically syncs wirelessly to select smartphones & computers.



SEE PROGRESS WITH ONLINE & MOBILE TOOLS

- Share & compete with friends
- Earn badges, stay motivated
- Log food, workouts and more

WEAR Flex 24/7

TRACK steps, distance, calories burned and sleep

SYNC your stats wirelessly

SEE real-time progress on your smartphone or computer






 **fitbit flex**

SYNCS WITH

 iPhone® 4S & 5
iPad® (3 gen.)
Samsung Galaxy S III
Note II & select Android devices.
Full list: www.fitbit.com/devices

 Windows® XP & Windows® 8
Mac® OS 10.5 +

WHAT'S INCLUDED

 Tracker  Wireless USB dongle
 Charging cable

00 **2 Wristbands included**
Large & small

 It's water resistant.
Wear it in the shower!

Wireless Wristband
Track Activity + Sleep



SET GOALS



TRACK ACTIVITY



TRACK SLEEP




[Dashboard](#)
[Log](#)
[Community](#)
[Premium](#)
[STORE](#)


Your Flex battery level is low.


 Profile as viewed by **You** public url: [/www.fitbit.com/user2QXVC5](#)
[View account settings](#)

Maggie

Female • 36 • 5' 4"

United States • Joined Jun 07, 2014

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Overall
[Food](#)
[Activities](#)
[Weight](#)
[Sleep](#)

Last 30 Days

30 day graph of intake vs. burn


Steps
[Distance](#)

30 day graph

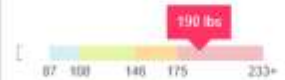
30 day graph of time active (in hours)



About Me

No description available.

My Body

Weight
[BMI](#)


My Achievements

Lifetime
[Best](#)
1,280,635 steps

Total lifetime steps



YOUR EMAIL:

Top Badges