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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JAMES P. BRICKMAN, et al., individually
and as representatives of all others similarly
situated,

Plaintiffs,

v.

FITBIT, INC.,

Defendant.

Case No. 3:15-cv-2077-JD

STIPULATION OF SETTLEMENT

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (“Agreement”) is made by and between:

(1) Fitbit, Inc., a Delaware corporation (“Fitbit”) and (2) James P. Brickman, Margaret Clingman, Carissa Ray, Michael Landis, Erica Wathey, Stephanie Curtis, Carolyn Ciavarella, Amanda Samy, and James Gau (“Class Representatives”), individually and as representatives of their respective “Settlement Sub-Classes” as defined below (collectively the “Parties”).

DEFINITIONS

As used herein, the following terms have the meanings set forth below:

A. “Device” or “Devices” means the Fitbit Ultra, Fitbit One, and/or Fitbit Flex purchased on or before October 27, 2014, and during the time periods set forth in the various Settlement Sub-Classes.

B. “Class Member” shall mean each member of the Settlement Sub-Classes, defined herein, who does not validly and timely request exclusion or object to the settlement. “Settlement Class Member” shall mean and include every Class Member who submits a valid and timely claim for a Settlement Benefit.

C. “Settlement Benefit” shall mean a cash payment of \$12.50 available to Settlement Class Members for each Device purchased.

D. “Releasing Persons” means Class Representatives, each Class Member, and their respective heirs, executors, administrators, representatives, agents, partners, successors, and assigns.

E. “Released Persons” means Fitbit and each of its past or present directors, officers, employees, agents, insurers, shareholders, attorneys, advisors, consultants, representatives, partners, affiliates, parents, subsidiaries, joint venturers, independent contractors, wholesalers, resellers, distributors, retailers, related companies, and divisions, and each of their predecessors, successors, heirs, and assigns.

F. “Class Counsel” means Patrick J. Perotti and Frank A. Bartela of Dworken & Bernstein Co., L.P.A., 60 South Park Place, Painesville, OH 44077, (440) 946-7656; and Ronald A. Margolis of Bonezzi Switzer Polito & Hupp Co. L.P.A., 1300 East 9th Street, Suite 1950,

1 Cleveland, OH 44114, (216) 586-2013.

2 RECITALS

3 This Agreement is made for the following purposes and with reference to the following
4 facts:

5 A. On May 8, 2015, Plaintiff James P. Brickman filed a class action complaint against
6 Fitbit in the United States District Court for the Northern District of California, San Francisco
7 Division, titled *Brickman, et al. v. Fitbit, Inc.*, Case No. 3:15-cv-2077-JD (the “Action”). On
8 December 22, 2015, Plaintiff Brickman, together with Plaintiff Margaret Clingman, filed the
9 operative Fourth Amended Complaint (the “4AC” or “Complaint”). The Complaint alleged that
10 Fitbit’s advertising of the sleep-tracking feature on the Devices was false or misleading and that
11 the Devices do not track sleep as advertised. The Complaint alleged the following causes of
12 action: (1) Violations of California’s Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200,
13 *et seq.* (“UCL”) (4AC ¶¶ 70-98); (2) Violation of the Consumer Legal Remedies Act (Cal. Civ.
14 Code § 1750, *et seq.* (“CLRA”) (*id.* ¶¶ 104-109); (3) Violation of Florida’s Deceptive and Unfair
15 Trade Practices Act (“FDUTPA”), Fla. Stat. § 501.201, *et seq.* (*id.* ¶¶ 134-140); (4) Common
16 Law Fraud (*id.* ¶¶ 141-109); (5) Negligent Misrepresentation (*id.* ¶¶ 149-154); and (6) Unjust
17 Enrichment/Quasi-Contract (*id.* ¶¶ 155-164). The Complaint also included causes of action for
18 violation of California’s False Advertising Law, Cal. Bus. & Prof. Code § 17500, *et seq.*;
19 violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.*; and breach of implied
20 warranties; however, Plaintiffs James P. Brickman and Margaret Clingman subsequently
21 abandoned those claims. The Complaint sought damages, restitution, punitive damages, and fees
22 and costs.

23 B. On July 29, 2016, Fitbit answered the Complaint by denying the allegations
24 therein and alleging various affirmative defenses.

25 C. On November 20, 2017, the Court granted the motion for class certification of
26 Plaintiffs James P. Brickman and Margaret Clingman, except as to the Florida common fraud and
27 negligent misrepresentation claims. The Court certified the following two classes (the “Certified
28 Classes”):

1 1. All California residents who have purchased and registered online a Fitbit
2 Flex, One, or Ultra in the State of California between 2009 and October 27, 2014.

3 2. All Florida residents who have purchased and registered online a Fitbit
4 Flex, One, or Ultra in the State of Florida between 2009 and October 27, 2014.

5 D. On December 8, 2017, the Court denied Fitbit's motion for summary judgment.

6 E. Fitbit has disputed, and continues to dispute, all claims alleged in the Complaint
7 and in the Action and does not by this Agreement admit any liability or wrongdoing whatsoever.
8 Fitbit has agreed to enter into this Agreement to avoid the further expense, inconvenience, and
9 distraction of burdensome and protracted litigation.

10 F. Class Counsel and the Class Representatives believe that the claims asserted in the
11 Action possess merit and have examined and considered the benefits to be obtained under the
12 proposed settlement set forth in this Agreement, the risks associated with the continued
13 prosecution of this complex and potentially time consuming litigation, and the likelihood of
14 ultimate success on the merits of the Action. Class Counsel have retained and provided reports
15 and testimony from multiple experts, have conducted discovery, including fact and multiple
16 expert depositions, have diligently investigated the facts and law relevant to the merits of their
17 claims, and have concluded that the proposed settlement set forth in this Agreement is fair,
18 adequate, reasonable, and in the best interests of the Settlement Sub-Classes.

19 E. The Parties desire to settle the Action as to the Class Representatives, the
20 Settlement Sub-Classes, and Fitbit in its entirety with respect to all potential claims arising out of
21 the facts that were or could have been alleged in the Complaint and any iteration thereof. The
22 Parties intend this Agreement to bind Fitbit, Class Representatives (both individually and as
23 representatives of their respective Settlement Sub-Classes), and all members of the Settlement
24 Sub-Classes as defined below who do not specifically object or request exclusion.

25 The Parties agree to cooperate and take all reasonable steps necessary and appropriate to
26 obtain preliminary and final approval of the settlement set forth in this Agreement, to effectuate
27 its terms, and dismiss the Action with prejudice.

28 **NOW, THEREFORE**, in light of the foregoing, for good and valuable consideration, the

Parties, and each of them, hereby warrant, represent, acknowledge, covenant, and agree, subject to approval by the Court, as follows:

I. CERTIFICATION OF THE SETTLEMENT SUB-CLASSES

A. Definition of the Settlement Sub-Classes

The Parties agree that, for purposes of this Agreement only, the “Settlement Sub-Classes” shall be defined, collectively, as the following individual sub-classes:

California Sub-Class: All persons who purchased in the State of California, and registered online, a Fitbit Flex, One, or Ultra between 2009 and October 27, 2014 (Represented by Margaret Clingman);

Florida Sub-Class: All persons who purchased in the State of Florida, and registered online, a Fitbit Flex, One, or Ultra between 2009 and October 27, 2014 (Represented by James P. Brickman);

New York Sub-Class: All persons who purchased in the State of New York and registered online a Fitbit Flex, One, or Ultra between March 26, 2012 and October 27, 2014 (Represented by Carissa Ray);

Pennsylvania Sub-Class: All persons who purchased in the State of Pennsylvania, and registered online, a Fitbit Flex, One, or Ultra between March 26, 2012 and October 27, 2014 (Represented by Michael Landis);

Ohio Sub-Class: All persons who purchased in the State of Ohio, and registered online, a Fitbit Flex, One, or Ultra between March 26, 2012 and October 27, 2014 (Represented by Erica Wathey);

Michigan Sub-Class: All persons who purchased in the State of Michigan, and registered online, a Fitbit Flex, One, or Ultra between March 26, 2012 and October 27, 2014 (Represented by Stephanie Curtis);

New Jersey Sub-Class: All persons who purchased in the State of New Jersey, and registered online, a Fitbit Flex, One, or Ultra between March 26, 2012 and October 27, 2014 (Represented by Carolyn Ciavarella);

Missouri Sub-Class: All persons who purchased in the State of Missouri, and registered online, a Fitbit Flex, One, or Ultra between March 26, 2013 and October 27, 2014 (Represented by James Gau);

Multi-State Sub-Class: All persons who purchased in the State of Illinois, and registered online, a Fitbit Flex, One, or Ultra between

March 26, 2013 and October 27, 2014 or purchased in the State of Washington, State of Texas, State of Georgia, or State of North Carolina, and registered online, a Fitbit Flex, One, or Ultra between March 26, 2014 and October 27, 2014 (Represented by Amanda Samy).

B. Stipulation Respecting Conditional Certification

The Parties stipulate and agree that, subject to Court approval, the Settlement Sub-Classes described in Section I.A. above should be conditionally certified solely for purposes of the settlement embodied in this Agreement.

II. CONSIDERATION FOR SETTLEMENT; CLAIMS PROCESS

A. Claims Process

1. Claim Form

Class Members who wish to claim a Settlement Benefit will be required to submit a Claim Form, executed under penalty of perjury, setting forth, among other things, the Class Member's name and address; e-mail address used to register their Fitbit Device; and state of purchase.

2. Claims Period

To be valid, Claim Forms must be submitted within ninety (90) days from the date the Class Notice is disseminated as set forth in Section IV below ("Claims Period").

B. Notice of Settlement Benefit

1. Class Notice of Settlement Benefit

The Class Notice and Summary Notice described in Section IV below shall inform Class Members of the Settlement Benefit.

2. Time Period for Claims

Class Members will have ninety (90) days from the date the Class Notice is disseminated as set forth in Section IV below to claim a Settlement Benefit.

3. Payment of Notice Costs, Costs of Administration, and Attorneys' Fees

Except as otherwise provided herein, Fitbit agrees to pay all of the actual costs (including but not limited to sorting, merging and mailing and e-mailing notice; arranging publication notice; processing claims and inquiries regarding this settlement; distributing settlement benefits;

1 handling reports of all notice, claims, and settlement activities) of notice to the Settlement Sub-
2 Classes and administering the settlement as set forth in Sections IV and IX below.

3 **III. OBTAINING COURT APPROVAL OF THE AGREEMENT**

4 A. Upon full execution of this Agreement, the Parties shall take all necessary steps to
5 obtain an Order from the Court substantially in the form of Exhibit F hereto (the “Conditional
6 Approval Order”), granting conditional certification of the Settlement Sub-Classes, granting
7 preliminary approval of this Agreement, and approving the forms and methods of notice to the
8 Settlement Sub-Classes set forth herein. The Conditional Approval Order shall further set a date
9 for a hearing (“Final Approval Hearing”) at which the Court will determine whether the
10 requirements for certification of the Settlement Sub-Classes have been met; whether the proposed
11 settlement should be finally approved as fair, reasonable, adequate, and in the best interests of the
12 Class Members, and carried into effect; whether the award of fees and expenses to Class Counsel
13 should be approved; whether a service award should be paid to one or more of the Class
14 Representatives; and whether a final judgment should be entered dismissing the Action on the
15 merits and with prejudice against the Class Representatives and the Class Members.

16 B. In the event that the Court disapproves or sets aside the Agreement or any material
17 part of the Agreement for any reason, or holds that it will not enter the final judgment without
18 material modification, or holds that the entry of the final judgment or any material part thereof
19 should be overturned or modified in any material way, then:

20 1. If all Parties do not agree jointly to appeal such ruling, the Agreement will
21 become null and void, and the Parties stipulate to joint motions (i) that any and all orders entered
22 pursuant to the Agreement be vacated; and (ii) that any and all dismissals pursuant to the
23 Agreement will be vacated; or

24 2. If the Parties do agree to jointly appeal such ruling and if the final
25 judgment or its equivalent in all material respects is not in effect after the termination of all
26 proceedings arising out of such appeal, the Agreement will become null and void, and the Parties
27 stipulate to joint motions (i) that any and all orders entered pursuant to the Agreement be vacated,
28 including without limitation any order modifying the class certification order or permitting

1 amendment of the Complaint to conform the complaint to the Settlement Sub-Classes definition
2 set out in Section I.A; and (ii) that any and all dismissals pursuant to the Agreement will be
3 vacated, and the Action will resume in the Court.

4 C. In the event that the Court does not approve the Fee Award or Service Awards set
5 forth in Sections V.A and V.B in the amounts requested by Class Counsel, or in the event that the
6 Fee Award or Service Awards requested by Class Counsel are reduced, that finding shall not be a
7 basis for rendering the entire Agreement null, void, or unenforceable. Class Counsel retains their
8 right to appeal any decision by the Court regarding the Fee Award and Service Awards.

9 **IV. NOTICE AND SETTLEMENT ADMINISTRATION**

10 The Parties agree to, and will request approval by the Court of, the following forms and
11 methods of notice to the Settlement Sub-Classes:

12 A. A copy of the Notice of Pendency and Proposed Settlement of Class Action
13 substantially in the form attached hereto as Exhibit A (the “Class Notice”), together with the
14 Claim Form (including the Instructions, Claim Form and Release) substantially in the form
15 attached hereto as Exhibit C, shall be posted and available for download on a settlement website
16 to be created by the Class Administrator and approved by the Parties (the “Settlement Website”),
17 and shall be mailed at no charge to Class Members who call a toll-free number to be established
18 at Fitbit’s expense (“Toll-Free Number”). This information shall remain available on the Internet
19 until the last day of the Claims Period. All costs and expenses associated with complying with
20 this provision shall be borne exclusively by Fitbit.

21 B. Fitbit shall also e-mail (and also send by First Class U.S. Mail to all persons for
22 whom Fitbit has a physical mailing address), a copy of the Class Notice substantially in the form
23 attached hereto as Exhibit A along with the Claim Form (including the Instructions, Claim Form
24 and Release) to each potential Class Member. This provision is intended to require notice to: i)
25 all persons identified by the Settlement Administrator as potential Class Members; ii) all persons
26 for whom Fitbit has a physical mailing address of a Class Member.

27 C. The Class Notice shall contain an Issue Date, being the date the Class Notice is
28 sent to the class. All costs and expenses associated with complying with this provision shall be

1 borne exclusively by Fitbit. Any Class Notice sent by U.S. mail and returned as undeliverable or
2 otherwise returned shall be promptly reissued by the Settlement Administrator if given a better or
3 forwarding address by the U.S. Postal Service.

4 D. Fitbit shall also arrange for a Summary Notice substantially in the form attached
5 hereto as Exhibit B (the "Summary Notice"), to be published in a manner directed by the
6 Settlement Administrator, with all costs and expenses associated with complying with this
7 provision to be paid exclusively by Fitbit. The Summary Notice shall inform members of the
8 Settlement Sub-Classes of the fact of the settlement and that the Class Notice and Claim Form are
9 available on the Settlement Website or by calling the Toll-Free Number.

10 E. Fitbit shall be solely responsible for making all arrangements necessary to
11 effectuate the notice set forth above, in compliance with the administrator's recommendations,
12 and for payment of all costs and expenses of such notice.

13 F. The Class Notice shall provide a procedure whereby Class Members may object to
14 the settlement or exclude themselves.

15 1. Any Class Member who wishes to object to the settlement must notify the
16 Court and the Parties in writing of their objection. To be considered valid, an objection must be
17 in writing, must include the objector's name and address, and must include: i) all alleged
18 grounds, facts, and law on which the objection is based; ii) copies of any and all documents or
19 other materials allegedly supporting the objection; iii) the names and addresses of all persons
20 intended as witnesses in support of the objection with a full summary of their expected testimony;
21 and iv) the name and address of all persons working in conjunction with the objector in bringing
22 the objection, or in representing or advising the objector or their counsel regarding the objection.
23 If a Class Member, their counsel, or any person with whom they are working in bringing the
24 objection has objected to a class action settlement on more than 3 occasions, the Class Member
25 shall, i) list all cases in which such objections were filed, and by whom; ii) state the outcome of
26 the objection; iii) state the amount of money, if any, paid in connection with the objection to
27 objector, to their counsel, or to anyone else, including by whom such payment was made and
28 whether it was disclosed to the court overseeing the proposed settlement.

1 2. The objection must also indicate whether the objector intends to appear at
2 the hearing on the motion for final approval of the settlement. Objections shall be filed with the
3 Court and served on counsel for the Parties (as identified in the Class Notice) no later than
4 twenty-five (25) days prior to the Final Hearing. Additional instructions regarding the
5 requirements for any objection to the settlement are contained in the Class Notice and Summary
6 Notice.

7 3. Any Class Member who wishes to request exclusion from the settlement,
8 its benefits, and from the release of claims pursuant to the settlement shall submit a Request for
9 Exclusion Form. For a request for exclusion to be accepted, it must be timely and valid. To be
10 timely, the Request for Exclusion Form must be emailed or postmarked no later than the date that
11 is ninety (90) days after the Issue Date as set forth in Section IV.B. To be valid, the Request for
12 Exclusion Form must be signed and dated by the person seeking exclusion. Request for
13 Exclusion Forms, substantially similar to the attached Exhibit D, shall be available for download
14 from the Settlement Website and, upon request by a Class Member, made available by the
15 Settlement Administrator through First Class Mail. In addition, an electronic version of the
16 Exclusion Form will be accessible via the Settlement Website. A Class Member who submits a
17 valid and timely Request for Exclusion Form is not eligible to receive any Settlement Benefit,
18 except that if any Class Member submits both a Request for Exclusion Form and a Claim Form,
19 the Request for Exclusion Form will be rejected; the Claim Form will be treated as valid, if it
20 meets the requirements detailed above, and processed; and the Class Member will be treated as a
21 Settlement Class Member.

22 4. The Settlement Administrator shall maintain a list of persons who have
23 excluded themselves and shall provide such list to the Parties upon request. The Settlement
24 Administrator shall retain the originals of all Request for Exclusion Forms (including the
25 envelopes with the postmarks) received from Class Members and shall make copies of the
26 originals available to Fitbit or Class Counsel within three (3) business days upon request.

27 G. Class Members who do not file a timely written objection in accordance with all
28 procedures and requirements set forth in the Agreement and Class Notice and Summary Notice

1 shall be deemed to have waived any objections to the settlement and shall forever be foreclosed
2 from making any objection (whether by appeal or otherwise) to the settlement, or any aspect of
3 the settlement, set forth in this Agreement, including, without limitation, the fairness,
4 reasonableness, or adequacy of the settlement, or any award of attorneys' fees and costs,
5 reimbursement of costs and expenses, and/or the Class Representative Service Awards. Objectors
6 who otherwise meet the requirements and time deadlines for their objection, but fail to provide
7 the grounds, evidence, or witness identification required above shall be barred from offering any
8 such ground, evidence or witnesses in support the their objection, or at any hearing or proceeding
9 on it.

10 **V. PAYMENT OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES**
11 **TO CLASS COUNSEL**

12 A. No later than thirty five (35) days before the deadline for filing objections to the
13 settlement, as set forth in Section IV.F.3 above, Class Counsel shall petition the Court for an
14 award of attorneys' fees and verified costs and expenses incurred in the prosecution of litigation,
15 all of which is to be paid by Fitbit upon approval by the Court (the "Fee Award"). These amounts
16 are in addition to and separate from all other consideration and remedies available to the
17 Settlement Sub-Classes. The Court's award of any attorneys' fees and verified costs and
18 expenses shall be separate from its determination of whether to approve the settlement. In the
19 event the Court approves the settlement, but declines to award Class Counsel's attorneys' fees or
20 costs in the amount requested by Class Counsel, the Agreement will nevertheless be binding on
21 the Parties to the extent permissible under applicable law. Fitbit shall not challenge Class
22 Counsel's right or ability to seek attorneys' fees and verified costs and expenses related to this
23 settlement. However, Fitbit reserves all rights to object to, challenge, or otherwise dispute the
24 amount of the award of attorneys' fees and verified costs and expenses sought by Class Counsel.
25 In the event of an appeal by Fitbit of the Fee Award, on any amount of the award granted by the
26 district court and upheld on appeal, Fitbit agrees to pay interest at the rate provided by 28 U.S.C.
27 § 1961(a) without further motion.

28 B. Class Counsel will petition the Court for, and Fitbit will not oppose, service

awards in an amount not to exceed \$5,000 for each of the Class Representatives Brickman and
 Clingman (total amount not to exceed \$10,000), and not to exceed \$500 each for each other Class
 Representative listed in Section I.A. (total amount not to exceed \$3,500) which is to be paid by
 Fitbit, in recognition of their efforts on behalf of the Settlement Sub-Classes (“Service Awards”).
 The Court’s award of any Service Awards shall be separate from its determination of whether to
 approve the settlement set forth in the Agreement. In the event the Court approves the settlement,
 but declines to award any Class Representatives Service Awards in the amount requested by
 Class Counsel, the settlement will nevertheless be binding on the Parties to the extent permissible
 under applicable law.

C. Class Counsel and Class Representatives agree to provide Fitbit or, as necessary,
 the Settlement Administrator all identification information necessary to effectuate the payment of
 any Fee Award and Service Awards including, but not limited to, Taxpayer Identification
 Number(s), completed Internal Revenue Service Form W-9(s), and wire transfer information.
 The payment of any Fee Award or Service Award is separate from and in addition to the other
 relief afforded the Settlement Class Members in this Agreement.

D. Fitbit shall not be liable for any additional fees or expenses of the Class
 Representatives or any Class Member in connection with the Action. Class Counsel agree that
 they will not seek any additional fees or costs from Fitbit in connection with the Action or the
 settlement of the Action. Fitbit expressly agrees that it will not seek to recover its Court costs,
 attorneys’ fees, or expenses once the Court enters a dismissal of the Action. No later than fifteen
 (15) days following the Effective Date as defined below and receipt of the information listed in
 Section V.C above, Fitbit shall pay the Fee Award and Service Awards by wire transfer into an
 account held by Dworken & Bernstein Co., L.P.A.

VI. FINAL JUDGMENT APPROVING SETTLEMENT AND DISMISSING CLAIMS OF CLASS MEMBERS WITH PREJUDICE; RELEASE OF CLAIMS BY CLASS MEMBERS

A. Entry of Final Judgment

Upon the Court’s approval of this Agreement and the settlement set forth herein, a
 judgment substantially in the form attached hereto as Exhibit E (“Judgment”) shall be entered

1 dismissing the claims of the Class Representatives and of the Class Members with prejudice.

2 **B. Release of Claims**

3 1. As of the Effective Date of this Agreement as defined below, Releasing
 4 Persons hereby fully and irrevocably release and forever discharge Released Persons from any
 5 and all liabilities, claims, cross-claims, causes of action, rights, actions, suits, debts, liens,
 6 contracts, agreements, damages, costs, attorneys' fees, losses, expenses, obligations, or demands,
 7 of any kind whatsoever, whether known or unknown, existing or potential, or suspected or
 8 unsuspected, whether raised by claim, counterclaim, setoff, or otherwise, including any known or
 9 unknown claims, which they have or may claim now or in the future to have, that were or could
 10 have been alleged or asserted against any of the Released Persons in the Action, arising out of or
 11 related to claims relating to the sleep-tracking feature of the Devices and Fitbit's advertising
 12 regarding the same ("Released Claims").

13 2. Class Representatives, on behalf of themselves and all Class Members,
 14 hereby waive any and all provisions, rights, and benefits conferred by section 1542 of the
 15 California Civil Code or any comparable statutory or common law provision of any other
 16 jurisdiction, including, but not limited to, Florida, New York, Pennsylvania, Ohio, Michigan,
 17 New Jersey, Illinois, Missouri, Texas, Georgia, North Carolina, and Washington. California Civil
 18 Code Section 1542 reads as follows:

19 Certain Claims Not Affected By General Release: A general
 20 release does not extend to claims which the creditor does not know
 21 or suspect to exist in his or her favor at the time of executing the
 release, which if known by him or her must have materially
 affected his or her settlement with the debtor.

22 Class Representatives, on behalf of themselves and of all Class Members, expressly
 23 acknowledge that Class Representatives and the Class Members are waiving the protections of
 24 section 1542 and of any comparable statutory or common law provision of any other jurisdiction,
 25 including the jurisdictions listed above.

26 3. Notwithstanding the entry of Judgment, this Court shall retain jurisdiction
 27 of the Action until such time as the Court determines that the settlement is fully consummated
 28

1 according to the terms and conditions of this Agreement.

2 **VII. CLASS REPRESENTATIVES' CLAIMS AND THE BENEFITS OF**
3 **SETTLEMENT**

4 A. Before commencing the Action and during settlement negotiations, Class Counsel
5 conducted a thorough examination and evaluation of the relevant law and facts to assess the
6 merits of Class Representatives' claims and potential claims and to determine how best to serve
7 the interests of the Settlement Sub-Classes. Further, Class Representatives retained and used
8 expert witnesses, conducted extensive discovery, and Fitbit provided Class Counsel with the
9 information requested to permit the Class Representatives and Class Counsel to fully assess the
10 merits of all the claims and potential claims covered by this settlement, and to negotiate a
11 settlement. Class Counsel and the Class Representatives believe that the claims asserted in the
12 Action have merit.

13 B. However, Class Counsel, on behalf of the Settlement Sub-Classes, have agreed to
14 settle the Actions pursuant to the provisions of this Agreement after considering, among other
15 things: (a) the substantial benefits to Class Representatives and the Settlement Sub-Classes under
16 the settlement; (b) the attendant risks and uncertainty of litigation, especially in complex actions
17 such as this, as well as the difficulties and delays inherent in such litigation; and (c) the
18 desirability of consummating this settlement to provide effective timely relief to Class
19 Representatives and the Settlement Sub-Classes.

20 C. In consideration of all of these circumstances, Class Counsel and the Class
21 Representatives have concluded that the proposed settlement set forth in this Agreement is fair,
22 adequate, reasonable, and in the best interests of the Settlement Sub-Classes.

23 **VIII. FITBIT'S DENIAL OF LIABILITY; AGREEMENT AS DEFENSE IN FUTURE**
24 **PROCEEDINGS**

25 A. Fitbit has indicated its intent vigorously to contest each and every claim in the
26 Action, and continues vigorously to deny all of the material allegations in the Action. Fitbit
27 enters into this Agreement without in any way acknowledging any fault, liability, or wrongdoing
28 of any kind. Fitbit nonetheless has concluded that it is in its best interests that the Actions be
settled on the terms and conditions set forth herein in light of the expense that would be necessary

1 to defend the Action, the benefits of disposing of protracted and complex litigation, and the desire
2 of Fitbit to conduct its business unhampered by the distractions of continued litigation.

3 B. Neither this Agreement, nor any of its terms or provisions, nor any of the
4 negotiations or proceedings connected with it, shall be construed as an admission or concession
5 by Fitbit of the truth of any of the allegations in the Actions, or of any liability, fault, or
6 wrongdoing of any kind, nor as an admission or concession by Class Representatives of any lack
7 of merit of their claims against Fitbit.

8 C. To the extent permitted by law, neither this Agreement, nor any of its terms or
9 provisions, nor any of the negotiations or proceedings connected with it, shall be offered as
10 evidence or received in evidence in any pending or future civil, criminal, or administrative action
11 or proceeding to establish any liability or admission by Fitbit.

12 D. To the extent permitted by law, the Agreement may be pleaded as a full and
13 complete defense to, and may be used as the basis for an injunction against, any action, suit, or
14 other proceeding which may be instituted, prosecuted, or attempted for claims covered by the
15 releases in this Agreement.

16 **IX. ADMINISTRATIVE AND IMPLEMENTATION MATTERS**

17 **A. Effective Date of the Agreement**

18 The “Effective Date” of this Agreement shall be the first day after which all of the
19 following events and conditions of this Agreement have been met or have occurred:

- 20 1. All of the Parties and their counsel have executed this Agreement;
- 21 2. The Court has conditionally certified the Settlement Sub-Classes,
22 preliminarily approved the settlement embodied in this Agreement, and provided for approved
23 notice to the Settlement Sub-Classes by entry of an order substantially in the form of Exhibit F
24 hereto;
- 25 3. Following the final date for Class Members to object to the settlement set
26 forth in this Agreement, or request exclusion, pursuant to Section IV.F and IV.G hereof, and no
27 less than seven (7) days prior to the Final Hearing, Class Counsel has verified in writing or via
28 email to the Parties that fewer than 2,000 of the Class Members have objected to, or requested

1 exclusion from, the settlement, except that if this condition is not met, Fitbit shall have the option
 2 to give written notice to Class Counsel waiving this condition and stating that Fitbit intends to
 3 proceed with the settlement set forth in this Agreement;

4 4. The Court has signed the Judgment; and

5 5. The Judgment has become final (“Final”) either as a result of the time for
 6 appeal or writ has expired or, if an appeal and/or petition for review is taken and the settlement is
 7 affirmed, the time period during which further petition for hearing, appeal, or writ of certiorari
 8 can be taken has expired. If the Judgment is set aside, materially modified, or overturned by the
 9 trial court or on appeal, and is not fully reinstated on further appeal, the Judgment shall not
 10 become “Final.”

11 6. If this Agreement is terminated or fails to become effective, the Parties
 12 shall be restored to their respective positions in the Action as of the date of the signing of this
 13 Agreement. In such event, any final approval order and final judgment or other order entered by
 14 the Court in accordance with the terms of this Agreement shall be treated as vacated, *nunc pro*
 15 *tunc*, and the Parties shall be returned to the *status quo ante* with respect to the Action as if this
 16 Agreement had never been entered into.

17 **B. Settlement Administration; Invalid or Incomplete Claims**

18 1. Fitbit shall, in good faith, administer the process of receiving, handling,
 19 processing, and paying claims through KCC, LLC, a third-party settlement administrator (the
 20 “Settlement Administrator”). Class Counsel shall have the right to inquire of Fitbit’s counsel
 21 regarding any aspect of implementation of the settlement, including but not limited to the
 22 settlement administration process and the treatment of individual Settlement Class Member’s
 23 claims under Section IX of this Agreement. Class Counsel shall also receive quarterly written
 24 reports summarizing claims received and action taken thereon at Class Counsel’s request.

25 2. The Settlement Administrator shall discharge all duties of notice and
 26 claims administration consistent with this Settlement Agreement and consistent with all Orders of
 27 the Court in this matter. To facilitate the ability of Class Members to obtain full answers to any
 28 questions regarding this settlement and the claims process, Settlement Administrator shall, at

1 minimum, establish a telephone number where, following any recorded announcements, any class
2 member can speak with a live person to seek information or answers regarding the settlement and
3 the Claims process. This facility shall continue as long as the Settlement Website is in operation.

4 3. The Settlement Administrator shall have the right to reject any claims
5 deemed to be fraudulent, insufficient, or incomplete. However, all claimants will be given a fair
6 and reasonable opportunity to cure any insufficient or incomplete claim submissions in order to
7 maximize the overall benefit to the Settlement Sub-Classes in accordance with Section IX.C
8 below.

9 4. The Settlement Administrator, not later than five (5) business days after the
10 Effective Date, shall provide a written list of all persons submitting timely and valid claims.

11 5. Not later than twenty-one (21) business days following the Effective Date,
12 Fitbit shall deposit with the Settlement Administrator an amount equal to the amount needed to
13 pay all timely and valid claims submitted to the Settlement Administrator. Not later than fourteen
14 (14) business days following the Settlement Administrator's receipt from Fitbit of the funds
15 needed to pay all timely and valid claims, the Settlement Administrator shall issue the \$12.50
16 payment, by check, to each Class Member submitting a timely and valid claim, to be sent by first
17 class U.S. mail to the address provided by the Settlement Class Member in their Claim Form.

18 6. In the event the mailing to any Settlement Class Member is returned
19 undeliverable, the Settlement Administrator shall reissue the mailing to the Settlement Class
20 Member no more than once, if no later than thirty (30) days after the return of the mailing, the
21 Settlement Administrator is given a new or forwarding address by the Postal Service, or by Class
22 Counsel.

23 7. The checks used to pay the claims of Settlement Class Members shall
24 contain the date the check is issued, and be marked conspicuously, "VOID UNLESS CASHED
25 IN 90 DAYS OF ISSUE DATE."

26 **C. Invalid or Incomplete Claims; Cure Period**

27 The Settlement Administrator will mail originals or copies of Claim Forms rejected as
28 invalid or incomplete, or a written notice of additional information required for the Claim Form to

be valid (“Cure Notice”), directly to the Settlement Class Member who submitted the Claim Form, with a specific, written explanation of how the Claim Form is invalid or incomplete, and what the Settlement Administrator needs to correct that deficiency. The Settlement Administrator shall mail each Cure Notice promptly, and in no event later than thirty (30) days following the end of the Claims Period. Settlement Class Members shall have a 45-day period to cure defective or incomplete claims, which shall run from the date of mailing of the original or copy of the Cure Notice to the Settlement Class Member. The 45-day cure period may extend after the end of the period for submission of Claim Forms so long as the original Claim Form was timely submitted. Settlement Class Members shall have only one opportunity to cure.

D. Disputed Claims

On a quarterly basis after the commencement of claims fulfillment, the Settlement Administrator will provide Class Counsel with a list of rejected Claims (including the Settlement Class Member’s name, address, and telephone number and the reason for rejection). Class Counsel shall have a reasonable opportunity to inspect originals or copies of the Claim Forms and all materials submitted in connection with them or with any attempt to cure defects. Counsel for the Parties will first attempt to resolve any disputes concerning rejected claims informally between themselves. If counsel cannot reach an agreement concerning one or more claims, the claims will be submitted to the Court for determination.

X. MISCELLANEOUS PROVISIONS

A. Extensions Of Time

Unless otherwise ordered by the Court herein, the Parties may jointly agree to reasonable extensions of time to carry out any of the provisions of this Agreement.

B. Integration

This Agreement, including all exhibits, constitutes a single, integrated written contract expressing the entire agreement of the Parties relative to the subject matter hereof. No covenants, agreements, representations, or warranties of any kind whatsoever have been made by any Party hereto, except as provided for herein. This Agreement supersedes all prior oral or written agreements and contemporaneous oral agreements among the parties.

1 **C. Governing Law**

2 This Agreement shall be construed in accordance with, and be governed by, the laws of
3 the State of California, without regard to the principles thereof regarding choice of law.

4 **D. Disputes**

5 The Parties agree that they will first attempt to resolve any disagreements or disputes over
6 the implementation of the terms of the settlement, the Agreement, or any other documents
7 necessary to effectuate the settlement informally. In the event the parties are unable to resolve
8 their disagreement or dispute informally, they agree to attempt to resolve the matter through
9 mediation with the Hon. John Leo Wagner (Ret.) of Judicate West, or through another mediator
10 who is mutually agreeable to the Parties. In the event that one or more of the Parties institutes a
11 legal action, arbitration, or other proceeding against any other Party or Parties to enforce the
12 sections of the settlement or to declare rights and/or obligations under the settlement, they will
13 bear their own costs, expenses, and attorney's fees.

14 **E. Gender and Plurals**

15 As used in this Agreement, the masculine, feminine, or neutral gender, and the singular or
16 plural number, shall each be deemed to include the others whenever the context so indicates.

17 **F. Survival of Warranties and Representations**

18 The warranties and representations of this Agreement are deemed to survive the date of
19 execution hereof.

20 **G. Authority to Execute**

21 The respective signatories to the Agreement each represent that they are fully authorized
22 to enter into the settlement on behalf of the respective Parties for submission to the Court for
23 preliminary and final approval. Each person executing this Agreement in a representative
24 capacity represents and warrants that he or she is empowered to do so.

25 **H. No Prior Assignments**

26 The Parties represent, covenant, and warrant that they have not directly or indirectly,
27 assigned, transferred, encumbered, or purported to assign, transfer, or encumber, to any person or
28 entity any portion of any liability, claim, demand, action, cause of action, or right released and

1 discharged in the settlement.

2 **I. Counterparts**

3 This Agreement may be executed in any number of counterparts, each of which shall be
4 deemed an original, but all of which together shall constitute one and the same instrument, even
5 though all Parties do not sign the same counterparts.

6 **J. Binding on Class Members**

7 It is agreed that because the members of the Settlement Sub-Classes are numerous, it is
8 impossible or impractical to have each Class Member execute the Agreement. The Class Notice
9 and Summary Notice will provide all Class Members with a summary of the settlement and will
10 advise all Class Members of the binding nature of the release. The Class Notice and Summary
11 Notice shall have the same force and effect as if the Agreement was executed by each Class
12 Member.

13 **K. Cooperation of Parties**

14 The Parties to this Agreement agree to prepare and execute all documents, to seek Court
15 approvals, to defend Court approvals, and to do all things reasonably necessary to complete the
16 settlement described in this Agreement.

17 **L. Execution Voluntary**

18 This Agreement is executed voluntarily by each of the Parties without any duress or undue
19 influence on the part, or on behalf, of any of them. The Parties represent and warrant to each
20 other that they have read and fully understand the provisions of this Agreement and have relied
21 on the advice and representation of legal counsel of their own choosing. Each of the Parties has
22 cooperated in the drafting and preparation of this Agreement and has been advised by counsel
23 regarding the terms, effects, and consequences of this Agreement. Accordingly, in any
24 construction to be made of this Agreement, this Agreement shall not be construed as having been
25 drafted solely by any one or more of the Parties.

26 **M. Confidentiality**

27 Any and all negotiations related to the settlement and the Agreement will remain strictly
28 confidential and shall not be discussed with anyone other than the Class Representatives and

Fitbit, their retained attorneys, their accountants and financial or tax advisers, auditors, retained consultants, the Court, and the mediator Hon. John Leo Wagner (Ret.) and his staff, unless otherwise agreed to by Class Counsel and Fitbit or unless otherwise ordered by the Court. All communications to the media or the public by Class Counsel will be reviewed by Fitbit for accuracy, and will not be in any way inconsistent with the notices issued pursuant to the Court's preliminary and final approval orders, and any other orders. This section does not prohibit the Parties from presenting to the Court as much information about their settlement negotiations as they mutually agree is necessary, or as the Court requires, to procure approval of the settlement set forth in this Agreement.

N. Documents and Discovery

Within thirty (30) days after the Effective Date, Class Counsel agrees to take steps necessary to destroy or erase all documents and data provided by Fitbit in the Action. Upon request from Fitbit, Class Counsel shall certify in writing to Fitbit their compliance with this section. Nothing in this section or the Agreement shall prohibit Class Counsel from retaining a case file, including all pleadings, motion papers, court filings, deposition transcripts, legal memoranda, correspondence, notes, and work product, so long as any exhibits to such documents that contain documents or data marked "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" continue to be treated as such under the Protective Orders in this case. Further, nothing in this section or in the Agreement shall prohibit Class Counsel from retaining the identifying information of all Settlement Class Members submitting claims in this matter, nor from contacting those persons, as Class Counsel's clients, regarding this settlement.

O. Notices

1. All Notices to Class Counsel provided for herein shall be sent by email to PPerotti@dworkenlaw.com with a hard copy sent by overnight mail to Patrick Perotti, Dworken & Bernstein Co., L.P.A., 60 South Park Place, Painesville, Ohio 44077.

2. All Notices to Fitbit provided for herein shall be sent by email to EBosman@mofo.com, with a hard copy sent by overnight mail to Erin M. Bosman, Morrison & Foerster LLP, 12531 High Bluff Drive, Suite 100, San Diego, California 92130-2040.

1 3. The notice recipients and addresses designated in Sections 1 and 2 above
2 may be changed by written notice pursuant to this Section.

3 4. Upon the request of any of the Parties, the Parties agree to promptly
4 provide each other with copies of objections, requests for exclusion, or other filings received as a
5 result of the Class Notice.

6 **L. Modification and Amendment**

7 This Agreement may be amended or modified only by a written instrument signed by the
8 Parties' counsel and approved by the Court.

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12 Dated: _____, 2018

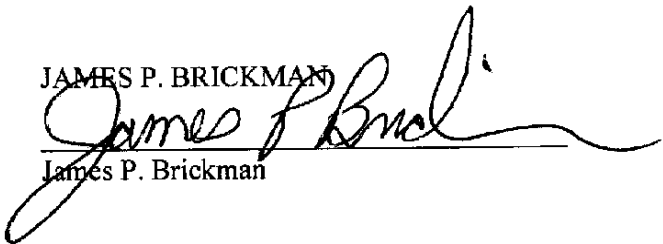
FITBIT, INC.

13 By: _____

14 Title: _____

15
16 Dated: Oct 29, _____, 2018

JAMES P. BRICKMAN


James P. Brickman

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18
19 Dated: _____, 2018

MARGARET CLINGMAN

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Margaret Clingman

22
23 Dated: _____, 2018

CARISSA RAY

24
25 _____
Carissa Ray

26 Dated: _____, 2018

MICHAEL LANDIS

27
28 _____
Michael Landis

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Dated: _____, 2018 FITBIT, INC.


By: _____

Title: _____

Dated: _____, 2018 JAMES P. BRICKMAN

James P. Brickman

Dated: October 29th, 2018 MARGARET CLINGMAN


Margaret Clingman

Dated: _____, 2018 CARISSA RAY

Carissa Ray

Dated: _____, 2018 MICHAEL LANDIS

Michael Landis

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By: _____

Title: _____

Dated: _____, 2018 JAMES P. BRICKMAN

James P. Brickman

Dated: _____, 2018 MARGARET CLINGMAN

Margaret Clingman

Dated: Oct 29, 2018

CARISSA RAY



Carissa Ray

Dated: _____, 2018 MICHAEL LANDIS

Michael Landis

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Dated: _____, 2018 FITBIT, INC.

By: _____

Title: _____

Dated: _____, 2018 JAMES P. BRICKMAN

James P. Brickman

Dated: _____, 2018 MARGARET CLINGMAN


Margaret Clingman

Dated: _____, 2018 CARISSA RAY

Carissa Ray

Dated: OCTOBER 29th, 2018

MICHAEL LANDIS



Michael Landis

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Dated: 10/28, 2018

ERICA WATHEY

Erica Wathey
Erica Wathey

Dated: _____, 2018

STEPHANIE CURTIS

Stephanie Curtis

Dated: _____, 2018

CAROLYN CIAVARELLA

Carolyn Ciavarella

Dated: _____, 2018

AMANDA SAMY

Amanda Samy

Dated: _____, 2018

JAMES GAU

James Gau

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Dated: _____, 2018

ERICA WATHEY

Erica Wathey

Dated: 10-29, 2018

STEPHANIE CURTIS

Stephanie S Curtis
Stephanie Curtis

Dated: _____, 2018

CAROLYN CIAVARELLA

Carolyn Ciavarella

Dated: _____, 2018

AMANDA SAMY

Amanda Samy

Dated: _____, 2018

JAMES GAU

James Gau

1 Dated: _____, 2018

ERICA WATHEY

2 _____
Erica Wathey

3
4 Dated: _____, 2018

STEPHANIE CURTIS

5 _____
Stephanie Curtis

6
7
8 Dated: October 29, 2018

CAROLYN CIAVARELLA

9 Carolyn Ciavarella
Carolyn Ciavarella

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11 Dated: _____, 2018

AMANDA SAMY

12 _____
Amanda Samy

13
14
15 Dated: _____, 2018

JAMES GAU

16 _____
James Gau

1 Dated: _____, 2018

ERICA WATHEY

2 _____
Erica Wathey

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4 Dated: _____, 2018

STEPHANIE CURTIS

5 _____
Stephanie Curtis

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8 Dated: _____, 2018

CAROLYN CIAVARELLA

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Carolyn Ciavarella

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11 Dated: 10/29/2018, 2018

AMANDA SAMY

12 _____
13 *Amanda Samy*
Amanda Samy

14
15 Dated: _____, 2018

JAMES GAU

16 _____
James Gau

1 Dated: _____, 2018 ERICA WATHEY

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Erica Wathey

4 Dated: _____, 2018 STEPHANIE CURTIS

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6 _____
Stephanie Curtis

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8 Dated: _____, 2018 CAROLYN CIAVARELLA

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Carolyn Ciavarella

11 Dated: _____, 2018 AMANDA SAMY

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Amanda Samy

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15 Dated: 10/29, 2018 JAMES GAU

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James Gau

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1 APPROVED AS TO FORM:

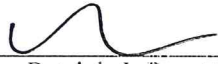
2 Dated: _____, 2018

DAVID F. McDOWELL
MORRISON & FOERSTER LLP

3
4 By: _____
David F. McDowell
Attorneys for Defendant
FITBIT, INC.

5
6
7 Dated: 10/29, 2018

PATRICK J. PEROTTI
DWORKEN & BERNSTEIN CO., L.P.A.

8
9
10 By: 
Patrick J. Perotti
Attorneys for Class Representatives and the
Settlement Sub-Classes

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This Agreement may be amended or modified only by a written instrument signed by the Parties' counsel and approved by the Court.

Dated: 10/29/2018, 2018

FITBIT, INC.

DocuSigned by:

By: 

E8CF67FD2AF646C...

Title: EVP and General Counsel

Dated: _____, 2018

JAMES P. BRICKMAN

James P. Brickman

Dated: _____, 2018

MARGARET CLINGMAN

Margaret Clingman

Dated: _____, 2018

CARISSA RAY

Carissa Ray

Dated: _____, 2018

MICHAEL LANDIS

Michael Landis

1 APPROVED AS TO FORM:

2 Dated: Oct 29, 2018

DAVID F. McDOWELL
MORRISON & FOERSTER LLP

3
4 By: 

David F. McDowell
Attorneys for Defendant
FITBIT, INC.

5
6
7 Dated: _____, 2018

PATRICK J. PEROTTI
DWORKEN & BERNSTEIN CO., L.P.A.

8
9 By: _____

Patrick J. Perotti
Attorneys for Class Representatives and the
Settlement Sub-Classes