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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JUDITH LANDERS, LISA MARIE BURKE, and JOHN MOLENSTRA, individually and on behalf of all others similarly situated, Plaintiffs, v. FITBIT, INC., Defendant.	Case No. 16-cv-00777 **CLASS ACTION COMPLAINT** CLASS ACTION DEMAND FOR JURY TRIAL

Plaintiffs Judith Landers, Lisa Marie Burke, and John Molenstra ("Plaintiffs"), by and through their attorneys, make the following allegations pursuant to the investigation of their counsel and based upon information and belief, except as to allegations specifically pertaining to themselves and their counsel, which are based on personal knowledge, against defendant Fitbit, Inc. ("Fitbit" or "Defendant").

NATURE OF THE ACTION

1. This is a class action relating to the Defendant's design, testing, marketing, and sale of its defective Fitbit Charge HR (the "Charge HR") and Fitbit Surge (the "Surge") wristband activity trackers.

2. The Charge HR and Surge (together, the "PurePulse Devices" or "Devices") feature Fitbit's "PurePulse™ Heart Rate" technology, which Defendant claims will provide users with "continuous, automatic, wrist-based heart rate" data, including during high-intensity workouts and training sessions.

3. The heart rate tracking component is a major selling point for both PurePulse Devices, which retail for a significant premium based on Defendant's heavy marketing of that feature.[1] Among the "Perks of PurePulse" that Defendant promotes, Defendant claims that the Devices enable users to get their "real-time heart rate," as well as "simplified heart rate zones" ("fat burn," "cardio," and "peak" zones) to ensure they are exercising with a desirable and safe level of intensity during workouts—"all without an uncomfortable chest strap" style heart monitor. Defendant also represents that by tracking heart rate trends with the PurePulse Devices, users can see how their health improves over time.

4. Unfortunately for purchasers of the PurePulse Devices, Fitbit's technology does not work as represented. As user experience and product testing confirms, these Devices do not

[1] For example, the Charge HR retails for approximately $150, while the Fitbit Charge, a tracker nearly identical to the Charge HR, but for the heart rate monitor, retails for approximately $130.

accurately record heart rates, particularly during the intense workouts for which Fitbit markets them.

5. Nevertheless, Fitbit, which encourages customers utilizing the Devices to speak with their doctor to determine healthy target heart rates, continues to market and sell the Devices to consumers while delivering inaccurate and unreliable heart rate data.

6. The PurePulse Devices are sold throughout the United States in hundreds of thousands of retail locations, including by mass retailers, as well as through online retailers and Defendant's own website, fitbit.com (the "Fitbit Website").

7. Although Fitbit requires consumers purchasing Devices through the Fitbit Website to agree to be bound by an arbitration clause and class action ban, third-party retailers do not require any such agreement in advance or at the time of purchase, or give any indication at the point of sale that such an agreement will later be required.

8. Instead, Fitbit includes a post-purchase instruction inside Device boxes that requires purchasers to visit the Fitbit Website and register their PurePulse Device. As Fitbit has acknowledged, the PurePulse Devices will not function unless and until users set up a Fitbit Website account, which requires the user to agree to FitBit's Terms of Service.

9. Fitbit's Terms of Service even purport to bind anyone who visits its website to its arbitration agreement, whether or not they purchase or register a product.[2] Fitbit's attempt to bind customers who bought PurePulse Devices through third-party retailers to an arbitration clause and class action ban of which they had no notice pre-purchase, and which is required to make the Devices function as advertised, is deceptive, unconscionable, and unenforceable.

[2] The Terms of Service provide: "You must accept these Terms to create a Fitbit account and to use the Fitbit Service. If you do not have an account, you accept these Terms by visiting www.fitbit.com or using any part of the Fitbit Service. IF YOU DO NOT ACCEPT THESE TERMS, DO NOT CREATE AN ACCOUNT, VISIT WWW.FITBIT.COM OR USE THE FITBIT SERVICE." *See* https://www.fitbit.com/legal/terms-of-service (last visited February 7, 2016). Thus, upon reading the Terms of Service, according to Fitbit, you have surrendered important rights.

10. This action seeks redress on a class-wide basis for Defendant's deceptive business practices in selling the PurePulse Devices. Plaintiffs bring claims individually and on a class-wide basis against Defendant for breach of express and implied warranties, violations of the California Consumer Legal Remedies Act ("CLRA"), Civil Code §§ 1750, *et seq.*, California's Unfair Competition Law ("UCL"), Bus. & Prof. Code §§ 17200, *et seq.*, California's False Advertising Law ("FAL"), Bus. & Prof. Code §§ 17500, *et seq.*, the Magnuson-Moss Warranty Act – Implied Warranty, 15 U.S.C. § 2301, *et seq.*, New York General Business Law §§ 349 and 350, the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), 815 Ill. Comp. Stat. 505/1, *et seq.*, common law fraud, fraud in the inducement, unjust enrichment, and injunctive relief.

PARTIES

11. Plaintiff Judith Landers is a citizen of the state of New York, residing in Watervliet, New York. Plaintiff, who is currently in her late 60s, began working with a personal trainer in 2015. Her trainer wanted Plaintiff to use a heart rate monitor during her work outs as a training tool and safety precaution. Plaintiff viewed advertisements promoting the Charge HR and the Devices' PurePulse technology online, including, but not limited to, on Facebook, and she relied on Defendant's claims that the Device would continuously monitor her heart rate and report her accurate, real-time heart rate, including during exercise sessions. In September 2015, Plaintiff purchased the Charge HR from a local L.L.Bean retail store. She paid approximately $150.00 for the Device. At no point before or during the purchase of her Charge HR was Plaintiff Landers provided with or required to agree to an arbitration clause or class action ban, nor was she put on notice that she would be required to agree to an arbitration clause or class action ban for her Charge HR to function as intended. Since that time she has used the Charge HR during her independent work out sessions, which occur approximately four times per week, and trainer sessions, which take place two times per week. Both Plaintiff and her trainer have observed that the Charge HR misreports Plaintiff's heart rate, in particular, by understating her heart rate. For example, during a recent session with her personal trainer, her Charge HR reported a heart rate of approximately 112 beats per minute ("bpm"); however, at that time Plaintiff's heart rate was in

fact approximately 153 bpm. Had Plaintiff known that the PurePulse Devices do not work as represented by Defendant and do not deliver accurate, real-time heart rate readings, Plaintiff would not have purchased the Device or would have paid less for the Device.

12. Plaintiff Lisa Marie Burke is a citizen of the state of Illinois, residing in Aurora, Illinois. Plaintiff viewed advertisements promoting the Charge HR both on television and the internet, including, but not limited to on Facebook as well as amazon.com. Plaintiff, who has had heart surgery, relied on Defendant's advertising claims that the Charge HR would accurately and continuously record her real time heart rate and Plaintiff Burke purchased the Device with her husband specifically because of the heart rate feature. Plaintiff and her husband paid approximately $149.99 for the Device, which they purchased from a Verizon retail store located in North Aurora, Illinois, on or around May 31, 2015. At no point before or during the purchase of her Charge HR was Plaintiff Burke provided with or required to agree to an arbitration clause or class action ban, nor was she put on notice that she would be required to agree to an arbitration clause or class action ban for her Charge HR to function as intended. Upon using the Charge HR, Plaintiff Burke noticed that the heart rate readings were widely inaccurate. For example, Plaintiff has observed that while simply lying in bed, her heart rate reading will jump from approximately 88 to 145 bpm. Plaintiff has also compared the Charge HR heart rate readings with other heart rate monitors that she frequently consults and finds that the Charge HR heart rate reading is consistently inaccurate, typically by between 10 and 30 bpm. Plaintiff has contacted Defendant regarding both the inaccurate heart rate readings and problems she has experienced with the Device's step counter. Although Fitbit has sent Plaintiff a response with regard to the step count issue, Defendant has offered no response regarding the inaccuracy of the heart rate data reported by the PurePulse Device. Had Plaintiff known that the PurePulse Devices do not work as represented by Defendant and do not deliver accurate, real-time heart rate readings, Plaintiff would not have purchased the Device or would have paid less for the Device.

13. Plaintiff John Molenstra is a citizen of the state of Illinois, residing in Chicago, Illinois. Plaintiff purchased the Surge in December 2015 online from Brookstone.com for

approximately $250. He purchased the Charge HR in January 2015 from an AT&T store located in Norridge, Illinois for approximately $150. In purchasing the Devices, Plaintiff relied on Defendant's claims in magazine and internet advertisements, including but not limited to Men's Health and Men's Fitness magazines, that the Devices would accurately and continuously monitor his heart rate. Since purchasing and using the PurePulse Devices, Plaintiff has noticed the heart rate feature on the Devices fails to accurately report his heart rate. Generally, Plaintiff finds his heart rate is understated, but at times, the Devices fail to register his heart rate at all. For example, approximately two to three months ago, Plaintiff compared the heart rate reading on the Surge to a chest strap heart monitor and found that the Surge understated his heart rate by approximately 15 to 20 beats per minute. Had Plaintiff known that the PurePulse Devices do not work as represented by Defendant and do not deliver accurate, real-time heart rate readings, Plaintiff would not have purchased the Devices or would have paid less for the Devices.

14. Defendant Fitbit, Inc., is a Delaware Corporation with its headquarters located at 405 Howard Street, Suite 550, San Francisco, California 94105. Defendant designed, manufactures, markets, distributes, and sells the PurePulse Devices. It sells the Devices directly through its consumer website, fitbit.com, and through third-party retailers nationwide.

JURISDICTION AND VENUE

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

16. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because Defendant is headquartered in this District, and a substantial part of the events and omissions giving rise to Plaintiffs' claims occurred in this District, including Fitbit's design and marketing of the Devices from its headquarters in San Francisco, California, and that Fitbit's wrongful actions harmed consumers who live in this District and purchased Devices in this District.

INTRADISTRICT ASSIGNMENT

17. Pursuant to Civil L.R. 3-2(c), this civil action should be assigned to the San Francisco Division, because a substantial part of the events or omissions giving rise to the claim occurred in the county of San Francisco, where Fitbit is headquartered.

FACTUAL ALLEGATIONS

18. Since 2007, Fitbit has released a variety of wearable activity trackers that it claims will help users to meet their health and fitness goals. Fitbit's product features have included step counting, distance calculating, calorie calculating, and sleep monitoring, and users may synch the products to smart phones and computers to review and track their fitness developments.

19. Fitbit claims that sales of its products have made it "the market leader in the fast-growing Connected Health and Fitness category."

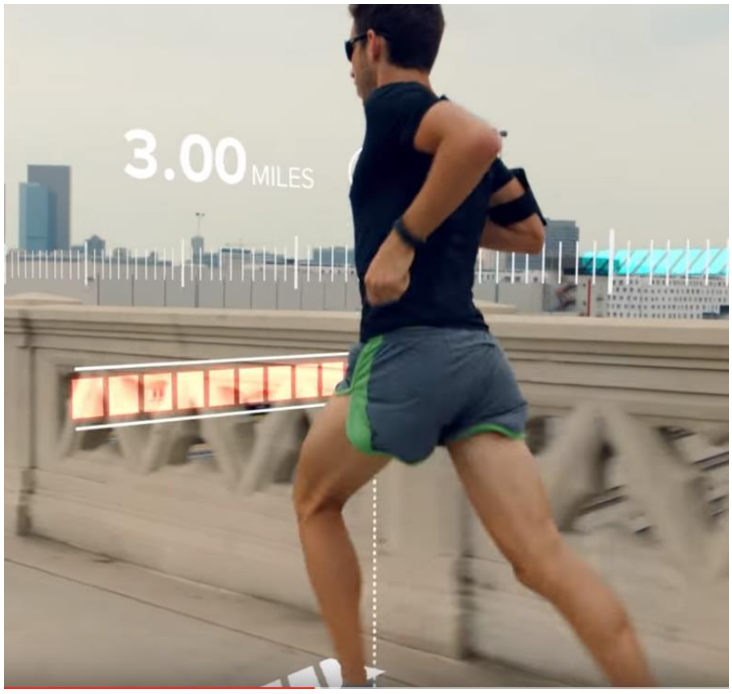
20. In October 2014, Fitbit introduced a new, highly sought feature to certain trackers—continuous heart rate monitoring. It promoted its proprietary "PurePulse™ optical heart rate technology" as a means of receiving continuous and automatic heart rate data through two of its wearable wristbands—the Charge HR and Surge.

21. Along with these two PurePulse Devices, Defendant announced the Fitbit Charge, a tracker nearly identical to the Charge HR, but lacking the heart rate monitor. The PurePulse Devices, which retail at approximately $150 (the Charge HR) and $250 (the Surge, which also features a GPS device) sell at a significant premium over the Fitbit Charge, which retails for approximately $130.

22. Fitbit introduced the Fitbit Charge, Charge HR, and Surge together as "3 New Fitness Trackers for Everyday, Active and Performance Consumers."

23. Specifically, while Defendant targeted the Fitbit Charge toward consumers wanting to track everyday activities, such as walking and sleeping, it marketed the PurePulse enabled Charge HR and Surge as designed especially for, respectively, "regular exercisers looking to push their fitness further" and "people dedicated to reaching their peak performance."

24. Marketing materials for the Charge HR "heart rate + activity wristband" heavily promoted the heart rate feature and depicted users engaging in vigorous exercise, such as jumping rope, boxing, jogging, and running, as well as sit-ups and squats. A video advertisement promoting the Charge HR and depicted in part below, begins, "The difference between good and great is heart:"



https://www.fitbit.com/chargehr (last visited February 8, 2016).

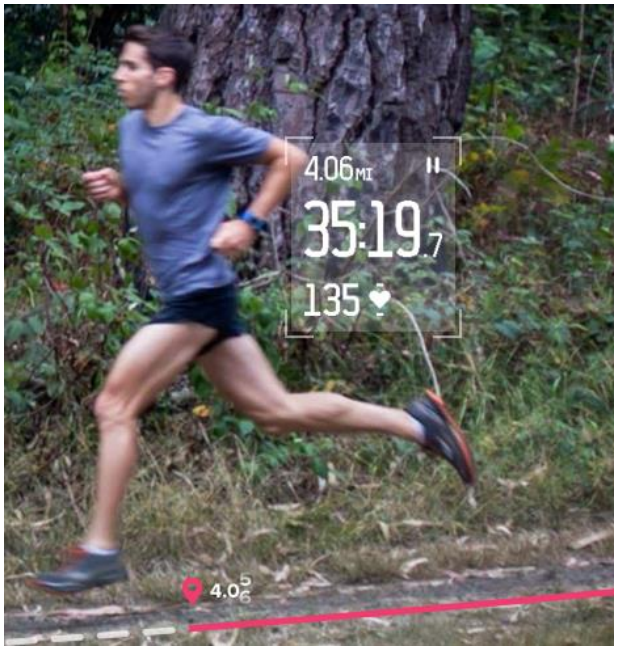
25. To emphasize the benefits of its PurePulse technology, Defendant used slogans such as "Every beat counts," "For better fitness, start with heart," and "Get better tracking with every beat."

26. Defendant claimed that the PurePlus heart rate technology would report continuous, automatic, "real-time heart rate," so that users can "[g]et instant heart rate readings all day, every day," as well as tell users the "simplified heart rate zones" into which their heart rate fell, including the "fat burn," "cardio," and "peak" zones.

27. Defendant promises users their real-time heart rate to, *inter alia*, "ensure you're giving the right amount of intensity during workouts." Similarly, Defendant suggests, "Set a target heart rate zone to ensure you're pushing yourself hard enough, but not overtraining," and advises, "Talk to your doctor to learn which heart rate zones are right for you." Thus, PurePulse

Device owners rely on this heart rate information to help determine if they are exercising or otherwise engaging in physical activity at a desirable and safe pace.

28. These representations were made with respect to both the PurePulse Devices. Indeed, the Surge was marketed as being designed for even higher intensity workouts. Images from Defendant's website show users engaged in intense exercise:



29. Defendant claims on the Surge product page, "With continuous heart rate readings, Surge keeps you in the zone—all day and during workouts. No straps. No clips. No guessing."

30. Moreover, Defendant marketed its wrist-based heart rate technology as superior to uncomfortable chest strap heart monitors, because, according to Defendant, its PurePulse Devices provide the same heart rate data as a chest strap monitor, but without the bulk and physical restrictions of the chest strap.

31. These marketing materials were and are utilized by the third-party retailers who sell the Devices throughout the country. For example, Defendant's marketing slogans, images, and videos for the Devices appear on the Amazon.com page selling the Charge HR.

PurePulse Heart Rate

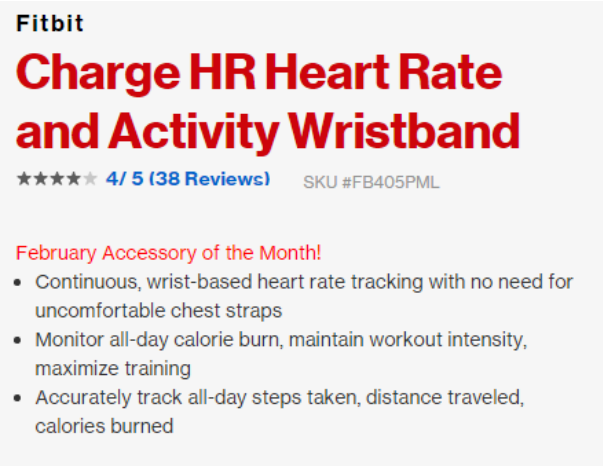
Get continuous, automatic, wrist-based heart rate monitoring and see simplified heart zones—with no uncomfortable chest strap.

See http://www.amazon.com/Fitbit-Charge-Wireless-Activity-Wristband/dp/B00N2BW9BW/ref=sr_1_9?ie=UTF8&qid=1454965495&sr=8-9&keywords=fitbit+charge (last visited February 8, 2016).

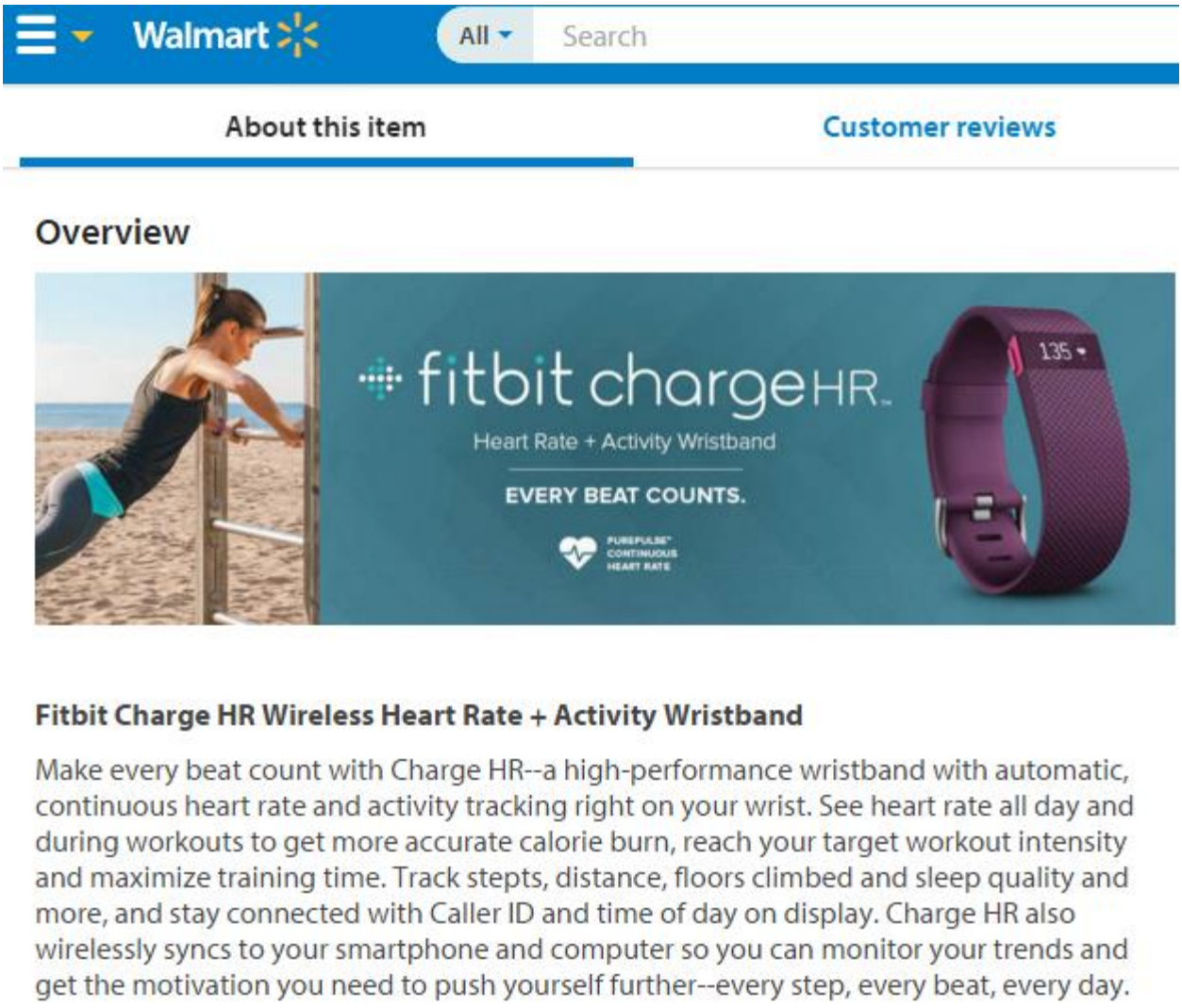
From the Manufacturer

See http://www.amazon.com/Fitbit-Surge-Fitness-Superwatch-Black/dp/B00N2BWF6Q/ref=sr_1_3?ie=UTF8&qid=1454966318&sr=8-3&keywords=fitbit+surge (last visited February 8, 2016).

32. The claims are similarly echoed by other retailers, for example Verizon and Walmart:



See http://www.verizonwireless.com/accessories/fitbit-charge-hr-heart-rate-and-activity-wristband/ (last visited February 8, 2016).



See http://www.walmart.com/ip/Fitbit-Charge-HR-Heart-Rate-Activity-Wristband/39877708#about (last visited February 8, 2016).

33. These claims, repeated uniformly by retailers of the Devices are false and misleading and omit material information regarding the accuracy of the heart rate the PurePulse Devices report.

34. In reality, wrist-based heart rate monitors are far less accurate than chest strap monitors. This is particularly true when users are engaged in physical activity and attempting to read an elevated heart rate, as opposed to their resting heart rate. Unfortunately for PurePulse Devise users, an individual's resting heart rate is much less useful for determining overall health

and fitness and it of course fails to act as a warning signal for users who use a heart rate monitor to help them keep their heart rate within a range that is medically safe for them during exercise.

35. Fitbit's PurePulse Devices use LED-based technology to monitor heart rate based on changes in blood volume in capillaries. As explained by Defendant, "PurePulse™ LED lights on your tracker reflect onto the skin to detect blood volume changes and finely tuned algorithms are applied to measure heart rate automatically and continuously."

36. However, Defendant's PurePulse monitoring technology does not function as claimed especially when users engage in physical activity, including the exercises for which Defendant promotes the Devices.

37. Among other things, because optical heart rate sensors get their blood flow reading from users' wrists, their accuracy is reduced by the fact that they are far down the arm and away from the heart. Additionally, many exercises, including those featured in Fitbit's marketing materials, involve vigorous wrist movement or flexing of muscles around the wrist. Such movements also make it impossible for the PurePulse Devices to record an accurate and/or continuous real-time heart rate. Device accuracy can also be reduced by surrounding light affecting the wristband sensor.

38. In short, it is far more difficult to capture an accurate heart rate reading from one's wrist, which is exposed and frequently in motion, than from a monitor secured to one's chest.

39. The shortcomings of the PurePulse Devices' heart rate capabilities are reflected in the many consumer and professional reviews posted online that complain of inaccurate heart rate readings from PurePulse Devices.

40. For example, Samuel Gibbs, writing for the Guardian, concluded in his review for the Charge HR, "Considering at full sprint I only managed to record a maximum of 155 beats per minute, I think either the sensor is flawed or Fitbit's heart rate bands are a bit optimistic." http://www.theguardian.com/technology/2015/feb/13/fitbit-charge-hr-review-heart-rate-tracker. And in his review for the Surge, he noted, the Surge was "less capable of tracking a run as the weight of the watch and sweat build up meant it moved around even when drawn tight, producing

variable heart rate readings." http://www.theguardian.com/technology/2015/mar/13/fitbit-surge-review-fitness-tracking-watch.

41. A review of the Charge HR for Wired magazine also concluded that during a high intensity work out, although the Device at times could measure "peaks" in the 160s, a heart rate strap recorded a significant amount of time in the 180s, which the Charge HR failed to capture. http://www.wired.com/2015/02/review-fitbit-charge-hr/.

42. In a review for wearable.com, testers found that while engaged in an activity that required movement—running—"results were fairly wide of the mark compared to a chest strap." http://www.wareable.com/fitbit/fitbit-charge-hr-review.

43. In another wearable.com review, testers concluded, "The Surge seemed to take about five minutes to properly pick up the heart rate…. Once it did, it was in the right heart rate zone 77% of the time." *See* http://www.wareable.com/fitness-trackers/heart-rate-monitor-accurate-comparison-wrist.

44. Consumer reviews on sites such as amazon.com share this same theme, for example:

> The product does not capture heart rate accurately, despite referencing their online user guide as instructed by customer service in order to ensure proper wear and usage. Please see attached photos of a treadmill run in February. I alternated between sprints and hill walking in order to get my heart rate up. The treadmill heart rate reflects my Polar chest strap reading (which, based on perceived exertion standards, felt reasonable.) …The FitBit is regularly lower than the Polar or cannot capture a reading at all.
> I did contact Customer Service who provided me with a detailed explanation of "how our capillaries expand and contract based on blood volume changes and how the PurePulse LED lights reflect onto the skin to detect blood volume changes and finely tuned algorithms are applied to measure heart rate automatically and continuously". Perhaps so, but after two months of wear it does not seem accurate. The nail in the coffin was today at the doctor's office when their fingertip heart rate monitor read 60 and the FitBit Chart HR read 99. The nurse and I had a good laugh and I'm still searching for a product which accurately measures heart rate without a chest strap.
>
> I wanted to love this but it just isn't happening. You see I thought that the HR stood for Heart Rate. Well I must have been mistaken. As soon as you begin working out your heart rate climbs a bit. BUT as soon as my HR got above 120 it either shuts down or just sits on 120. On a couple different occasions I wore my Polar at the same time. Polar had my

> highest heart rate at 160 BPM while the charge hr had me resting at 75. So I posted in the "community forum", no response. I emailed, no response. I called customer support, your average wait time is more than 10 minutes. The first time I just figured I would call back, the second time I waited on hold about 15 minutes. The third time I waited for 24 minutes before someone comes on the line and assists me. We updated the tracker, and she has me put the HR from auto to on. She assured me that that would fix the issue. So I get off the phone 45 minutes later and begin a BeachBody Cardio workout, Polar put my highest heart rate at 160 again and the charge hr completely shut down registering my heart rate. I emailed again, still no response. I called again, "your average wait time is more than 10 minutes". Tomorrow when the mail is running this glorified watch is going back and I am going with another brand. What a JOKE!!...
>
> I read all the reviews and debated for 6-months whether I should buy this watch or not. I am highly disappointed with this product. It is a glorified step tracker and does not accurately read your heart rate at all. If you're at a resting heart rate all day, this product might be for you, but for those who are active (aka - those who would buy this product), this wristband does not accurately monitor and report your increased heart rate.
> While working out and while running, it said my heart rate was (on average) 95 beats per minute. What? 95 BPM? How is that even possible when I'm sweating after a 30 minute run or workout session? Moreover, I compared my heart rate on this tracker to the one on a treadmill and the difference was at least 60bpm.
> No one will get accuracy from this product and the Fitbit customer service for this product was awful. They suggest wearing it *3* finger widths from your wrist bone during activity, but to also make sure it's not on too tight or else you won't get a good read. How can it not be tight? It's going to only slide closer to my wrist bone! This paradoxical advice is almost as ridiculous as it reading my heart rate to be 95 BPM after running for 30 minutes!

See http://www.amazon.com/Fitbit-Charge-Wireless-Activity-Wristband/product-reviews/B00N2BW2PK/ref=cm_cr_pr_paging_btm_next_8?ie=UTF8&filterByStar=one_star&showViewpoints=0&pageNumber=8 (last visited February 8, 2016).

45. In sum, contrary to Fitbit's marketing claims, Fitbit's PurePulse Devices do not accurately report users' heart rates, particularly during the workouts for which Fitbit advertises and promotes them.

46. Plaintiffs and other members of the Class and Subclasses (as defined below) relied on Defendant's misrepresentations and omissions regarding the benefits and capabilities of the PurePulse Devices. Plaintiffs, the Class, and the Subclasses have been damaged by Defendant's deceptive and unfair conduct and wrongful inaction in that they purchased the Devices which they would not have otherwise purchased or would not have paid as much for had Defendant not misrepresented the benefits of the PurePulse Devices.

47. Finally, Plaintiffs and other Class members did not sign away their rights to a jury trial or to join a class action upon purchase of the PurePulse Devices. At the point of sale, there was no indication on Device packaging or elsewhere that any agreement to limit their constitutional and statutory rights would be necessary in order to utilize the PurePulse Devices.

48. Only after purchasing the PurePulse Devices were Plaintiffs and Class members informed that in order the render the Devices operational, they would first need to register and create and online account through the Fitbit Website, which requires the user to agree to Fitbit's Terms of Service. By creating such an account, they would purportedly bind themselves to an adhesive arbitration clause and class action ban.

49. Specifically, a "Dispute Resolution" section buried in the Fitbit Website Terms of Service purports to, *inter alia*: eliminate the consumer's constitutional rights to a jury trial by designating binding arbitration as the only forum for dispute resolution; prohibit class actions; and impose an extra-judicial, one year statute of limitations on Class members' potential causes of actions relating to the PurePulse Devices.

50. Further evidencing the sweeping and unconscionable nature of the arbitration and class action waiver provisions, Fitbit purports to bind anyone who even visits the Fitbit Website to these terms, even if they do not take further steps to register and create an account.

51. Moreover, while the Dispute Resolution section contains an inconspicuous provision outlining a limited procedure for opting out of the arbitration agreement, no such opt-out possibility exists for the class action waiver, the one-year statute of limitation, or the clauses governing selection of law and forum.

CLASS DEFINITIONS AND ALLEGATIONS

52. Plaintiffs seek to represent a class defined as all persons in the United States who purchased a PurePulse Device, excluding those who purchased a PurePulse Device directly from the Fitbit Website and who did not opt out of Fitbit's arbitration agreement (the "Class"). Also excluded from the Class are persons who purchased the PurePulse Devices for purposes of resale.

53. Plaintiff Judith Landers also seeks to represent a subclass defined as all members of the Class who purchased the PurePulse Devices in New York (the "New York Subclass").

54. Plaintiffs Lisa Marie Burke and John Molenstra also seek to represent a subclass defined as all members of the Class who purchased the PurePulse Devices in Illinois (the "Illinois Subclass").

55. Members of the Class and the Subclasses are so numerous that their individual joinder herein is impracticable. On information and belief, members of the Class and the Subclasses number in the millions. The precise number of Class members and their identities are unknown to Plaintiffs at this time but may be determined through discovery. Class members may be notified of the pendency of this action by mail and/or publication through the distribution records of Defendant and third party retailers and vendors.

56. Common questions of law and fact exist as to all members of the Class and the Subclasses and predominate over questions affecting only individual Class and Subclass members. Common legal and factual questions include, but are not limited to, whether Defendant's marketing of the PurePulse Devices was misleading and omitted material information.

57. The claims of the named Plaintiffs are typical of the claims of the Class and the Subclasses they seek to represent in that the named Plaintiffs were exposed to Defendant's misleading advertising, purchased the Devices, and suffered a loss as a result of that purchase.

58. Plaintiffs are adequate representatives of the Class and the Subclasses because their interests do not conflict with the interests of the Class or Subclass members they seek to represent, they have retained competent counsel experienced in prosecuting class actions, and they intend to prosecute this action vigorously. The interests of Class and Subclass members will be fairly and adequately protected by Plaintiffs and their counsel.

59. The class mechanism is superior to other available means for the fair and efficient adjudication of the claims of Class and Subclass members. Each individual member of the Class and Subclasses may lack the resources to undergo the burden and expense of individual prosecution of the complex and extensive litigation necessary to establish Defendant's liability.

Individualized litigation increases the delay and expense to all parties and multiplies the burden on the judicial system presented by the complex legal and factual issues of this case. Individualized litigation also presents a potential for inconsistent or contradictory judgments. In contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court on the issue of Defendant's liability. Class treatment of the liability issues will ensure that all claims and claimants are before this Court for consistent adjudication of the liability issues.

COUNT I

(California's Consumer Legal Remedies Act, Cal. Civil Code §§ 1750, *et seq.*)

60. Plaintiffs repeat the allegations contained in the paragraphs above as if fully set forth herein.

61. Plaintiffs bring this Count individually and on behalf of the Class.

62. Plaintiffs and Class members are consumers who purchased the PurePulse Devices for personal, family, or household purposes. Accordingly, Plaintiffs and Class members are "consumers" as that term is defined by the CLRA in Cal. Civ. Code § 1761(d). Plaintiffs and Class members are not sophisticated experts with independent knowledge of the capabilities of the PurePulse Devices.

63. At all relevant times, the PurePulse Devices constituted "goods" as that term is defined in Cal. Civ. Code § 1761(a).

64. At all relevant times, Defendant was a "person" as that term is defined in Civ. Code § 1761(c).

65. At all relevant times, Plaintiffs' purchases of the PurePulse Devices, and the purchases of the PurePulse Devices by other Class members, constituted "transactions" as that term is defined in Cal. Civ. Code § 1761(e). Defendant's actions, inactions, representations, omissions, and conduct has violated, and continues to violate the CLRA, because they extend to transactions that intended to result, or which have resulted in, the sale of the Devices to consumers.

66. The policies, acts, omissions, and practices described in this Complaint were intended to and did result in the sale of the PurePulse Devices to Plaintiffs and the Class. Defendant's practices, acts, omissions, policies, and course of conduct violated the CLRA §1750, *et seq.* as described above.

67. Defendant represented that the PurePulse Devices had characteristics, uses, and benefits which they did not have in violation of Cal. Civ. Code § 1770(a)(5).

68. Defendant represented that the PurePulse Devices were of a particular standard or quality when Defendant was aware they were of another, in violation of California Civil Code § 1770(a)(7).

69. Defendant violated California Civil Code §§ 1770(a)(5) and (a)(7) by representing that the PurePulse Devices were capable of continuously reporting an accurate, real time heart rate, even during vigorous exercise, when, in fact, the PurePulse Devices do not have this ability.

70. Defendant advertised the PurePulse Devices with the intent not to sell them as advertised in violation of § 1770(a)(9) of the CLRA. Defendant did not intend to sell the Devices as advertised because Defendant knew that the PurePulse Devices are not capable of continuously recording or reporting an accurate real time heart rate.

71. Plaintiffs and Class members suffered injuries caused by Defendant's misrepresentations and omissions because: (a) Plaintiffs and Class members would not have purchased the PurePulse Devices or would not have paid as much for them if they had known the true facts; (b) Plaintiffs and Class members purchased the PurePulse Devices due to Defendant's misrepresentations and omissions; and (c) the PurePulse Devices did not have the level of quality or value as promised.

72. Plaintiffs and the Class seek an order enjoining Defendant's unfair or deceptive acts or practices, equitable relief, an award of attorneys' fees and costs under Cal. Civ. Code § 1780(e), and any other just and proper relief available under the CLRA.

73. In accordance with section 1782(a) of the CLRA, Plaintiffs' counsel, on behalf of Plaintiffs, will serve Defendant with notice of their alleged violations of Cal. Civ. Code § 1770(a)

relating to the PurePulse Devices purchased by Plaintiffs and Class members, and demand that Defendant corrects or agrees to correct the actions described therein within thirty (30) days of such notice. If Defendant fails to do so, Plaintiffs will amend this Complaint as of right (or otherwise seek leave to amend the Complaint) to include compensatory and monetary damages to which Plaintiffs and Class members are entitled.

COUNT II

(California's False Advertising Law, Cal. Bus. & Prof. Code §§17500, *et seq.*)

74. Plaintiffs repeat the allegations contained in the paragraphs above as if fully set forth herein.

75. Plaintiffs bring this Count individually and on behalf of the Class.

76. California's FAL (Bus. & Prof. Code §§17500, *et seq.*) makes it "unlawful for any person to make or disseminate or cause to be made or disseminated before the public in this state, . . . in any advertising device . . . or in any other manner or means whatever, including over the Internet, any statement, concerning . . . personal property or services, professional or otherwise, or performance or disposition thereof, which is untrue or misleading and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading."

77. Defendant committed acts of false advertising, as defined by the FAL, by using false and misleading statements, and material omissions, to promote the sale of the PurePulse Devices, as described above, and including, but not limited to, representing that the PurePulse Devices would continuously and accurately record and report Class members' real time heart rate.

78. Defendant knew or should have known, through the exercise of reasonable care, that its statements were untrue and misleading.

79. Defendant's actions and omissions in violation of the FAL were false and misleading such that the general public is and was likely to be deceived.

80. As a direct and proximate result of these acts and omissions, consumers have been and are being harmed. Plaintiffs and members of the Class have suffered injury and actual out-of-pocket losses as a result of Defendant's FAL violation because: (a) Plaintiffs and Class members

would not have purchased the PurePulse Devices or would not have paid as much for them if they had known the true facts; (b) Plaintiffs and Class members purchased the PurePulse Devices due to Defendant's misrepresentations and omissions; and (c) the PurePulse Devices did not have the level of quality or value as promised.

81. Plaintiffs bring this action pursuant to Bus. & Prof. Code § 17535 for injunctive relief to enjoin the practices described herein and to require Defendant to issue corrective disclosures to consumers. Plaintiffs and the Class are therefore entitled to: (a) an order requiring Defendant to cease the acts of unfair competition alleged herein; (b) full restitution of all monies paid to Defendant as a result of its deceptive practices; (c) interest at the highest rate allowable by law; and (d) the payment of Plaintiffs' attorneys' fees and costs pursuant to, *inter alia*, California Code of Civil Procedure §1021.5.

COUNT III

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

82. Plaintiffs repeat the allegations contained in the paragraphs above as if fully set forth herein.

83. Plaintiffs bring this Count individually and on behalf of the Class.

84. The Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.*, prohibits any "unlawful," "unfair," or "fraudulent," business act or practice and any false or misleading advertising. The UCL also provides for injunctive relief and restitution for UCL violations. By virtue of its above-described wrongful actions, Defendant engaged in unlawful, unfair, and fraudulent practices within the meaning, and in violation of, the UCL.

85. "By proscribing any unlawful business practice, section 17200 borrows violations of other laws and treats them as unlawful practices that the UCL makes independently actionable." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 180 (1999) (citations and internal quotation marks omitted).

86. Virtually any law or regulation – federal or state, statutory, or common law – can serve as a predicate for an UCL "unlawful" violation. *Klein v. Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1383 (2012).

87. Defendant violated the "unlawful prong" by violating the CLRA and the FAL, as well as by breaching express and implied warranties as described herein.

88. Defendant's acts and practices constitute "unfair" business acts and practices in that the harm caused by Defendant's wrongful conduct outweighs any utility of such conduct, and that Defendant's conduct: (i) offends public policy; (ii) is immoral, unscrupulous, unethical, oppressive, deceitful and offensive, and/or (iii) has caused (and will continue to cause) substantial injury to consumers, such as Plaintiffs and the Class.

89. There were reasonably available alternatives to further Defendant's legitimate business interests, including accurately representing the capabilities of the PurePulse Devices, other than Defendant's wrongful conduct and omissions described herein.

90. The UCL also prohibits any "fraudulent business act or practice." Defendant's above-described claims, nondisclosures, and misleading statements were false, misleading, and likely to deceive the consuming public in violation of the UCL.

91. As a direct and proximate result of Defendant's above-described wrongful actions, inactions, and violation of the UCL; Plaintiffs and members of the Class have suffered injury and actual out-of-pocket losses because: (a) Plaintiffs and Class members would not have purchased the PurePulse Devices or would not have paid as much for them if they had known the true facts; (b) Plaintiffs and Class members purchased the PurePulse Devices due to Defendant's misrepresentations and omissions; and (c) the PurePulse Devices did not have the level of quality or value as promised.

92. Pursuant to Bus. & Prof. Code §17203, Plaintiffs and the Class are therefore entitled to: (a) an order requiring Defendant to cease the acts of unfair competition alleged herein; (b) full restitution of all monies paid to Defendant as a result of its deceptive practices; (c) interest

at the highest rate allowable by law; and (d) the payment of Plaintiffs' attorneys' fees and costs pursuant to, *inter alia*, California Code of Civil Procedure §1021.5.

COUNT IV

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

(Fitbit Website Terms of Service)

93. Plaintiffs repeat the allegations contained in the paragraphs above as if fully set forth herein.

94. Plaintiffs bring this Count individually and on behalf of the Class.

95. The UCL, Cal. Bus. & Prof. Code § 17200, *et seq.*, prohibits any "unlawful," "unfair," or "fraudulent," business act or practice and any false or misleading advertising.

96. By virtue of its conduct relating to the Fitbit Website's Terms of Service, Defendant engaged in unfair and fraudulent practices within the meaning, and in violation of, the UCL.

97. Defendant committed unfair and fraudulent business acts and practices in violation of Cal. Bus. & Prof. Code § 17200, *et seq.*, by concealing and failing to alert Plaintiffs and Class members at the point of sale that in order to make use of the PurePulse Devices they would be required to register for an online account and that the account would be accompanied by Defendant's clickwrap Terms of Service, which would include an arbitration clause, forum selection clause, choice of law provision, class action ban, and claim period limitation.

98. These Terms of Service were all imposed on Plaintiffs and Class members unilaterally, post-purchase.

99. Defendant's acts and practices constitute "unfair" business acts and practices in that the harm caused by Defendant's wrongful conduct outweighs any utility of such conduct, and that Defendant's conduct: (i) offends public policy; (ii) is immoral, unscrupulous, unethical, oppressive, deceitful and offensive, and/or (iii) has caused (and will continue to cause) substantial injury to consumers, such as Plaintiffs and the Class.

100. There were reasonably available alternatives to further Defendant's legitimate business interests, including disclosing the Terms of Service and their provisions and/or including terms that do not purport to significantly curtail their customers' legal rights, other than Defendant's wrongful conduct and omissions described herein.

101. Defendant's actions and omissions were likely to deceive the consuming public in violation of the UCL.

102. As a direct and proximate result of Defendant's above-described wrongful actions, inactions, and violation of the UCL, Plaintiffs and members of the Class have suffered and will continue to suffer actual damages.

103. As a result of its unfair and deceptive conduct, Defendant has been unjustly enriched and should be required to disgorge its unjust profits and make restitution to Plaintiffs and Class members pursuant to Cal. Bus. & Prof. Code §§ 17203 and 17204.

104. Plaintiffs and the Class further seek an order requiring Defendant to cease the acts of unfair competition alleged herein, and the payment of Plaintiffs' attorneys' fees and costs pursuant to, *inter alia*, California Code of Civil Procedure §1021.5.

COUNT V

(Common Law Fraud)

105. Plaintiffs repeat the allegations in the foregoing paragraphs as if fully set forth herein.

106. Plaintiffs bring this claim individually and on behalf of the members of the Class and Subclasses against Defendant.

107. Defendant engaged in both speaking and silent fraud, and in fraudulent and deceptive conduct. As described above, Defendant's conduct defrauded Plaintiffs and Class members, by intentionally leading them to believe, through affirmative misrepresentations, omissions, suppressions, and concealments of material fact, that the PurePulse Devices possessed important characteristics that they in fact do not possess—namely that they could consistently

record an accurate real time heart rate, even during vigorous exercise—and inducing their purchases.

108. The foregoing misrepresentations were uniform across all Class members. The same extensive and widespread advertising campaign was promoted nationwide, and all of the promotional materials contained the same material representations regarding the PurePulse Devices' ability to consistently record accurate heart rates.

109. These representations were false, as detailed above. Defendant knew these representations were false when it made them and intended to defraud purchasers thereby.

110. Defendant also had a duty to disclose, rather than conceal and suppress, that the Devices were not capable of consistently recording an accurate, real time heart rate, because:

a. Defendant had exclusive knowledge of this defect in the Devices and the concealment thereof;

b. The details regarding this defect were known and accessible only to Defendant;

c. Defendant knew Plaintiffs and Class members were not aware of the defect and the concealment thereof; and

d. Defendant made general representations regarding the qualities of the Devices, including statements about their performance and abilities that were misleading, deceptive, and incomplete without the disclosure of the fact that the PurePulse Devices could not consistently record accurate heart rates, particularly during exercise.

111. Defendant's actions constitute "actual fraud" within the meaning of Cal. Civ. Code §1572 because Defendant did the following with intent to deceive Plaintiffs and Class members and to induce them to enter into their contracts:

a. Suggested the PurePulse Devices can consistently record accurate heart rates, even during vigorous exercise, even though it knew this to be untrue;

b. Positively asserted that the Devices can consistently record accurate heart rates, even during vigorous exercise, in a manner not warranted by the information available to Defendant;

c. Suppressed the true nature of the defect in the Devices from Plaintiffs and Class members; and

d. Promised it would deliver Devices that consistently record accurate heart rates, even during vigorous exercise, with no intention of so doing.

112. Defendant's actions, listed above, also constituted "deceit" as defined by Cal. Civ. Code §1710 because Defendant willfully deceived Plaintiffs and Class members with intent to induce them to alter their positions to their detriment by purchasing defective PurePulse Devices.

113. Defendant's fraud and concealment were also uniform across all Class members; Defendant concealed from everyone the true nature of the defect in the PurePulse Devices.

114. Defendant's misrepresentations and omissions were material in that they would affect a reasonable consumer's decision to purchase a PurePulse Device. Consumers paid a premium for the PurePulse Devices precisely because they purportedly offered continuous, accurate heart rate readings.

115. Defendant's intentionally deceptive conduct induced Plaintiffs and Class members to purchase the Devices and resulted in harm and damage to them.

116. Plaintiffs believed and relied upon Defendant's misrepresentations and concealment of the true facts. Class members are presumed to have believed and relied upon Fitbit's misrepresentations and concealment of the true facts because those facts are material to a reasonable consumer's decision to purchase the PurePulse Devices.

117. As a result of Defendant's inducements, Plaintiffs and Class members sustained actual damages including but not limited to receiving a product that does not perform as promised not receiving the benefit of the bargain of their PurePulse Devices purchases. If Plaintiffs and Class members had known about the defect in the Devices, they would not have purchased the

PurePulse Devices or would have paid significantly less for them. Defendant is therefore liable to Plaintiffs and Class members in an amount to be proven at trial.

118. Defendant's conduct was systematic, repetitious, knowing, intentional, and malicious, and demonstrated a lack of care and reckless disregard for Plaintiffs' and Class members' rights and interests. Defendant's conduct thus warrants an assessment of punitive damages under Cal. Civ. Code § 3294 and other applicable states' laws, consistent with the actual harm it has caused, the reprehensibility of its conduct, and the need to punish and deter such conduct.

COUNT VI

(Fraud in the Inducement)

119. Plaintiffs repeat the allegations in the foregoing paragraphs as if fully set forth herein.

120. Plaintiffs bring this claim individually and on behalf of the members of the Class and Subclasses against Defendant.

121. Defendant's fraud and false affirmations of fact, described herein, induced Plaintiffs and Class members to purchase the PurePulse Devices and thereby enter into a contract with Defendant.

122. As described above, Defendant had a duty to disclose the defect in the PurePulse Devices to Plaintiffs and Class members.

123. As described above, Defendant's actions constituted actual fraud and deceit as defined by Cal. Civ. Code §§ 1572 and 1710.

124. Plaintiffs justifiably relied to their detriment on the truth and completeness of Defendant's material representations regarding the PurePulse Devices. Class members are presumed to have relied upon Defendant's misrepresentations and concealment of the true facts because those facts are material to a reasonable consumer's decision to purchase the PurePulse Devices.

125. Defendant's fraud and concealment was also uniform across all Class members; Defendant concealed from everyone the true nature of the defect in the PurePulse Devices.

126. Plaintiffs and Class members would not have agreed to purchase their PurePulse Devices, or would have paid less for them, if they had not been deceived by Defendant.

127. As a result of Defendant's inducements, Plaintiffs and Class members sustained actual damages including but not limited to not receiving a product that performs as promised and not receiving the benefit of the bargain of their PurePulse Device purchases.

128. Defendant's conduct was systematic, repetitious, knowing, intentional, and malicious, and demonstrated a lack of care and reckless disregard for Plaintiffs' and Class members' rights and interests. Defendant's conduct thus warrants an assessment of punitive damages under Cal. Civ. Code § 3294 and other applicable states' laws, consistent with the actual harm it has caused, the reprehensibility of its conduct, and the need to punish and deter such conduct.

COUNT VII

(Breach of Express Warranty)

129. Plaintiffs repeat the allegations in the foregoing paragraphs as if fully set forth herein.

130. Plaintiffs bring this claim individually and on behalf of the members of the Class and Subclasses against Defendant.

131. In connection with the sale of the PurePulse Devices, Defendant, as the designer, manufacturer, marketer, distributor and/or seller issued written warranties by representing that the PurePulse Devices would record heart rate accurately, even during exercise.

132. Defendant made express representations, including, but not limited to representations that the PurePulse Devices would provide "continuous, automatic," and "real-time heart rate," so that users can "[g]et instant heart rate readings all day, every day" and "track[] your heart rate all day and during exercise."

133. Defendant's express warranties, and its affirmations of fact and promises made to Plaintiffs and the Class regarding the PurePulse Devices, became part of the basis of the bargain between Defendant and Plaintiffs and the Class, thereby creating an express warranty that Defendant would conform to those affirmations of fact, representations, promises and descriptions.

134. In fact, the PurePulse Devices do not report an accurate heart rate, particularly during exercise.

135. Plaintiffs and proposed Class members were injured as a direct and proximate result of Defendant's breach because (a) they would not have purchased the PurePulse Devices or would not have paid as much for them had they known the true facts and (b) the PurePulse Devices did not have the characteristics, uses, or benefits as promised.

COUNT VIII

(Breach of Implied Warranty of Merchantability)

136. Plaintiffs repeat the allegations in the foregoing paragraphs as if fully set forth herein.

137. Plaintiffs bring this claim individually and on behalf of the members of the Class and Subclasses against Defendant.

138. Defendant, as the designer, manufacturer, distributor, and seller, impliedly warranted that the PurePulse Devices were fit for their intended purpose in that the PurePulse Devices would act as heart rate monitors and report accurate heart rates. Defendant did so with the intent to induce Plaintiffs and proposed Class members to purchase the PurePulse Devices.

139. Defendant breached its implied warranties because the PurePulse Devices do not have the characteristics, uses, or benefits as promised.

140. Plaintiffs and proposed Class members were injured as a direct and proximate result of Defendant's breach because they would not have purchased the PurePulse Devices or would not have paid as much for the PurePulse Devices had they known that they do not have the characteristics, uses, or benefits as promised.

COUNT IX

(Violations of the Magnuson-Moss Warranty Act – Implied Warranty 15 U.S.C. § 2301, *et seq.*)

141. Plaintiffs repeat the allegations in the foregoing paragraphs as if fully set forth herein.

142. Plaintiffs bring this claim individually and on behalf of the members of the Class and Subclasses against Defendant.

143. The PurePulse Devices are "consumer products" within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(1).

144. Plaintiffs and Class members are "consumers" within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(3), because they are persons entitled under applicable state law to enforce against the warrantor the obligations of its express and implied warranties.

145. Defendant is a "supplier" and "warrantor" within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(4)-(5).

146. Section 2310(d)(1) of Chapter 15 of the United States Code provides a cause of action for any consumer who is damaged by the failure of a warrantor to comply with a written or implied warranty.

147. Defendant provided Plaintiffs and other Class members with an implied warranty of merchantability in connection with the purchase of the PurePulse Devices within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(7). As a part of the implied warranty of merchantability, Defendant warranted that the PurePulse Devices would pass without objection in the trade as designed, manufactured, and marketed, were fit for the ordinary purposes for which they are used, and were adequately labeled.

148. Defendant breached these implied warranties, as described in more detail above, and is therefore liable to Plaintiffs and the Class pursuant to 15 U.S.C. § 2310(d)(1).

149. Any efforts to limit the implied warranties in a manner that would exclude coverage of the PurePulse Devices is unconscionable, and any such effort to disclaim, or otherwise limit, liability for the PurePulse Devices is null and void.

150. Plaintiffs and other Class members have had sufficient direct dealings with either Defendant or its agents to establish privity of contract.

151. Nonetheless, privity is not required here because Plaintiffs and other Class members are intended third-party beneficiaries of contracts between Fitbit and its retailers, and specifically, of the implied warranties. The retailers were not intended to be the ultimate consumers of the PurePulse Devices and have no rights under the warranty agreements provided with the PurePulse Devices; the warranty agreements were designed for and intended to benefit consumers.

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

153. Furthermore, Defendant has actual notice of the defect in the PurePulse Devices, but has refused to remedy its wrongs and further notice would be futile.

154. Plaintiffs' individual claims place into controversy an amount equal to or exceeding $25.00. The amount in controversy of this entire action exceeds the sum of $50,000.00, exclusive of interest and costs, computed on the basis of all claims to be determined in this lawsuit. Plaintiffs, individually and on behalf of the other Class members, seek all damages permitted by law in an amount to be proven at trial.

155. In addition, pursuant to 15 U.S.C. § 2310(d)(2), Plaintiffs and the other 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 reasonably been incurred by Plaintiffs and the other Class members in connection with the commencement and prosecution of this action.

156. Further, Plaintiffs and the Class are also entitled to equitable relief under 15 U.S.C. § 2310(d)(1).

COUNT X
(Unjust Enrichment)

157. Plaintiffs repeat the allegations in the foregoing paragraphs as if fully set forth herein.

158. Plaintiffs bring this claim individually and on behalf of the members of the Class and Subclasses against Defendant.

159. Plaintiffs and members of the Class conferred benefits on Defendant by purchasing the PurePulse Devices.

160. Defendant has been unjustly enriched in retaining revenues derived from Plaintiffs' and Class members' purchases of the PurePulse Devices. Retention of that revenue under these circumstances is unjust and inequitable because Defendant misrepresented and omitted facts concerning the characteristics, uses, and benefits of the PurePulse Devices and caused Plaintiffs and Class members to purchase the Devices and to pay a premium price for the Devices, which they would not have done had the true facts been known.

161. Because Defendant's retention of the non-gratuitous benefits conferred on it by Plaintiffs and members of the Class is unjust and inequitable, Defendant must pay restitution to Plaintiff and members of the Class for its unjust enrichment, as ordered by the Court.

COUNT XI
(Deceptive Acts or Practices, New York Gen. Bus. Law § 349)

162. Plaintiffs repeat the allegations in the foregoing paragraphs as if fully set forth herein.

163. Plaintiff Judith Landers brings this claim individually and on behalf of the members of the New York Subclass against Defendant.

164. By the acts and conduct alleged herein, Defendant committed unfair or deceptive acts and practices by misrepresenting and omitting facts concerning the characteristics, uses, and benefits of the PurePulse Devices and caused Plaintiff and New York Subclass members to

purchase the PurePulse Devices and to pay a premium price for the PurePulse Devices, which they would not have done had the true facts been known.

165. The foregoing deceptive acts and practices were directed at consumers.

166. The foregoing deceptive acts and practices are misleading in a material way because they fundamentally misrepresent the characteristics, quantities, and benefits of the PurePulse Devices to induce consumers to purchase the PurePulse Devices.

167. Plaintiff and members of the New York Subclass were injured because they paid more for the PurePulse Devices than they would have paid had they known the truth about the PurePulse Devices.

168. On behalf of herself and other members of the New York Subclass, Plaintiff seeks to enjoin the unlawful acts and practices described herein, to recover her actual damages or fifty dollars, whichever is greater, three times actual damages, and reasonable attorneys' fees.

COUNT XII
(False Advertising, New York Gen. Bus. Law § 350)

169. Plaintiffs repeat the allegations in the foregoing paragraphs as if fully set forth herein.

170. Plaintiff Judith Landers brings this claim individually and on behalf of the members of the New York Subclass against Defendant.

171. Based on the foregoing, Defendant has engaged in consumer-oriented conduct that is deceptive or misleading in a material way which constitutes false advertising in violation of Section 350 of the New York General Business Law.

172. Defendant's misleading and deceptive misrepresentations and omissions of fact, including misrepresentations and omissions concerning the ability of the PurePulse Devices to continuously report an accurate, real time heart rate, were and are directed at consumers.

173. Defendant's misleading and deceptive misrepresentations of fact, including misrepresentations and omissions concerning the ability of the PurePulse Devices to continuously

report an accurate, real time heart rate, were likely to mislead a reasonable consumer acting reasonably under the circumstances.

174. Defendant's misleading and deceptive misrepresentations of fact, including including misrepresentations and omissions concerning the ability of the PurePulse Devices to continuously report an accurate, real time heart rate, have resulted in consumer injury and/or harm the public interest.

175. As a result of Defendant's misleading and deceptive misrepresentations of fact, including misrepresentations and omissions concerning the ability of the PurePulse Devices to continuously report an accurate, real time heart rate, Plaintiff has suffered and continues to suffer economic injury.

176. Plaintiff and New York Subclass members suffered an ascertainable loss caused by Defendant's misrepresentations and omissions concerning the ability of the PurePulse Devices to continuously report an accurate, real time heart rate because they paid more for the PurePulse Devices than they would have paid had they known the truth about the PurePulse Devices.

177. On behalf of herself and other members of the New York Subclass, Plaintiff seeks to enjoin the unlawful acts and practices described herein, to recover her actual damages or five hundred dollars, whichever is greater, three times actual damages, and reasonable attorneys' fees.

COUNT XIII
(Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 505/1, *et seq.*)

178. Plaintiffs repeat the allegations in the foregoing paragraphs as if fully set forth herein.

179. Plaintiffs Lisa Marie Burke and John Molenstra bring this claim individually and on behalf of the members of the Illinois Subclass against Defendant.

180. The Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), 815 Ill. Comp. Stat. 505/1, *et seq.* (the "ICFA") protects consumers and competitors by promoting fair competition in commercial markets for goods and services.

181. The ICFA prohibits any unlawful, unfair, or fraudulent business acts or practices including the employment of any deception, fraud, false pretense, false advertising, misrepresentation, or the concealment, suppression, or omission of any material fact.

182. Section 2 of the ICFA provides in relevant part as follows:

> Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby.

815 ILCS 505/2 (footnote omitted).

183. The ICFA applies to Defendant's actions and conduct as described herein because it protects consumers in transactions that are intended to result, or which have resulted, in the sale of goods or services.

184. Defendant is a person within the meaning of the ICFA.

185. Plaintiffs and other members of the Illinois Subclass are consumers within the meaning of the ICFA.

186. Defendant's PurePulse Devices are merchandise within the meaning of the ICFA and the sale of its Devices is considered trade or commerce under the ICFA.

187. Defendant violated the ICFA by misrepresenting and omitting material facts about the PurePulse Devices. Specifically, Defendant advertised the Devices as being capable of continuously recording an accurate real time heart rate, even when engaged in vigorous exercise, when in fact, the PurePulse Devices are not capable of recording an accurate real time heart rate, particularly when users are engaged in vigorous exercise.

188. Defendant was aware or should have been aware that the Devices were not capable of recording an accurate real time heart rate, particularly when users are engaged in vigorous

exercise. Defendant created its advertisements and marketing materials with the intent that Plaintiffs and other consumers would rely on the information provided.

189. Defendant's misrepresentations and omissions to Plaintiffs and members of the Illinois Subclass constitute unfair and deceptive acts and practices in violation of the ICFA.

190. Had Defendant not engaged in the deceptive misrepresentation and omission of material facts as described above, Plaintiffs and Illinois Subclass members would not have purchased the PurePulse Devices or would have paid less for the PurePulse Devices.

191. Plaintiffs and the Illinois Subclass members were damaged by Defendant's conduct directed towards consumers. As a direct and proximate result of Defendant's violation of the ICFA, Plaintiffs and Illinois Subclass members have suffered harm in the form of monies paid for Defendant's Devices. Plaintiffs, on behalf of themselves and the Illinois Subclass, seek an order (1) requiring Defendant to cease the unfair practices described herein; (2) awarding damages, interest, and reasonable attorneys' fees, expenses, and costs to the extent allowable; and/or (3) requiring Defendant to restore to Plaintiffs and each Illinois Subclass member any money acquired by means of unfair competition.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of all others similarly situated, seek a judgment against Defendant, as follows:

a. For an order certifying the Class under Rule 23 of the Federal Rules of Civil Procedure and naming Plaintiffs as representatives of the Class and Subclasses and Plaintiffs' attorneys as Class Counsel to represent the Class and Subclasses;

b. For an order declaring that Defendant's conduct violates the statutes referenced herein;

c. For an order finding in favor of Plaintiffs and the Class and Subclasses on all counts asserted herein;

d. For compensatory, statutory, and punitive damages in amounts to be determined by the Court and/or jury;

e. For prejudgment interest on all amounts awarded;

f. For an order of restitution and all other forms of equitable monetary relief;

g. For an order enjoining Defendant from continuing the unlawful practices detailed herein; and

h. For an order awarding Plaintiffs and the Class and Subclass their reasonable attorneys' fees and expenses and costs of suit.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury on all issues so triable.

DATED: February 16, 2016

LEVI & KORSINSKY LLP

By: */s/ Adam C. McCall*
Adam C. McCall

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Counsel for Plaintiffs

JS 44 (Rev. 12/12) cand rev (1/15/13)

CIVIL COVER SHEET

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

I. (a) PLAINTIFFS

Judith Landers, Lisa Marie Burke, and John Molenstra, individually and on behalf of all others similarly situated

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

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Lori G. Feldman, Adam C. McCall, Andrea Clisura, Courtney E. Maccarone, Levi & Korsinsky LLP, 445 South Figueroa Street, 31st Floor, Los Angeles, CA 90071, Tel.: 213-985-7290

DEFENDANTS

Fitbit, Inc.

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

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

Attorneys *(If Known)*

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

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

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

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☒ 4
Citizen of Another State	☒ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

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

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☒ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

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

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

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
28 U.S.C. § 1332(d) - Class Action Fairness Act

Brief description of cause:
Product defect, unfair and deceptive trade practices

VII. REQUESTED IN COMPLAINT:

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

DEMAND $ > 5,000,000.00

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE Hon. James Donato DOCKET NUMBER 3:15-cv-2077; 3:16-cv-36

DATE
02/16/2016

SIGNATURE OF ATTORNEY OF RECORD
/s/ Adam C. McCall

IX. DIVISIONAL ASSIGNMENT (Civil L.R. 3-2)

(Place an "X" in One Box Only) ☑ SAN FRANCISCO/OAKLAND ☐ SAN JOSE ☐ EUREKA

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INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I.(a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) **County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) **Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below**; NOTE: federal question actions take precedence over diversity cases.**)

III. **Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. **Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. **Origin.** Place an "X" in one of the six boxes.
Original Proceedings. (1) Cases which originate in the United States district courts.
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

VI. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service

VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. **Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Northern District of California

Judith Landers, Lisa Marie Burke, and John Molenstra, individually and on behalf of all others similarly situated,

Plaintiff(s)

v.

Fitbit, Inc.

Defendant(s)

Civil Action No. 16-cv-00777

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Fitbit, Inc.
405 Howard Street, Suite 550
San Francisco, California 94105

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Adam C. McCall
445 South Figueroa Street, 31st Floor
Los Angeles, CA 90071
Telephone: (213) 985-7290

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 16-cv-00777

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

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