

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

LOGAN LANDES and JAMES  
GODDARD, individually and on behalf of  
all others similarly situated,

Plaintiffs,

v.

**SONY MOBILE COMMUNICATIONS  
(U.S.A.), INC. and SONY  
ELECTRONICS, INC.,**

Defendants.

Civil Action No. \_\_\_\_\_

**CLASS ACTION COMPLAINT**

**JURY TRIAL DEMANDED**

Plaintiffs Logan Landes and James Goddard (“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 defendants Sony Mobile Communications (USA) Inc. (“Sony Mobile”) Sony Electronics Inc. (“Sony Electronics”), and Sony Electronics Inc. (“Sony Electronics”) (collectively, “Sony” or “Defendants”).

**NATURE OF THE ACTION**

1. This is a class action against Sony for deceptively advertising its “waterproof” Xperia smartphones and tablets (the “Devices”)<sup>1</sup> as being able to withstand underwater and other prolonged use in wet environments when, in fact, the Devices are not waterproof and are not designed for or capable of ordinary underwater use.

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<sup>1</sup> The Devices include the following models: Xperia ZR, ZU, Z1, Z1s TMO, M2A, Z1C, Z2, Z3 TMO, Z3V, M4A, Z3+, Z5, Z2 Tab, Z2 Tab V, Z4, Z3, Z3 Tab C, Z5C, Z3 Dual, Z3+ Dual, and Z4.

2. During the Class Period,<sup>2</sup> Sony, *inter alia*, persistently misrepresented to consumers that the Devices could withstand prolonged exposure to wet environments, including, for example, use filming, photographing, watching videos underwater in chlorinated pools, and even holding the phones while diving underwater.

3. In reality, Sony's so-called waterproof Devices are not waterproof and are not designed for or capable of ordinary underwater use. Following some reports of screens dying, phones repeatedly locking, damaged audio functions, and phones failing altogether, Sony changed its messaging. After making advertisements of the phones being used underwater in swimming pools, filming fish, and capturing dives from beneath the surface—all widely available on the internet, including Sony's own websites—Defendants issued new disclosures to add purported disclaimers; however, such disclaimers further confused consumers.

4. Although their latest models of Xperia “waterproof” phones are still marketed with what Sony has called its “highest waterproof rating,”<sup>3</sup> Sony has more recently acknowledged that the waterproof rating was achieved in laboratory conditions in standby mode and, accordingly, users “shouldn’t use the device underwater for taking pictures, for example.” According to Sony Xperia representatives, “The recent changes to guidance we provide to our customers are designed to more clearly illustrate the best ways to protect devices in day-to-day usage. . . . We have also recently updated our marketing visuals to better advocate sensible usage of our devices.” As a Sony Xperia Community Manager admitted with regard to their latest “waterproof” Xperia model, “Moving or operating the device while it is submerged is not tested

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<sup>2</sup> The Class Period for the California Class is from January 13, 2012 until the date of notice. The Class Period for the Illinois Class is from January 13, 2013 until the date of notice.

<sup>3</sup> See <http://www.sonymobile.com/global-en/xperia/technologies/waterproof/>. Last visited on April 14, 2017.

during the laboratory tests. There are also many environmental factors which we could not assess (e.g. water movement or water pressure changes during the movement), if a device is used underwater. Therefore we recommend [you] not submerge our Xperia Z5 in water.”<sup>4</sup>

5. Indeed, although Sony appears to have stopped creating new advertisements depicting the Xperia Devices plunging forcefully into various bodies of water, Sony continues to profit from earlier deceptive marketing materials which falsely promote the “waterproof” abilities of the Devices and which still abound on the internet (including on Sony’s own website and page at youtube.com). Sony has failed to issue clear corrective disclosures and has failed to make consumers, who each spent hundreds of dollars for Sony’s purported “waterproof” technology, whole.

6. This action seeks redress on a class-wide basis for Defendants’ deceptive business practices in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (“ICFA”), 815 Ill. Comp. Stat. 505/1, *et seq.*, the California Consumer Legal Remedies Act (“CLRA”), Civil Code §§ 1750, *et seq.*, California’s Unfair Competition Law (“UCL”), Bus. & Prof. Code §§ 17200, *et seq.*, and California’s False Advertising Law (“FAL”), Bus. & Prof. Code §§ 17500, *et seq.* In addition, Plaintiffs bring claims for breach of express and implied warranties, and unjust enrichment.

## **PARTIES**

7. Plaintiff Logan Landes is a citizen of the state of California, residing in Laguna Beach, California. In or around December 2014, Plaintiff purchased an Xperia Z3 smartphone from a T-Mobile store located in Shiloh, Illinois, for approximately \$600. Plaintiff purchased

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<sup>4</sup> See <http://www.xperiablog.net/2015/09/10/sony-changes-stance-on-waterproof-phones-do-not-use-underwater/>

the Device based on Defendants' claims on the web and in commercials, including, but not limited to, Sony's representations that the Device was "waterproof," that it could withstand regular exposure to water, and that he could safely take the Device underwater for up to 30 minutes to depths of approximately 4.9 feet, including while swimming underwater in a chlorinated pool. Plaintiff relied on Defendants' representations that the phone was waterproof and that he could use the phone in a chlorinated pool for filming and taking photographs. Additionally, in or around February 2015 Plaintiff purchased an Xperia Z3 Tablet at a Sony retail store located in Costa Mesa, California. Plaintiff purchased his tablet after viewing and relying on video advertisements depicting the tablet being fully submerged in water. Plaintiff owned his Z3 smartphone Device for approximately six months. When Plaintiff attempted to use the Xperia Z3 underwater in a swimming pool, the Device powered off and would not turn back on. Plaintiff paid \$50 for a temporary replacement phone. Subsequently, Plaintiff obtained a refurbished replacement Device from T-Mobile and was sent a \$400 bill for the replacement Device. With difficulty, Plaintiff was able to have the \$400 charge waived; however, Plaintiff no longer trusts the Devices to operate underwater and no longer intentionally exposes the Devices to water. Had Plaintiff known that his Devices were not in fact waterproof, that they were not designed to withstand ordinary underwater use, including in chlorinated swimming pools, and that his smartphone Device would die when Plaintiff attempted to use it underwater, Plaintiff would not have purchased the Devices or would have paid far less for the Devices.

8. Plaintiff James Goddard is a citizen of the state of California, residing in Concord, California. On April 9, 2015, Plaintiff purchased an Xperia Z3 compact smartphone from Amazon.com, for approximately \$394. Plaintiff purchased the Device based on Defendants' claims in video advertisements, including, but not limited to, the video "Xperia™ Z3 – a

premium waterproof\* smartphone in a stunning durable design,” and Sony’s representations that the Device was “waterproof,” that it could withstand regular exposure to water, and that it would function after being underwater, including in a chlorinated pool. Had Plaintiff known that his Device was not in fact waterproof, and that it was not designed to withstand ordinary underwater use, Plaintiff would not have purchased the Device or would have paid far less for the Device.

9. Sony Mobile is a Delaware corporation with its principal Executive Office located at 2207 Bridge Pointe Parkway, San Mateo, CA 94404. Sony Mobile develops, manufactures, and sells mobile communications products. The company claims that “[t]hrough its Xperia™ smartphone and tablet portfolio, Sony Mobile delivers the best of Sony technology....”

10. Sony Electronics is a Delaware corporation with its headquarters located at 16530 Via Esprillo, San Diego, California 92127. It provides audio and video electronics and information technology products for consumers and professionals. Its operations include research and development, engineering, sales, marketing, distribution, and customer service.

### **JURISDICTION AND VENUE**

11. 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 at least one Defendant.

12. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because Defendants do substantial business in this District.

## FACTUAL BACKGROUND

13. Sony, a leader in the development and sale of consumer and professional electronics, prides itself that its “relentless pursuit of innovation, drives us to deliver ground-breaking new excitement and entertainment in ways that only Sony can.”<sup>5</sup>

14. In Sony’s eagerness to deliver exciting and cutting edge technology to consumers, Sony exploited certain international water resistance ratings in order to launch a deceptive marketing campaign promoting the Devices.

15. Sony advertises its “waterproof” Devices as having an Ingress Protection (“IP”) rating of IPX8. The IP code is a rating system indicating a level of water resistance offered by a device. An IP rating is given in the format IPXY, where X is a level of dust resistance and Y indicates a level of resistance against liquids. An IPX8 rating means that under a controlled test, the conditions of which are in part specified by the manufacturer, a device functioned after immersion for a period of time specified by the manufacturer.<sup>6</sup>

16. Any conditions of use for the device are left up to the manufacturer.

17. In reality, what Sony has claimed their “waterproof” rating means and what the IP rating indicates are two very different things.

18. Sony did not use the IP ratings to deliver clear information to its customers; rather, it falsely and misleadingly advertised “waterproof” phones and tablets to consumers. Sony provided references to the Phones’ IP ratings throughout marketing materials which were inconsistent with what the IP rating tests actually signified. As explained in detail below, Sony

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<sup>5</sup> <http://www.sony.net/SonyInfo/>. Last visited on April 14, 2017.

<sup>6</sup> As explained *infra*, Sony has stated that its IP rated products “are placed carefully inside a container filled with water from the faucet and lowered to a depth of 1.5 meters. After 30 minutes in the container, the device is carefully taken out and its functions and features are tested.”

provided consumers with language and images depicting pool parties, underwater videos, and users jumping docks or diving with their Devices into swimming holes. Sony presented the phones as not only offering a level of protection against spills and splashes, but as having been designed to be taken underwater in a wide range of real life conditions for prolonged and repeated periods of time. In fact, the Devices are not waterproof and they are not designed to withstand underwater use or other prolonged use in wet environments. In reality, consumers, including Plaintiff Landes, have experienced a variety of technical problems, including complete failure of their Devices, when the Devices are used underwater and/or even exposed to heavy rain. Sony's advertisements are false and misleading and they have deceived Plaintiffs and other consumers across the nation and caused them to pay more for the Devices than they otherwise would.

**Sony's Deceptive Advertising Of The "Waterproof" Devices**

19. Sony markets its smartphones and tablet Devices to consumers under the Xperia brand. It sells Xperia products throughout the United States both directly to consumers and through a range of retailers both online and in retail outlets. Major retailers also include mobile service providers.

20. Throughout the Class Period, Sony released various models of "waterproof" Devices, each of which were represented by Sony to be capable of real world underwater use.

21. In a May 13, 2013 press release, SONY introduced the "new Xperia™ ZR waterproof\* smartphone" "featuring the highest level of water-resistance for capturing photos and Full HD videos underwater."<sup>7</sup>

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<sup>7</sup> May 13, 2013 press release, *available at* [http://blogs.sonymobile.com/press\\_release/the-new-xperia-zr-waterproof-smartphone-with-superior-sony-engineering/?rl=us](http://blogs.sonymobile.com/press_release/the-new-xperia-zr-waterproof-smartphone-with-superior-sony-engineering/?rl=us)

22. Advertised by Sony as “IP55 and IP58 compliant,” marketing materials emphasized the purported ability of the Xperia ZR phone to be usable in swimming pools:





23. Along with its claim that the waterproof Xperia ZR could be kept submerged in approximately 5 feet of water for 30 minutes, Sony promised consumers “the [phone’s] waterproof capabilities let you shoot videos in Full HD or snap pictures underwater”—it could “handle whatever life throws at it”:<sup>8</sup>

### **The ultimate in durable design**

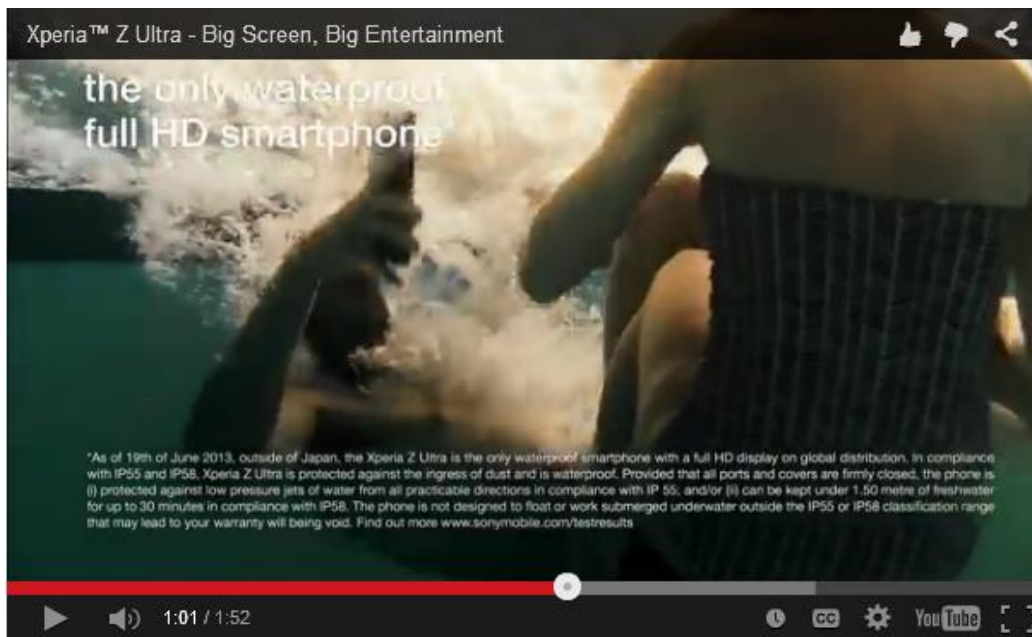
Xperia ZR is precision-crafted to handle whatever life throws at it. With its sleek, yet durable design, the Xperia ZR is your perfect companion in and out of the water. As well as being dust-resistant, this **waterproof\* phone** is IP55 and IP58 compliant, so you can keep it submerged in 1.5 meters of fresh water for up to 30 minutes. Combined with its dedicated camera key, the waterproof capabilities let you shoot videos in Full HD or snap pictures underwater, capturing the sharpest visuals. The camera key also allows you to shoot even from a locked screen, meaning you’ll never miss a moment again.

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<sup>8</sup> June 25, 2013 press release, available at [http://blogs.sonymobile.com/press\\_release/the-new-xperia-zr-waterproof-smartphone-with-superior-sony-engineering/?rl=us](http://blogs.sonymobile.com/press_release/the-new-xperia-zr-waterproof-smartphone-with-superior-sony-engineering/?rl=us).

24. Just over a month later, Sony boasted that the Xperia Z Ultra was “[t]he only waterproof Full HD smartphone,” and promised, “You can even film in Full HD underwater....”

25. It was advertised as “the only waterproof large screen smartphone”:



26. Sony claimed that with the Xperia Z Ultra’s waterproof rating, consumers could “even film in Full HD underwater, taking your large-screen smartphone experience to a new level.”<sup>9</sup>

### **The only waterproof Full HD smartphone\*\***

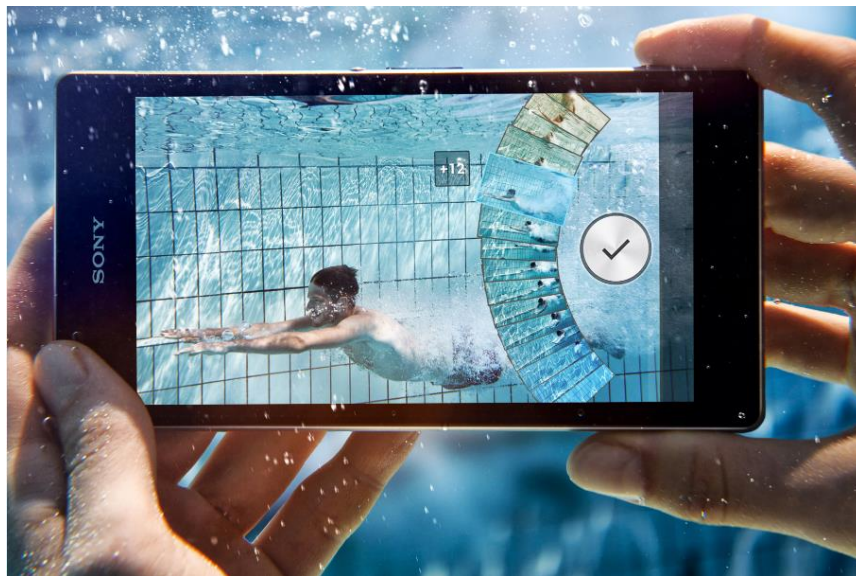
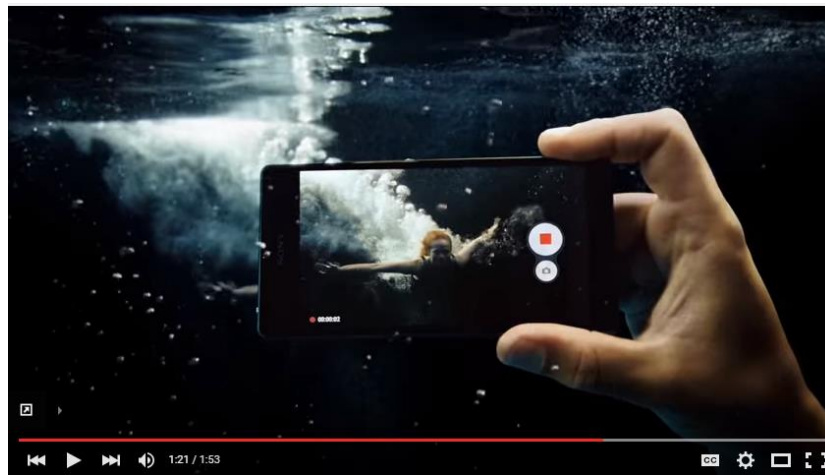
Xperia Z Ultra is both elegant and durable. With an impressive rating of IP55 and IP58, this smartphone isn't only resistant to dust, but is waterproof\*\* too – giving you the freedom to enjoy it anywhere. You can even film in Full HD underwater, taking your large-screen smartphone experience to a new level. The camera features “Exmor RS for mobile”, HDR for both photos and film, and Superior Auto mode automatically activates HDR and noise reduction when needed, so you'll get stunning imagery even in challenging light conditions. [Learn more about our waterproof technology](#)

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<sup>9</sup> [http://blogs.sonymobile.com/press\\_release/the-new-xperia-z-ultra-the-worlds-slimmest-and-largest-full-hd-smartphone-display/?rl=us](http://blogs.sonymobile.com/press_release/the-new-xperia-z-ultra-the-worlds-slimmest-and-largest-full-hd-smartphone-display/?rl=us)

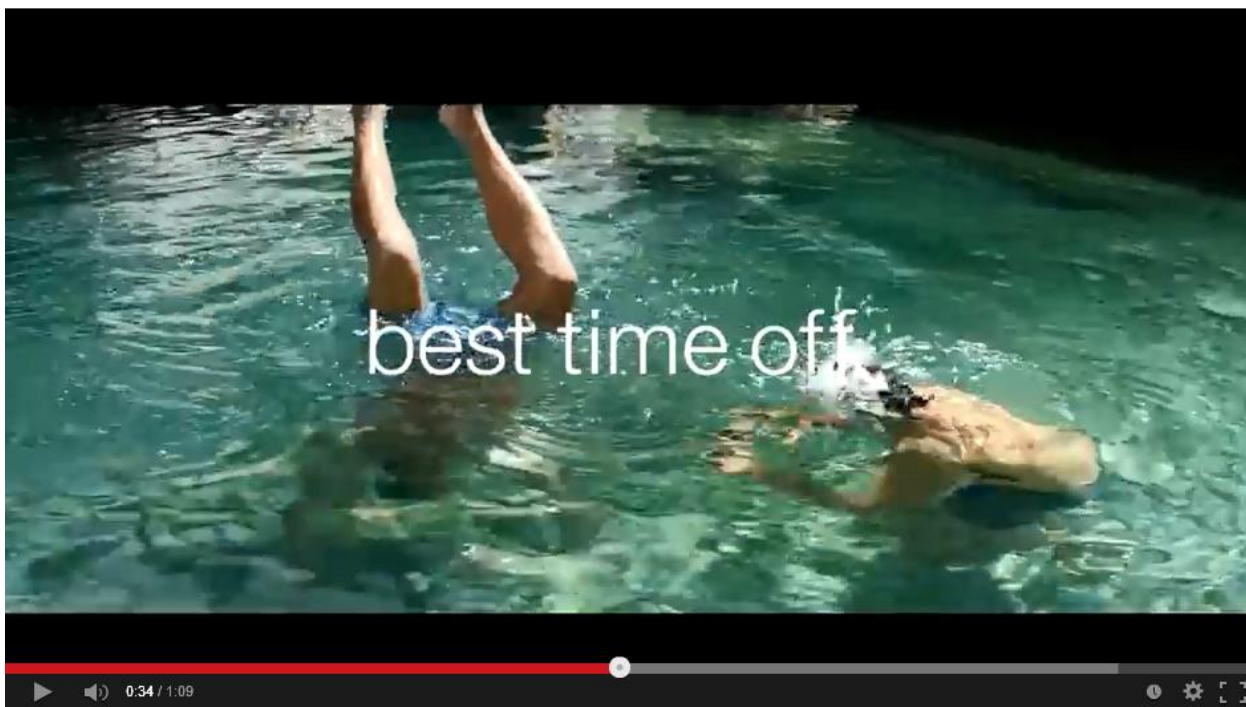
27. Approximately two months later, on September 4, 2013, a Sony press release “introduce[d] Xperia™ Z1 – a stunning waterproof smartphone with a groundbreaking camera experience.”<sup>10</sup>

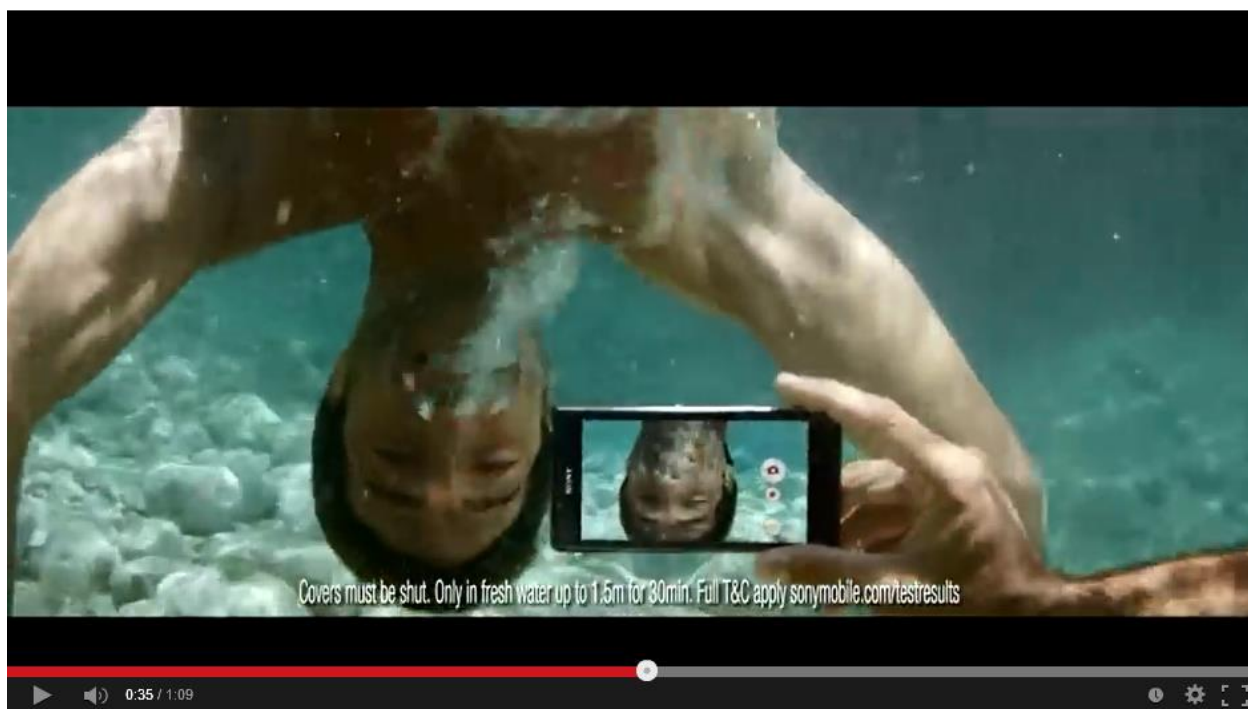
28. Yet again, Sony marketed the phone with images of people using it to film underwater, stating “we’ve made it waterproof...so you can take pictures and videos beneath the surface:



<sup>10</sup> [http://blogs.sonymobile.com/press\\_release/new-xperia-z-1-worlds-best-camera-in-a-waterproof-smartphone/?rl=us](http://blogs.sonymobile.com/press_release/new-xperia-z-1-worlds-best-camera-in-a-waterproof-smartphone/?rl=us)

29. Indeed, this feature was a major component of Sony's television advertising:





30. Sony stressed the phone's waterproof capabilities, proclaiming, "**Wild pool games**, hard desert winds or falling into the kitchen sink – the waterproof\* and dust-resistant Xperia Z1 will handle it all."<sup>11</sup>

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<sup>11</sup> [http://www.sonymobile.com/global-en/products/phones/xperia-z1/?utm\\_source=sactive&utm\\_medium=blogs&utm\\_campaign=xperiaz1](http://www.sonymobile.com/global-en/products/phones/xperia-z1/?utm_source=sactive&utm_medium=blogs&utm_campaign=xperiaz1) (Emphasis added.)



**Waterproof\* and ready for life's surprises**

Wild pool games, hard desert winds or falling into the kitchen sink – the waterproof\* and dust-resistant Xperia Z1 will handle it all.



31. At the same time that Sony told consumers they could feel free to “[s]nap away underwater” and “dive up to 1.5 m with it,” Sony added miniscule disclaimers to its website that scaled back the phone’s abilities, stating that the device was “not designed to float or work submerged underwater outside of the IP55 or IP58 classification range. This may lead to your warranty being void.”

## Snap away underwater.

With the waterproof<sup>(1)</sup> Xperia Z1, you can take pictures while swimming in freshwater for up to 30 minutes. You can even dive up to 1.5 m with it. Just remember that all the covers for the micro USB port, the micro SIM slot, and the memory card slot must be firmly closed.

<sup>(1)</sup> In compliance with IP55 and IP58, the Xperia Z1 is protected against the ingress of dust and is waterproof. Provided that all ports and covers are firmly closed, the phone is (i) protected against low pressure jets of water from all practicable directions in compliance with IP 55; and/or (ii) can be kept under 1.50 metre of freshwater for up to 30 minutes in compliance with IP 58. The phone is not designed to float or work submerged underwater outside of the IP55 or IP58 classification range. This may lead to your warranty being void. [Get the full story.](#)

32. Indeed, Sony's Xperia Z1 product support page shows that Sony knew chlorinated water would damage the device, noting, "Over time, chlorinated water can corrode the rubber seals, so prolonged use in chlorinated water is not recommended." But if consumers wanted to use the device for a special moment, such as "your child's first swimming lesson, go ahead."

## Built for life

Even though your device may be resistant to dust and water, you should avoid unnecessary exposure to environments with excessive dust, sand and mud, or to moist environments with extremely high or low temperatures.

Therefore we wouldn't recommend using your smartphone, tablet or accessory during a sandstorm or in a hot shower. Never immerse your device in salt water or let the micro USB port, headset jack or other uncovered parts come into contact with salt water. If you're washing dishes by hand, avoid letting your device come into contact with the detergent or any other liquid chemicals.

## Take your device swimming

If your Sony smartphone or tablet is waterproof to IPX8 standard\*, then you can use it in a chlorinated swimming pool. However, avoid keeping the device in the pool for too long and remember to rinse it off thoroughly with fresh water once you get out.

Over time, chlorinated water can corrode the rubber seals, so prolonged use in chlorinated water is not recommended. But if you want to use your device to get underwater close-ups of a spectacular dive or your child's first swimming lesson, go ahead.

\* Sony devices that are rated IPX7 or lower should not be exposed to chlorinated water.

## Warranty, repairs and customer service

It's important to know that your warranty does not cover damage or defects caused by abuse or improper use of your device, including use in environments where the relevant IP rating limitations are exceeded. Also note that compatible accessories, including batteries, chargers, hands-free devices and micro USB cables, are not waterproof and dust-resistant on their own.

If you send a waterproof or dust-resistant device to a Sony Service Centre for repair, our repair teams will test it to ensure your device still meets the requirements of its IP rating.

If you have any questions about the use of your device that are not answered here, please refer to our Customer Support Service for help. For relevant warranty information you can refer to the Important Information document, which is accessible via the Setup guide in your device.

### Can I get more specific IP information about my device?

Yes, you can. Just go to <http://www.sonymobile.com/testresults> and select your device.

<http://support.sonymobile.com/global-en/xperiaz1/dm/water-and-dust-resistance/>

33. In early 2014, Sony introduced the Xperia Z2, “with our highest level of waterproofing.”<sup>12</sup> Then, in August 2014, Sony introduced the Xperia M2 Aqua with “[t]he world’s highest level of waterproofing available in a smartphone.”

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<sup>12</sup> [http://blogs.sonymobile.com/press\\_release/xperia-z2-best-camera-camcorder-in-waterproof-smartphone/?rl=us](http://blogs.sonymobile.com/press_release/xperia-z2-best-camera-camcorder-in-waterproof-smartphone/?rl=us)

34. Just days later, Sony announced the Xperia Z3, Z3 Compact, and Z3 Tablet, again with the “highest waterproof rating,” claiming both were “fully waterproof.”

35. A video of the M2 Aqua published by Sony Xperia on youtube.com on August 19, 2014, features, *inter alia*, a steamy shower, the phone floating down to the bottom of a pool, a user watching a video while snorkeling, and the promise, “You always get the photo or video you want, even underwater.”







36. Videos of the Xperia Z3 models published by Sony Xperia on youtube.com in and around September, 2014, show individuals holding their phones as they dive forcefully into a body of water.







37. In 2015, throughout the year and again in quick succession, Sony introduced the “waterproof” Xperia M4 Aqua, Z4 Tablet, Z3+ smartphone, and Xperia M5. Sony continued

to represent the models as capable of ordinary underwater use, including use in chlorinated swimming pools.

38. In September 2015, Sony unveiled the Xperia Z5 and Z5 Compact. It was not until Sony released its Z5 model, that it quietly acknowledged the limitations of the Device's IP ratings and began to scale back its advertising claims.

39. It was at that time that some news outlets and technology blogs began to report on Sony's change in marketing, which led some writers to retract earlier-written product reviews. *See, e.g.*, <http://www.craveonline.com/design/905747-oops-sony-xperia-z3v-smartphone-not-exactly-waterproof> ("Since I reported that the Xperia was, in fact, safe to use around water, I felt it was a responsibility to correct that statement. Evidence indicates the Xperia Z3v is not waterproofed and should not be used in contact with moisture.").

#### **Sony Begins to Include Deceptive and Contradictory Website Disclaimers, Further Confusing Consumers**

40. As of December 3, 2015, Sony's United States product page featured the following "waterproof" smart phone models: the Xperia Z3, Xperia Z3v Verizon, Xperia Z3 T-Mobile, Xperia M4 Aqua, and Xperia Z3+. <sup>13</sup> Shortly before that time, the Xperia Z3 Compact (also claimed to have the "highest waterproof rating") was also featured on the United States version of the site.

41. Although the Xperia Z3+ is newest of these five models, and bears what Sony claimed was its "highest level of waterproofing" (IPX5/IPX8), careful scrutiny of the product disclosures showed that SONY's waterproofing claims had been dialed back significantly.

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<sup>13</sup> <http://www.sonymobile.com/us/products/phones/>

42. The product page states the “**Xperia Z3+ carries our renowned waterproof design,**” but a disclaimer at the bottom of the Xperia Z3+ page, stated in tiny gray print that “[t]he Xperia Z3+ is waterproof...so don’t worry if you get caught in the rain or want to wash off dirt under a tap, but.... *You should not: put the device completely underwater, or expose it to seawater, salt water, chlorinated water or liquids such as drinks.* Abuse and improper use of device will invalidate warranty. The device has Ingress Protection rating IP65/68. For more info see [www.sonymobile.com/waterproof](http://www.sonymobile.com/waterproof).” (Emphasis added.)<sup>14</sup>

43. Significantly, and for all practical purposes, these parameters were a return to the guidelines Sony set out for purchasers of its earliest 2013 water *resistant* models—the Xperia Z and Xperia Tablet Z.

44. The link leads to the “Your Xperia™ support” page—“Water and Dust Protection – All You Need to Know.”<sup>15</sup> This page presents a much less impressive picture of what Sony’s “waterproof” claims mean in reality.

45. Specifically, Sony advises, “Your device has an IP rating. This means that under a strictly controlled laboratory environment, the hardware works as intended, even after being exposed to specific conditions. **Sony devices that are tested for their waterproof abilities are placed carefully inside a container filled with water from the faucet and lowered to a depth of 1.5 meters. After 30 minutes in the container, the device is carefully taken out and its functions and features are tested.**” (Emphasis added.) *Id.*

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<sup>14</sup> <http://www.sonymobile.com/us/products/phones/xperia-z3-plus/>

<sup>15</sup> [http://support.sonymobile.com/us/dm/waterproof/?utm\\_source=marketing-url&utm\\_medium=http://support.sonymobile.com/waterproof&utm\\_campaign=http://www.sonymobile.com/waterproof](http://support.sonymobile.com/us/dm/waterproof/?utm_source=marketing-url&utm_medium=http://support.sonymobile.com/waterproof&utm_campaign=http://www.sonymobile.com/waterproof)

## What this means for my device

Your device has an IP rating. This means that under a strictly controlled laboratory environment, the hardware works as intended, even after being exposed to specific conditions.

Sony devices that are tested for their waterproof abilities are placed carefully inside a container filled with water from the faucet and lowered to a depth of 1.5 meters. After 30 minutes in the container, the device is carefully taken out and its functions and features are tested.

46. The page continues, “You can...[t]ak[e] photos and movies in **wet surroundings**. *Remember not to use the device underwater.*” (Emphasis added.)

47. Further, Sony reiterates, “**The IP rating of your device was achieved in laboratory conditions in standby mode, so you shouldn’t use the device underwater for taking pictures, for example. Do not use the device to take photos while performing any type of activity underwater, including diving or snorkeling.**” (Emphasis added.)

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|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> <li>• After using your smartphone, tablet, or accessory in wet conditions, remember to dry off all covers and other areas where water can accumulate.</li> <li>• Do not expose the device to sea water, salt water, chlorinated water, or liquids such as fruit juices, liquid detergent, and vinegar.</li> <li>• If the device is accidentally exposed to non-fresh water, such as chlorinated water from a swimming pool, always rinse your device off using fresh water.</li> <li>• If either the speaker or microphone gets wet, their function may be affected until all the moisture has completely dried.</li> </ul> | <ul style="list-style-type: none"> <li>• The IP rating of your device was achieved in laboratory conditions in standby mode, so you shouldn't use the device underwater for taking pictures, for example. Do not use the device to take photos while performing any type of activity underwater, including diving or snorkeling.</li> <li>• Drying times will vary depending on the environment, but the process may take up to three hours. During this time, you can still use all the features that don't rely on the speaker or microphone—you can take photos, check your email, or send text messages without problems.</li> <li>• Do not use a hair dryer to dry any wet parts.</li> <li>• Everyday wear and tear, along with damage to your device, can reduce its ability to stay protected from dust and moisture.</li> </ul> |
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48. These statements are in sharp contrast to Sony’s marketing materials, which showed users both diving and snorkeling with their Xperia “waterproof” phones while using the photo and video features.

49. The product page for the Xperia M4 Aqua bears a tiny disclaimer identical to that of the Xperia Z3+, again stating “[t]he Xperia M4 Aqua is waterproof...so don’t worry if you get caught in the rain or want to wash off dirt under a tap, but.... *You should not:*

*put the device completely underwater, or expose it to seawater, salt water, chlorinated water or liquids such as drinks.* Abuse and improper use of device will invalidate warranty. The device has Ingress Protection rating IP65/68. For more info see [www.sonymobile.com/waterproof](http://www.sonymobile.com/waterproof).”<sup>16</sup> (Emphasis added.)

50. The “for more info” link again leads to the above describe “support page,” which advises, among other things, that the devices IP rating was achieved in laboratory conditions in standby mode and, accordingly, users “shouldn’t use the device underwater for taking pictures, for example.”

51. This is exceedingly confusing as it is applied to a phone dubbed the “waterproof” Xperia M4 “Aqua,” which is depicted in Sony videos doing precisely that.



52. Indeed, Sony can’t seem to keep its story straight. Under a “features” tab of the product webpage, Sony continues to claim: “The **Xperia M4 Aqua** Android phone brings you the same innovation in waterproof design as Sony premium smartphones.... You can take photos and videos 4.9 feet under fresh water for up to 30 minutes.....”<sup>17</sup>

<sup>16</sup> <https://www.sonymobile.com/us/products/phones/xperia-m4-aqua/>

<sup>17</sup> *Id.*

## Design that protects, even underwater

The Xperia M4 Aqua Android phone brings you the same innovation in waterproof design as Sony premium smartphones, protecting against water as well as fine dust particles. You can take photos and videos 4.9 feet under fresh water for up to 30 minutes.



53. The same page states that “Casual use in chlorinated pools is permitted.”

54. Yet the product page for the Xperia Z3 and Xperia Z3 T-Mobile continue to bear an earlier Xperia disclaimer:

\*\* The Xperia Z3 is waterproof and protected against dust as long as you follow a few simple instructions: all ports and attached covers should be firmly closed; you can't take the phone deeper than 1.5 m of water and for longer than 30 minutes; and the water should be fresh water. Casual use in chlorinated pools is permitted provided that you rinse the device in fresh water afterwards. No seawater and no salt water pools. Abuse and/or improper use of the device will invalidate the warranty. The phone has an Ingress Protection rating of IP65 and IP68. To see what this means and for more information see [www.sonymobile.com/durability](http://www.sonymobile.com/durability)

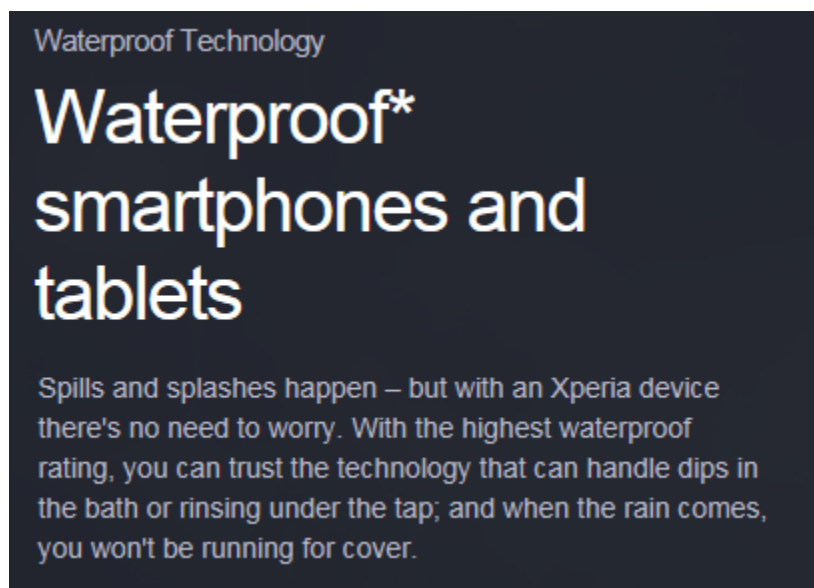
55. The product page for Xperia Z3v Verizon bears yet a different disclaimer.

\* In compliance with IP65 and IP68, the Xperia Z3v is protected against the ingress of dust and is waterproof. Provided that all ports and covers are firmly closed, the phone is (i) dust tight and (ii) protected against low-pressure jets of water from all practicable directions in compliance with IP65; and/or (iii) can be kept under 5 ft of fresh water for up to 30 minutes in compliance with IP68. Abuse and improper use of device will invalidate warranty. For more information see <http://www.sonymobile.com/durability>

56. However, links from Sony’s press releases to “Learn more about our waterproof technology” warn, bewilderingly, that consumers “**should not: put the device completely underwater; or expose it to seawater, salt water, chlorinated water or liquids such as drinks.** Abuse and improper use of device will invalidate warranty.”<sup>18</sup>

\* Many of the Xperia™ smartphones are waterproof and protected against dust, so don't worry if you get caught in the rain or want to wash off dirt under a tap, but remember: all ports and attached covers should be firmly closed. You should not: put the device completely underwater; or expose it to seawater, salt water, chlorinated water or liquids such as drinks. Abuse and improper use of device will invalidate warranty. The device has Ingress Protection rating IP65/68. For more info see [www.sonymobile.com/waterproof](http://www.sonymobile.com/waterproof). Note that some have a capless USB port to connect and charge. On these, the USB port needs to be completely dry before charging.


57. Nonetheless, on the very same web page, Sony more prominently states that Xperia smartphones and tablets “can handle dips in the bath”—“there’s no need to worry”:



<sup>18</sup> <http://www.sonymobile.com/global-en/xperia/technologies/waterproof/>

58. In response to consumer and reporter inquiries about the new and contradictory statements, Sony Xperia representatives stated, “The recent changes to guidance we provide to our customers are designed to more clearly illustrate the best ways to protect devices in day-to-day usage. . . . We have also recently updated our marketing visuals to better advocate sensible usage of our devices.”

59. This explanation was used on the Xperia blog, talk.sonymobile.com, by a Sony Xperia Community Manager, who also stated, “Moving or operating the device while it is submerged is not tested during the laboratory tests. There are also many environmental factors which we could not assess (e.g. water movement or water pressure changes during the movement), if a device is used underwater. Therefore we recommend [you] not submerge our Xperia Z5 in water.”

**Johan**  
Community Manager  
  
Posts: 9,126  
Registered: 2010-11-12

**Re: Do not use under water**  
Thursday

Options ▾

---

PJM wrote:  
I wonder what Sony thinks about this, someone put it underwater at the IFA presentation already.

---

[Z5 in fountain](#)

---

Sony Mobile is committed to providing the highest standards of product quality and customer service. Xperia models that feature levels of dust and water-resistance are validated independently and based on Ingress Protection (IP) standards agreed and used across the industry. We have every confidence in the qualities of Xperia devices, which are built to exacting technical standards and are designed to perform to high standards in normal usage.

The recent changes to guidance we provide to our customers are designed to more clearly illustrate the best ways to protect devices in day-to-day usage. We communicate necessary precautions, and the specific parameters of ingress protection ratings, to help customers to protect their smartphones and tablets in line with the applicable warranty we provide.

We have also recently updated our marketing visuals to better advocate sensible usage of our devices. The warranty terms provided for our products remain the same and any customer concerns will continue to be considered on a case by case basis in line with these terms.


**SONY** - Community Manager Sony Xperia Support Forum

If you're new to our forums make sure that you have read our [Discussion guidelines](#).  
If you want to get in touch with the local support team for your country please visit our [contact page](#).

Message 44 of 47 (143 Views)

0 Kudos
+

Reply

**Johan**  
Community Manager  
  
Posts: 9,126  
Registered: 2010-11-12

**Re: Do not use under water**  
2 weeks ago  
Hi guys!  
Our new Xperia Z5 is protected from water ingress according to the IPx5/x8 standard, which is the highest water protection featured in mobile handsets. The tests for this rating also include the slow submersion in a fresh water tank up to 1.5m for a duration of 30 minutes. Moving or operating the device while it is submerged is not tested during the laboratory tests. There are also many environmental factors which we could not assess (e.g. water movement or water pressure changes during the movement), if a device is used underwater. Therefore we recommend not submerge our Xperia Z5 in water.  
**SONY** - Community Manager Sony Xperia Support Forum  
If you're new to our forums make sure that you have read our [Discussion guidelines](#).  
If you want to get in touch with the local support team for your country please visit our [contact page](#).

Options ▾

Message 10 of 47 (2,294 Views)

0 Kudos + ★ Reply

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60. Sony's new disclosures do not make consumers whole. Plaintiffs and other members of the Class and Subclasses (as defined below) have been damaged by Defendants' deceptive and unfair conduct in that they purchased the Devices and paid far more than they otherwise would have paid had Defendants not misrepresented the waterproof abilities of the Devices.

### **CLASS ACTION ALLEGATIONS**

61. Plaintiffs bring this action as a class action under Federal Rule of Civil Procedure 23 on behalf of a Class consisting of all persons in the United States who, within the relevant statute of limitations period, purchased the Devices.

62. Plaintiffs Goddard and Landes also seeks to represent a subclass defined as all members of the Class who purchased the Devices in California (the "California Subclass").

63. Plaintiff Landes also seeks to represent a subclass defined as all members of the Class who purchased the Devices in Illinois (the "Illinois Subclass").

64. Excluded from the Classes are the Defendants, the officers and directors of the Defendants at all relevant times, members of their immediate families and their legal

representatives, heirs, successors or assigns and any entity in which either Defendants have or had a controlling interest.

65. Also excluded from the Classes are persons or entities that purchased the Devices for purposes of resale.

66. Plaintiffs are members of the Classes they seek to represent.

67. The Classes are so numerous that joinder of all members is impractical. Although Plaintiffs do not yet know the exact size of the Classes, the Devices are sold in major retail stores across the United States, including stores such as Verizon and T-Mobile. Major online retailers include Amazon.com. Upon information and belief, the Class includes thousands of members.

68. The Classes are ascertainable because the Class Members can be identified by objective criteria – the purchase of a Device during the Class Period. Individual notice can be provided to Class Members “who can be identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B).

69. There are numerous questions of law and fact common to the Class which predominate over any individual actions or issues, including but not limited to:

1. Whether Defendants’ marketing of the Devices is false, misleading, and/or deceptive;
2. Whether Defendants’ marketing of the Devices is an unfair business practice;
3. Whether the Devices are waterproof;
4. Whether the Devices are capable of operation underwater on an ordinary basis;
5. Whether Defendants breached warranties to Plaintiffs and the Class;
6. Whether Defendants were unjustly enriched by their conduct;
7. Whether Defendants violated the ICFA;
8. Whether Defendants violated the CLRA;
9. Whether Defendants violated the UCL;

10. Whether Class Members suffered an ascertainable loss as a result of Defendants' misrepresentations; and

11. Whether, as a result of Defendants' misconduct as alleged herein, Plaintiffs and the Class Members are entitled to restitution, injunctive and/or monetary relief and, if so, the amount and nature of such relief.

70. Plaintiffs' claims are typical of the claims of the members of the Class as all members of the Class are similarly affected by Defendants' wrongful conduct. Plaintiffs have no interests antagonistic to the interests of the other members of the Class. Plaintiffs and all members of the Class have sustained economic injury arising out of Defendants' violations of common and statutory law as alleged herein.

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

72. The class mechanism is superior to other available means for the fair and efficient adjudication of the claims of Plaintiffs and the Class Members. Each individual Class Member may lack the resources to undergo the burden and expense of individual prosecution of the complex and extensive litigation necessary to establish Defendants' 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 Defendants' liability. Class treatment of the liability issues will ensure that all claims are consistently adjudicated.

**COUNT I**

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

73. Plaintiffs Landes and Goddard bring this Count individually and on behalf of the California Subclass.

74. Plaintiffs and the California Subclass Members are consumers who purchased the Devices for personal, family, or household purposes. Accordingly, Plaintiffs and the California Subclass Members are “consumers” as that term is defined by the CLRA in Cal. Civ. Code § 1761(d). Plaintiffs and the California Class Members are not sophisticated experts with independent knowledge of the design and capabilities of the Devices.

75. At all relevant times, the Devices constituted a “good” as that term is defined in Cal. Civ. Code § 1761(a).

76. At all relevant times, Defendants were a “person” as that term is defined in Civ. Code § 1761(c).

77. At all relevant times, Plaintiffs’ purchase of the Devices, and the purchases of the Devices by other Class Members, constituted “transactions” as that term is defined in Cal. Civ. Code § 1761(e). Defendants’ actions, representations, 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.

78. The policies, acts, and practices described in this Complaint were intended to and did result in the sale of the Devices to Plaintiffs and the Class. Defendants’ practices, acts, policies, and course of conduct violated the CLRA §1750 *et seq.* as described above.

79. Defendants represented that the Devices had sponsorship, approval, characteristics, uses, and benefits which it did not have in violation of Cal. Civ. Code § 1770(a)(5).

80. Defendants represented that the Devices were of a particular standard, quality, and grade, when they were of another, in violation of California Civil Code § 1770(a)(7).

81. Defendants violated California Civil Code §§ 1770(a)(5) and (a)(7) by representing that the Devices were waterproof and capable of ordinary underwater use and operation when, in fact, they were not.

82. Defendants represented that the Devices were of a particular standard or quality when Defendants were aware that they were of another in violation of § 1770(a)(7) of the CLRA. Defendants represented that the Devices were waterproof and designed for and capable of ordinary underwater use and operation when, in fact, underwater use will damage the devices.

83. Defendants advertised the Devices with the intent not to sell them as advertised in violation of § 1770(a)(9) of the CLRA. Defendants did not intend to sell the Devices as advertised because Defendants knew that they Devices were not capable of intentional and regular underwater use, for example, for taking pictures and videos underwater.

84. Plaintiffs and the California Subclass Members suffered injuries caused by Defendants' misrepresentations because: (a) Plaintiffs and the Class Members would not have purchased the Devices if they had known the true facts; (b) Plaintiffs and the Class paid a price for the Devices due to the mislabeling of the Devices; and (c) the Devices did not have the level of quality, effectiveness, or value as promised.

85. Prior to the filing of this Complaint, a CLRA notice letter was served on Defendants which complies in all respects with California Civil Code § 1782(a). A true and correct copy of Plaintiffs' letter is attached as Exhibit A. On January 13, 2016, Plaintiffs sent Defendants a letter via certified mail, return receipt requested, advising Defendants that they are in violation of the CLRA and must correct, repair, replace, or otherwise rectify the goods alleged to be in violation of § 1770. In the event that the relief requested is not provided, Plaintiffs will amend this Complaint to include a request for damages pursuant to the CLRA.

86. Wherefore, Plaintiffs seeks only injunctive relief for this violation of the CLRA.

## **COUNT II**

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

87. Plaintiffs repeats the allegations contained in the paragraphs above as if fully set forth herein.

88. Plaintiffs Landes and Goddard bring this Count on behalf of the California Subclass.

89. 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."

90. Throughout the Class Period, Defendants committed acts of false advertising, as defined by the FAL, by using false and misleading statements to promote the sale of the Devices, as described above, and including, but not limited to, representing that the Devices were waterproof, and capable of ordinary and intentional operation underwater.

91. Defendants knew or should have known, through the exercise of reasonable care, that their statements were untrue and misleading.

92. Defendants' actions in violation of the FAL were false and misleading such that the general public is and was likely to be deceived.

93. As a direct and proximate result of these acts, 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 Defendants' FAL violation because: (a) Plaintiffs and the Class would not have purchased the Devices or would not have paid as much for the Devices if they had known the true facts regarding the capabilities of the Devices; (b) Plaintiffs and the Class paid a price premium

due to the misrepresentations about the Devices; and (c) the Devices did not have the promised quality, capabilities, or value.

94. Plaintiffs brings this action pursuant to Bus. & Prof. Code § 17535 for injunctive relief to enjoin the practices described herein and to require Defendants to issue corrective disclosures to consumers. Plaintiffs and the California Subclass are therefore entitled to: (a) an order requiring Defendants to cease the acts of unfair competition alleged herein; (b) full restitution of all monies paid to Defendants as a result of their 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.*)**

95. Plaintiffs repeat and reallege the allegations contained in the paragraphs above, as if fully set forth herein.

96. Plaintiffs Landes and Goddard bring this Count on behalf of the California Subclass.

97. The Unfair Competition Law, Cal. Business & Professions Code § 17200, *et seq.* ("UCL"), prohibits any "unlawful," "unfair," or "fraudulent," business act or practice and any false or misleading advertising.

98. The UCL, Bus. & Prof. Code § 17200 *et seq.*, provides, in pertinent part: "Unfair competition shall mean and include unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading advertising ...." The UCL also provides for injunctive relief and restitution for UCL violations. By virtue of their above-described wrongful actions, Defendants engaged in unlawful, unfair, and fraudulent practices within the meaning, and in violation of, the UCL.

99. "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).

100. 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).

101. Defendants violated the “unlawful prong” by violating the CLRA, the FAL, and Florida Deceptive and Unfair Trade Practices Act, as well as by breaching express and implied warranties as described herein.

102. Defendants’ acts and practices constitute “unfair” business acts and practices in that the harm caused by Defendants’ wrongful conduct outweighs any utility of such conduct, and that Defendants’ 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.

103. There were reasonably available alternatives to further Defendants’ legitimate business interests, including using the best practices to protect the personal and financial information, other than Defendants’ wrongful conduct described herein.

104. The UCL also prohibits any “fraudulent business act or practice.” Defendants’ above-described claims, nondisclosures, and misleading statements were false, misleading, and likely to deceive the consuming public in violation of the UCL.

105. As a direct and proximate result of Defendants’ above-described wrongful actions, and violation of the UCL; Plaintiffs and members of the Class have suffered injury and actual out-of-pocket losses because: (a) Plaintiffs and the Class would not have purchased the Devices if they had known the true facts regarding the qualities and capabilities of the Devices; (b) Plaintiffs and the Class paid a price due to the misrepresentations about the Devices; and (c) the Devices did not have the promised qualities, capabilities, or value.

106. Pursuant to Bus. & Prof. Code §17203, Plaintiffs and the California Subclass are therefore entitled to: (a) an order requiring Defendants to cease the acts of unfair competition

alleged herein; (b) full restitution of all monies paid to Defendants as a result of their 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**

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

107. Plaintiff Landes repeats and realleges the allegations contained in the paragraphs above, as if fully set forth herein.

108. Plaintiff Landes brings this Count individually and on behalf of the Illinois Subclass.

109. 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.

110. 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.

111. 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).

112. The ICFA applies to Defendants' 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.

113. Defendants are persons within the meaning of the ICFA.

114. Plaintiff and other members of the Class are consumers within the meaning of the ICFA.

115. Defendants' Devices are merchandise within the meaning of the ICFA and the sale of their Devices is considered trade or commerce under the ICFA.

116. Defendants violated the ICFA by misrepresenting and omitting material facts about the Devices. Specifically, Defendants advertised the Devices as "waterproof" and designed for and capable of ordinary underwater use and operation when, in fact, underwater use will damage the devices.

117. Defendants were aware or should have been aware that the Devices were not "waterproof" or designed for and capable of ordinary underwater use and operation. Defendants created their advertisements and marketing materials with the intent that Plaintiff and other consumers would rely on the information provided.

118. Defendants' misrepresentations and omissions to Plaintiff and members of the Illinois Subclass constitute unfair and deceptive acts and practices in violation of the ICFA.

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

120. Plaintiff and the Illinois Subclass members were damaged by Defendants' conduct directed towards consumers. As a direct and proximate result of Defendants' violation of the ICFA, Plaintiff and Illinois Subclass members have suffered harm in the form of monies paid for Defendants' products. Plaintiff, on behalf of himself and the Illinois Subclass, seeks an order (1) requiring Defendants 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 Defendants to restore to Plaintiff and each Illinois Subclass member any money acquired by means of unfair competition.

**COUNT V**

**(Breach of Express Warranty)**

121. Plaintiffs repeat and reallege the allegations contained in the paragraphs above, as if fully set forth herein.

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

123. Defendants expressly warranted in their marketing, advertising, and promotion of the Devices, that the Devices were “waterproof” and could safely be taken underwater, including in chlorinated swimming pools, for up to 30 minutes to depths of approximately 4.9 feet.

124. Plaintiffs purchased the Devices and paid a premium price for the Devices based upon the above said express warranty.

125. Defendants breached their express warranty by selling a product that is not “waterproof” and is not capable of or designed for ordinary underwater use.

126. As a direct and proximate result of Defendants’ breaches of their express warranties, Plaintiffs and members of the Class have been damaged in that they did not receive the Devices as specifically warranted and paid a premium for the Devices based on the Defendants’ misrepresentations.

**COUNT VI**

**(Breach of Implied Warranty)**

127. Plaintiffs repeat and reallege the allegations contained in the paragraphs above, as if fully set forth herein.

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

129. Defendants, through their acts and omissions set forth herein, in their sale, marketing, and promotion of the Devices, made implied representations to Plaintiff and the Class that the Devices were waterproof and suitable for ordinary and intentional underwater use, including, *inter alia*, operation in swimming pools, and Plaintiffs and the Class bought the Devices manufactured, advertised, and sold by Defendants.

130. Defendants breached their implied warranties because the Devices are not waterproof, and are not capable of regular and intentional use underwater and as a result of Defendants' conduct, Plaintiff and the Class did not receive goods as impliedly warranted by Defendants to be merchantable or fit for the purpose for which they were sold.

131. Plaintiffs and the Class have sustained damages as a proximate result of the foregoing reach of implied warranty in an amount to be determined at trial.

## **COUNT VII**

### **(Unjust Enrichment)**

132. Plaintiffs repeat and reallege the allegations contained in the paragraphs above, as if fully set forth herein.

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

134. Plaintiffs and Class members conferred a benefit on Defendants by purchasing the Devices.

135. Defendants have been unjustly enriched in retaining the revenues derived from Class members' purchases of the Devices, which retention under these circumstances is unjust and inequitable, because Defendants misrepresented that the Devices were waterproof and capable of regular and intentional underwater use, when in fact they were not, which caused injuries to Plaintiffs and Class members because: (a) they would not have purchased the Devices on the same terms if the true facts concerning their ability to: withstand exposure to water; and (b) they paid a price premium due to the misrepresentations of the benefits of the Devices.

136. Because Defendants' retention of the non-gratuitous benefit conferred on it by Plaintiffs and Class members is unjust and inequitable, Defendants must pay restitution to Plaintiffs and the Class members for their unjust enrichment, as ordered by the Court.

**WHEREFORE**, Plaintiffs pray for relief and judgment, as follows:

- A. Determining that this action is a proper class action;
- B. For an order declaring that the Defendants' conduct violates the statutes referenced herein;

C. Awarding compensatory and punitive damages in favor of Plaintiffs, members of the Class, and the Subclasses against Defendants for all damages sustained as a result of the Defendants' wrongdoing, in an amount to be proven at trial, including interest thereon;

D. Awarding injunctive relief against Defendants to prevent Defendants from continuing their ongoing unfair, unconscionable, and/or deceptive acts and practices;

E. For an order of restitution and/or disgorgement and all other forms of equitable monetary relief;

F. Awarding Plaintiffs and members the Class their reasonable costs and expenses incurred in this action, including counsel fees and expert fees; and

G. Awarding such other and further relief as the Court may deem just and proper.

**JURY DEMAND**

Plaintiffs hereby demand a trial by jury on all claims so triable in this action.

Dated: April 14, 2017

*/s/ Shannon L. Hopkins*

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**LEVI & KORSINSKY LLP**  
Shannon L. Hopkins (SH-1887)  
Nancy A. Kulesa  
733 Summer Street, Suite 304  
Stamford, CT 06901  
Tel.: (212) 363-7500  
Fax: (866) 367-5610  
Email: nkulesa@zlk.com  
Email: shopkins@zlk.com

*Counsel for Lead Plaintiffs*