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11 Attorneys for Plaintiff JAMES P. BRICKMAN

12
13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**

15
16 JAMES P. BRICKMAN, individually and as a
representative of all others similarly situated,

17 Plaintiff,

18 v.

19 FITBIT, INC.,

20 Defendant.
21

Case No. 3:15-cv-2077

COMPLAINT
CLASS ACTION
DEMAND FOR JURY TRIAL

22 Now comes Plaintiff James P. Brickman, individually and as a representative of all others
23 similarly situated, and for his Class Action Complaint states:

24 **INTRODUCTION**

25 This is a class action brought by James P. Brickman (“Plaintiff”), individually and as putative
26 class representative, against Fitbit, Inc. (“Defendant” and/or “Fitbit”). Defendant sells wearable,
27 wireless-enabled devices that purportedly track exercise and other fitness and physical activity to
28

1 measure data such as the number of steps walked, calories burned, and other personal metrics. This
2 lawsuit does not challenge any of those functions. Recently however, Defendant has made specific
3 advertisement claims that for an extra charge, the customer can purchase a device which also
4 contains a "sleep-tracking" function which will track "how long you sleep," "the number of times
5 you woke up," and "the quality of your sleep." In fact, the sleep-tracking function does not and
6 cannot do these things. It does not perform as advertised. Consumers who purchase these products
7 and pay the extra amount for this function do not receive the value of this function for which they
8 paid.

9 By advertising this sleep-tracking function without actually providing this function to its
10 customers, Defendant is violating California law. This lawsuit is to stop this unlawful practice, force
11 the Defendant to return and disgorge its inequitable profits, and recover for customers the
12 overcharges which they paid.

13 **PARTIES**

14 1. Plaintiff James P. Brickman is an individual and resident of the State of Florida,
15 County of Hernando, City of Spring Hill.

16 2. Defendant Fitbit, Inc. is a corporation organized under the laws of Delaware,
17 headquartered in San Francisco, CA, and registered to do business with the Secretary of State of
18 California. Defendant operates its website and online store (www.fitbit.com) from California,
19 through which Defendant sells its consumer fitness devices. Defendant also sells these devices at
20 national brick-and-mortar retailer stores, including Apple stores, AT&T and Verizon stores, Best
21 Buy, Brookstone, Dick's Sporting Goods, RadioShack, REI, Target, and more (see
22 <http://www.fitbit.com/where-to-buy>).

23 **JURISDICTION & VENUE**

24 3. Defendant is a citizen of the State of California and Plaintiff is a citizen of the State
25 of Florida.

26 4. This is a putative class action which involves more than 100 class members and more
27 than \$5,000,000.00 in controversy.

28

1 5. This Court has jurisdiction over the present matter pursuant to 28 U.S.C. §1332 et
2 seq.

3 6. Venue is proper in this Court pursuant to 28 U.S.C. §1391(b)(1) because Defendant
4 has its headquarters in this District.

5 6b. Intradistrict Assignment: Assignment to the San Francisco Division is proper because
6 a substantial part of the events or omissions which give rise to the claim occurred in this county.

7 **FACTS**

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

9 8. Defendant markets and sells to consumers, directly and through large retail stores
10 throughout the country, distinctly branded personal fitness-tracking devices. These are called the
11 Fitbit Force, Fitbit Flex, Fitbit One, Fitbit Zip, and Fitbit Ultra; as well as Fitbit’s second-generation
12 products, the Fitbit Charge, Fitbit Charge HR, and Fitbit Surge.

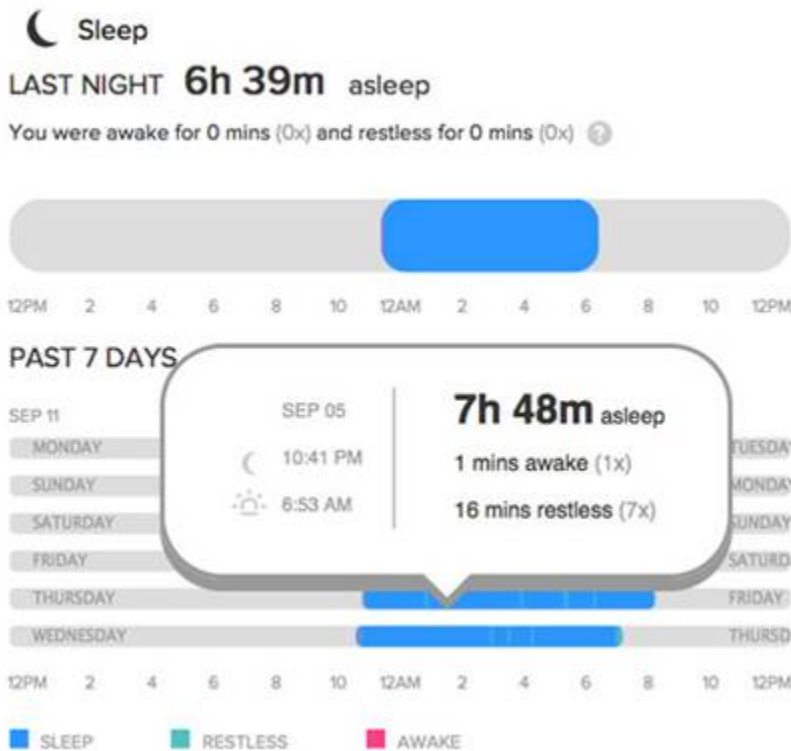
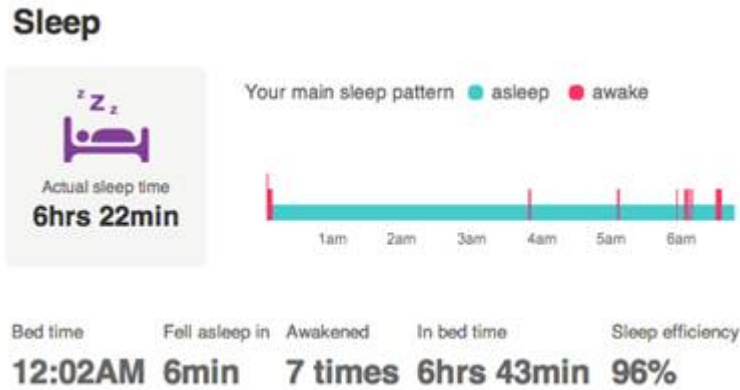
13 9. The basic model of the devices, the Fitbit Zip, does not have the 'sleep-tracking
14 function' and the price for this base-model device does not reflect any extra charge for that function.

15 10. In contrast, the non-Zip Fitbit devices – the Fitbit Force, Fitbit Flex, Fitbit One, Fitbit
16 Ultra, Fitbit Charge, Fitbit Charge HR, and Fitbit Surge (herein “Fitbit devices”) – charge at least an
17 additional \$30 for the 'sleep tracker' function which is not available on the Fitbit Zip. The Fitbit
18 Force, Fitbit Flex, Fitbit One, Fitbit Ultra, Fitbit Charge, Fitbit Charge HR, and Fitbit Surge all claim
19 to “track hours slept,” track “times woken up”, and track the “quality of sleep” of the wearer. These
20 claims are on Fitbit Inc.’s website (www.fitbit.com) as well as on the actual physical packaging of
21 the device itself.

22 11. On its always-available website, www.fitbit.com, Fitbit Inc. advertises claims that
23 these sleep-tracking devices will “measure your sleep quality. Once the data syncs, graphs on your
24 (device) dashboard will reveal how long you slept and the number of times you woke up, giving you
25 a ‘sleep quality score.’”

26 12. Even more, the functional displays of information (see below) present even further
27 detail and specific claims. These images claim to identify exactly what time and for how long the
28

wearer was awake over the course of each night's sleep. These images also include specific numbers for "actual sleep time, X hrs X mins," "bed time XX:XX p.m.," "fell asleep in X minutes," "awakened X times," "sleep efficiency X%," "X minutes awake," "X restless minutes," and how many times the user was awake and/or restless over the course of the wearer's night of sleep.



13. These are specific numbers presented to the consumer as exact times and percentages.

1 14. However, the Fitbit sleep-tracking technology cannot and does not perform these
2 functions as represented.

3 Research Shows Fitbit Sleep-Tracking Devices “Consistently Misidentify” Sleep¹

4 15. Polysomnography and actigraphy are the two widely accepted sleep-monitoring
5 technologies used by sleep scientists.

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

11 17. Actigraphy, on the other hand, is a less invasive sleep-monitoring technology. The
12 standard method involves attaching an actimetry sensor to the patient to measure gross motor
13 activity. While actigraphy is a scientifically accepted technology, it is widely regarded as less
14 accurate than the polysomnography.

15 18. The Fitbit sleep-monitoring function available to consumers on the Fitbit devices uses
16 a much cheaper, and much less accurate actigraphy-like technology called an accelerometer (a “3-
17 axis accelerometer” according to the device specs) to purportedly track a wearer’s movement while
18 they are sleeping.

19 19. At least one study has shown that the accuracy of the accelerometer in the Fitbit
20 sleep-tracking devices falls far below the accuracy level of the actigraphy, and far below an
21 acceptable standard of accuracy to render it useful in any way for scientific purposes.

22
23 ¹ The scientific study referred to in this section is available at <http://www.ncbi.nlm.nih.gov/pubmed/21971963>.

24 Additionally, a significant amount of anecdotal evidence suggests that there is a pattern of consumer as well as sleep-scientist
25 dissatisfaction with the Fitbit devices’ sleep-tracking function. See <http://www.theguardian.com/lifeandstyle/2014/aug/22/sleep-trackers-to-boost-health-fitness> (last visited October 28, 2014); <http://www.livescience.com/42710-fitness-trackers-sleep-monitoring-accuracy.html> (last visited October 28, 2014); http://www.huffingtonpost.com/2014/01/22/fitness-trackers-sleep_n_4637328.html (last visited October 28, 2014); <http://www.usatoday.com/story/news/nation/2013/03/24/sleep-tracking-devices/2007085/> (last visited October 28, 2014); <http://techcrunch.com/2012/11/18/fitbit-one-review-slightly-flawed-but-still-a-great-way-to-quantify-yourself/> (last visited October 28, 2014); <http://gizmodo.com/fitbit-force-review-a-health-tracker-you-d-actually-ke-1454962288> (last visited October 28, 2014); <http://gizmodo.com/5954563/fitbit-one-review-a-great-way-to-monitor-your-wretched-laziness> (last visited October 28, 2014).

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