EFiled: Mar 27 2018 03:45PM EDT
Transaction ID 61847123
Case No. 2017-0402-JRS

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE FITBIT, INC. STOCKHOLDER DERIVATIVE LITIGATION	CONSOLIDATED C.A. No. 2017-0402-JRS

REDACTED PUBLIC VERSION
E-FILED: March 27, 2018

VERIFIED SECOND AMENDED CONSOLIDATED STOCKHOLDER DERIVATIVE COMPLAINT

TABLE OF CONTENTS

Page

NATURE OF THE ACTION 1

THE PARTIES 12

RELEVANT NON-PARTIES 17

SUBSTANTIVE ALLEGATIONS 17

I. BACKGROUND OF FITBIT'S FORMATION, PRE-IPO INVESTORS, AND ITS EARLY PRODUCTS 17

II. FITBIT UNVEILS ITS "PUREPULSE" TECHNOLOGY 20

III. DEFENDANTS STRUCTURED THE IPO TO ALLOW THEM TO SELL A SIGNIFICANT BLOCK OF SHARES 27

IV. DEFENDANTS CONSPIRED TO WAIVE THE LOCK-UP AGREEMENTS, WHICH WOULD HAVE PROHIBITED THEIR PARTICIPATION IN THE SECONDARY OFFERING 35

V. THE DEFENDANTS KNEW THAT PUREPULSE WAS INACCURATE AND THAT THE COMPANY'S CLAIMS REGARDING PUREPULSE WERE FALSE WHEN THE SELLING DEFENDANTS WAIVED THEIR OWN LOCK-UP AGREEMENTS 47

A. Defendants Repeatedly Claimed Purepulse Was Accurate And That Management Was "Confident" In Fitbit's Future 47

B. Purepulse Products Represented The Vast Majority Of Fitbit's Revenues 50

C. Despite Telling Investors Purepulse Was Accurate And That Fitbit's Future Was Bright, The Selling Defendants Rushed Into An Unnecessary Secondary Offering 51

D. Defendants Knew The Truth 53

E. Selling Defendants Ignored The Company's Insider Trading Policies By Trading On Confidential, Material Information About The Accuracy Of The Purepulse Devices 66

F. The Allegations Of Fraud In The Securities Class Action Have Already Survived A Motion To Dismiss Under A Heightened Plausibility Standard 68

VI. THE SELLING DEFENDANTS PROFITED THROUGH INSIDER INFORMATION THROUGH THEIR SALES IN THE IPO AND THE SECONDARY OFFERING 71

VII. THE TRUTH EMERGES - INDEPENDENT TESTS CONFIRM PUREPULSE'S INACCURACY 74

SPECIFIC CORPORATE DUTIES OF THE DEFENDANTS 77

DERIVATIVE ALLEGATIONS 89

DEMAND ON THE FITBIT BOARD IS EXCUSED AS FUTILE 90

A. A Majority Of The Seven-Member Fitbit Demand Board Was Interested In The Insider Sales And The Lock-Up Agreement Waivers 95

B. Defendants' Conduct Is Not A Valid Exercise Of Their Business Judgment 103

CLAIMS FOR RELIEF 104

RELIEF REQUESTED 107

Plaintiffs Anne Bernstein, Michael Hackett, and Bright Agyapong (together, "Plaintiffs"), on behalf of nominal defendant Fitbit, Inc. ("Fitbit" or the "Company"), bring the following Verified Second Amended Consolidated Stockholder Derivative Complaint (the "Complaint") against certain members of the board of directors of Fitbit (the "Fitbit Board" or the "Board") and/or Fitbit officers (collectively, with the Board, the "Defendants") for breaching their fiduciary duties. The allegations of the Complaint are based on the knowledge of Plaintiffs as to themselves, information uncovered during the course of the investigation made by Plaintiffs' counsel, which included among other things, the review of publicly available information, including press releases, conference call transcripts, and filings made with the United States Securities and Exchange Commission (the "SEC") and a review of confidential materials produced by the Company in response to Plaintiffs' respective demands pursuant to 8 *Del. C.* § 220, and on information and belief as to all other matters.

NATURE OF THE ACTION

1. This Action arises out of the Defendants' breach of their fiduciary duties in failing to diligently and disinterestedly serve the Company. The Defendants deliberately kept stockholders in the dark as to highly material

information relating to key Fitbit products and misused that confidential information for their own benefit.

2. The Defendants further intentionally structured both the Company's initial public offering of June 18, 2015 (the "IPO") and its secondary offering of November 13, 2015 (the "Secondary Offering," and with the IPO, the "Offerings") to allow a majority of the members of the Board and certain officers to engage in and profit from insider trading in the Offerings.[1] The Secondary Offering was preceded by a highly conflicted decision—in breach of Defendants' fiduciary duties—to waive lock-up provisions put in place during the IPO so that the Selling Defendants (defined below) could further profit from their inside knowledge before the truth became known.

3. Fitbit manufactures and sells wearable personal fitness trackers for the consumer market. The Company's trackers purport to monitor and record individuals' activity and certain health metrics. Prior to October 2014, Fitbit's devices merely recorded and tracked a user's steps taken, stairs climbed, and sleep activity.

[1] By profiting through their confidential knowledge, the Selling Defendants (defined below) violated their fiduciary duties under *Brophy v. Cities Serv. Co.*, 70 A.2d 5 (Del. Ch. 1949) and its progeny.

4. In October 2014, the Company announced that it was adding a potentially game-changing health metric to Fitbit's tracking arsenal: the ability to calculate and record the real-time heart rate of its users through its proprietary "PurePulse" technology. Real-time readouts and historically-tracked heart rate information is critically important to individuals with cardiac issues whose physicians insist that they never exceed certain heart rate thresholds during exercise. Further, constant heart rate tracking allows for much greater accuracy in calculating users' calories burned. These key features propelled the sales of Fitbit devices containing PurePulse heart rate monitoring. Driven by marketing the PurePulse technology, Fitbit's prospects soared, with newly introduced devices representing approximately ***80% of its revenues*** shortly after their introduction in October 2014.[2]

5. The ensuing investor enthusiasm led to a strong reception for the Company's IPO in June 2015.[3] The IPO Prospectus, approved by the Board, touted, among other things, Fitbit's devices as "***highly accurate***."

6. As a result of the IPO, Fitbit's shares became listed on the New York Stock Exchange ("NYSE") under the symbol "FIT." The IPO for roughly 36.5

---

[2] Fitbit has noted that the three devices it announced in October 2015 represented approximately 80% of its revenue but did not back out the one non-PurePulse device's contributions from those sales.

[3] On June 18, 2015, Fitbit's filed its final prospectus (the "IPO Prospectus") with the SEC and conducted its IPO.

million shares was comprised of roughly 22.3 million Class A shares offered by Fitbit, reaching approximately $416 million in net proceeds to Fitbit, ***and*** roughly 6.15 million shares offered by Defendants James Park, Eric N. Friedman, Jonathan D. Callaghan, Steven Murray, and their affiliates (together with Defendant William R. Zerella, the "Selling Defendants"),[4] which represented approximately $115 million in net proceeds.

7. During a November 2, 2015 earnings call, Fitbit Chief Executive Officer ("CEO") and co-founder James Park[5] told investors and the public that Fitbit's future was bright, and that "[b]ased on the Company's execution in the third quarter, I've never been more confident in Fitbit's future." As discussed in more detail below, this is just one of the many representations about the positive outlook for the Company, based in large part on sales of products containing the PurePulse technology.

8. Important to this case, as disclosed in Fitbit's IPO Prospectus, each of the Defendants signed lock-up agreements (the "Lock-Up Agreements") agreeing to "not sell any [] stock for at least 180 days" (i.e., *six months*) following the IPO.

---

[4] The IPO Prospectus refers to the Selling Defendants as "selling stockholders." *See* IPO Prospectus at 9.

[5] James Park also holds the titles of President of Fitbit and Chairman of the Fitbit Board.

9. Despite Park's representation about the confidence in Fitbit's future, the same day as the investor call—and ***less than five months*** after the IPO—Fitbit announced that the Selling Defendants' Lock-Up Agreements were ***waived***.[6] On November 13, 2015, the Company filed its prospectus in connection with the Second Offering (the "Secondary Offering Prospectus") which disclosed that the Company anticipated selling only 3 million shares in the Secondary Offering, but that the Selling Defendants would be selling an *additional* 9.6 million shares.[7] Similar to the IPO Prospectus, the Secondary Offering Prospectus also described Fitbit's heart rate tracking technology as ***"highly accurate."***

10. Unbeknownst to public stockholders at this time and in contradiction to the representations in the IPO Prospectus and Secondary Offering Prospectus, the PurePulse technology was woefully, and in some instances dangerously, inaccurate. It underrepresented users' heart rates to a frightening level, by up to 20 beats per minute. Defendants knew that the PurePulse technology and claims surrounding its accuracy—which were responsible for the bulk of Fitbit's meteoric growth, which was in turn the lynchpin of the Offerings—was a sham.

---

[6] Because Defendants alone own Class B shares, which carry super-voting rights, Defendants and their affiliated entities and other insiders together control the Company.

[7] Over $270 million of the proceeds from the Secondary Offering went to the Selling Defendants.

11. Documents Fitbit produced in response to demands Plaintiffs each sent to Fitbit pursuant to 8 *Del. C.* § 220 confirm that Defendants were well-aware of serious problems with Fitbit's PurePulse technology at the time of the Selling Defendants' transactions. [redacted]

12. [redacted]

[redacted]

13. [redacted] Fitbit released products with the new PurePulse technology as part of an attempt to halt and reverse the Company's downhill slide that occurred following its release of a prior tracker that had serious flaws resulting in class action lawsuits, recalls, refunds, and substantial harm to the Company's reputation. Fitbit's PurePulse technology was intended to save the Company by providing consumers a new, valuable technology that would recuperate Fitbit's reputation and drive its revenues for years to come.

14. Though later proven to be faulty, the release of PurePulse technology seemingly had the intended effect, single-handedly causing Fitbit's revenues to soar from $271.1 million in 2013 to $1.858 billion in 2015. Given that the PurePulse technology was Fitbit's core product, and Fitbit's internal documents demonstrating that serious flaws with that technology had not been disclosed publicly, but were well-known among Fitbit's directors and officers, there is no doubt that all

[8] [redacted] Unless otherwise noted herein, all emphasis is added.

Defendants were fully aware of the serious flaws with the product when the Selling Defendants sold Fitbit shares.

15. A little over seven weeks after the Selling Defendants liquidated substantial holdings in the Secondary Offering, the truth about PurePulse's inaccuracy became public. Class action lawsuits were filed against Fitbit in the U.S. District Court for the Northern District of California revealing the failures of the PurePulse technology.[9] The Consumer Litigation alleged that the heart-rate monitoring systems were dangerously inaccurate and pose serious health risks to users. Further, an independent study on Fitbit's heart-rate monitors, subsequently relied on in the Consumer Litigation, confirms that "The PurePulse Trackers do not accurately measure a user's heart rate, particularly during moderate to high intensity exercise, and cannot be used to provide a meaningful estimate of a user's heart rate."

16. Because the PurePulse technology was woefully, and in some instances dangerously, inaccurate, the Company was grievously harmed when the truth was exposed. The Company was also harmed as a result of Defendants' use of inside information in violation of their fiduciary duties. The Defendants exposed Fitbit to

[9] Namely, *McLellan, et al. v. Fitbit, Inc.*, 3:16-cv-00036-JD (N.D. Cal. Jan. 5, 2016), *Landers, et al. v. Fitbit, Inc.*, No. 16-cv-00777-JD (N.D. Cal. Feb. 16, 2016) (collectively, the "Consumer Litigation"), and *Robb v. Fitbit Inc., et al*, 3:16-cv-00151-SI (N.D. Cal. Jan. 11, 2016) (collectively, the "Securities Class Action").

liability not only for the Consumer Litigation, but also for the Securities Class Action brought by investors who were defrauded by Defendants.

17. The Defendants named in this Action—who collectively constitute a majority of Fitbit's current Board—are also named as defendants in the Securities Class Action. The Securities Class Action alleges, in pertinent part, violations of securities fraud under sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5, claims which must meet the heightened pleading standards of federal securities fraud to proceed, as well as violations of Sections 11 and 15 of the Securities Act of 1933 for issuing materially false or misleading statements in the Company's Registration Statement soliciting stockholders to purchase shares of Fitbit in the IPO.

18. There, Northern District of California Judge Susan Illston denied the Securities Class Action defendants' motion to dismiss, allowing the Securities Class Action to proceed after finding that the allegations of fraud sufficiently demonstrated *scienter* and the Securities Class Action complaint stated actionable misrepresentations against certain of the Defendants named in the present Action—Park, Friedman, and Zerella. In making its decision (applying a much higher standard of review than applicable here, the Securities Class Action Court ruled that the allegations against these defendants were "sufficient to establish scienter"

regarding knowledge of PurePulse's inaccuracy.[10] The ruling also stated that "[t]aken together, the allegations in this case are at least as cogent or compelling as a plausible alternative inference, namely that Fitbit executives were simply unaware of the high degree of inaccuracy in PurePulse devices alleged. Particularly given the contributions these devices made to Fitbit's revenue stream in 2015 …, the Court finds that a holistic review of the allegations suffices to establish *scienter*."[11] Judge Illston also upheld claims against each of the Defendants named in this Action for violating Section 11 of the Securities Act of 1933 for causing Fitbit to issue materially false and misleading information regarding Fitbit's heart rate monitoring technology.

19. When Defendants moved Judge Illston to reconsider her decision denying their motion to dismiss, Judge Illston re-examined the evidence presented and ***again*** found "a '***cogent and compelling' argument*** that information regarding the basic functioning of products that constituted 80% of Fitbit's revenue stream … would have been known to the individual defendants."[12]

---

[10] Securities Class Action, Order Denying Defendants' Motions to Dismiss ("Motion to Dismiss Order") (annexed hereto as Exhibit B) at 16.

[11] *Id*. at 18.

[12] Securities Class Action, Order Denying Motion For Partial Reconsideration ("Motion For Reconsideration Order") (annexed hereto as Exhibit C) at 9.

20. It cannot be denied that Defendants touted the importance of the new devices containing the PurePulse technology and which comprised approximately 80% of Fitbit's revenues. They repeatedly claimed that their trackers, including those with PurePulse technology, were "highly accurate." While making these statements, which they knew were not true, Defendants effectuated an IPO, obtained a waiver for the Lock-Up Agreements, and orchestrated a Secondary Offering to allow the Selling Defendants to take advantage of the Company's inflated stock price before the public discovered the truth about Fitbit's inaccurate PurePulse technology. In doing so, Defendants significantly harmed the Company. All the while, the Selling Defendants profited by using their inside information about the true state of affairs at the Company in their own self-interest to achieve a waiver of the Lock-Up Agreements, allowing them to sell shares in the Secondary Offering before the truth about the Company's inaccurate PurePulse technology was revealed. Through these actions, the Selling Defendants profited by hundreds of millions of dollars.

21. Because of Defendants' wrongful acts, the Company has been substantially damaged. Through this Action, Plaintiffs, on behalf of the Company, seek disgorgement of the Selling Defendants' ill-gotten gains, and other remedies as appropriate.

THE PARTIES

22. Plaintiff Anne Bernstein ("Bernstein"), Michael Hackett ("Hackett"), and Bright Agyapong ("Agyapong") are current stockholders of Fitbit common stock. Plaintiffs Bernstein and Agyapong have continuously owned shares of Fitbit since prior to the closing of the IPO and Plaintiff Hackett since prior to the Secondary Offering.

23. Nominal Defendant Fitbit is a company focused on producing wearable health tracking devices for the consumer market. Fitbit is incorporated in the State of Delaware and has its corporate headquarters at 405 Howard Street, San Francisco, California 94105. Fitbit's common stock trades on the NYSE under the ticker symbol "FIT."

24. Defendant James Park ("Park") is a co-founder of the Company and has served as a member of the Board since March 2007, as its CEO and President since September 2007, and as the Chairman of the Board since May 2015.

[redacted]. During the IPO and the Secondary Offering, Park sold more than 3.3 million shares of Fitbit stock, for which he collected over $83 million. Park signed the Registration Statement filed in connection with the IPO (the "IPO Registration Statement"), the Registration Statement filed in connection with the Secondary Offering (the "Secondary Offering Registration Statement"), and all other SEC filings on behalf of Fitbit. Park is a defendant in the Securities Class Action.

25. Defendant William R. Zerella ("Zerella") has served as Fitbit's Chief Financial Officer ("CFO") since June 2014. [redacted] Zerella signed the IPO Registration Statement and Secondary Offering Registration Statement on behalf of Fitbit. Zerella is a defendant in the Securities Class Action.

26. Defendant Eric N. Friedman ("Friedman") is a co-founder of the Company and has served as a member the Board since March 2007. Friedman has

been, in various capacities, an executive officer of the Company since September 2007, currently serving as its Chief Technology Officer. [redacted] Friedman signed the IPO Registration Statement and Secondary Offering Registration Statement on behalf of Fitbit. Friedman is a defendant in the Securities Class Action.

27. Defendant Jonathan D. Callaghan ("Callaghan") has served as a member of the Fitbit Board since September 2008. [redacted] Callaghan has been designated as the Board's lead independent director and is a

founder and Managing Member of True Ventures, a venture capital firm which has controlled as much as one third of Fitbit's total voting power.[13] Between June and August 2013, True Ventures acquired 677,904 shares of Fitbit's Series D Convertible Preferred Stock, for which it paid $999,999. These shares were automatically converted to Class B shares of the Company during the IPO. During the IPO and the Secondary Offering, Callaghan and True Ventures sold over 7.9 million shares of Fitbit stock, for total proceeds over $195 million. Callaghan signed the IPO Registration Statement and Secondary Offering Registration Statement on behalf of Fitbit. Callaghan is a defendant in the Securities Class Action.

28. Defendant Steven Murray ("Murray") has served as a member of the Board since June 2013. [redacted] Murray is a partner at SoftBank Capital, a venture capital firm, where he has worked since 1996, and which

[13] As noted in the IPO Prospectus, Callaghan is a Managing Partner of True Ventures, an entity affiliated with True Ventures II, L.P., the actual corporate entity that holds a significant amount of Fitbit's stock and voting power. True Ventures and its various affiliates and divisions are collectively referred to herein as "True Ventures."

controlled millions of shares of the Company's stock during the complained of time period.[14] Between June and August 2013, SoftBank acquired 10,168,572 shares of Fitbit's Series D Convertible Preferred Stock, for which it paid $15 million. These shares were automatically converted to Class B shares of the Company during the IPO. During the IPO and the Secondary Offering, Murray and Softbank sold over 2 million shares of Fitbit stock, for total proceeds over $49 million. Defendant Murray signed the Registration Statement and the Secondary Offering Registration Statement. Murray is a defendant in the Securities Class Action.

29. Defendant Christopher Paisley ("Paisley") has served as a member of the Fitbit Board since January 2015. [redacted] Paisley signed the IPO Registration Statement and Secondary Offering Registration Statement on behalf of Fitbit. Paisley is a defendant in the Securities Class Action.

[14] As noted in the IPO Prospectus, Murray is a partner of SoftBank Capital, which is affiliated with SoftBank PrinceVille Investments, L.P., the actual corporate entity that holds a significant amount of Fitbit's stock and voting power. Softbank Capital and its various affiliates and divisions are collectively referred to herein as "Softbank."

RELEVANT NON-PARTIES

30. Brad Feld ("Feld") was a member of the Board from August 2010 until May 2015. [redacted] He is a managing member of the Foundry Group Funds, which have held a substantial voting and ownership interest in the Company. At the time of the Offerings, the Foundry Group Funds held between 26% and 27% of Fitbit's voting power.[15]

31. Laura Alber ("Alber") and Glenda Flanagan ("Flanagan") were members of the Board as of the date this stockholder derivative action was initiated (and remain as current Board members as of the date of this Complaint), but are not named as Defendants since they did not participate in any of the wrongdoing alleged herein.

SUBSTANTIVE ALLEGATIONS

I. BACKGROUND OF FITBIT'S FORMATION, PRE-IPO INVESTORS, AND ITS EARLY PRODUCTS

32. Fitbit is a Delaware corporation founded in May 2007 by Defendants Park and Friedman. The Company's principal business is to produce health and

---

[15] As noted in the IPO Prospectus, collectively the Board and their affiliates controlled 53% of the Company's voting power prior to the IPO. The Foundry Group Funds, affiliated with former Board member Feld, controlled an additional 26.1% of Fitbit's voting power. [redacted].

wellness monitoring wearable devices for consumers, and it held its first round of financing in October 2008, prior to launching its first device. Among the Company's largest initial investors was True Ventures, founded by Defendant Callaghan.

33. In September 2009, the Company released its first device, the eponymously named Fitbit. Unlike its current products, the Company's first device was neither synced to a smartphone nor worn on the wrist, but rather relied upon a wireless docking station to relay the device's recorded data. The Fitbit clipped onto a user's clothing to track the wearer's movement, sleep and calorie burn, day and night. It relied upon an internal motion detector to record and calculate data.

34. In September 2010, the Company engaged in an additional round of financing, with the Foundry Group—co-founded by former Fitbit Board member Feld—joining True Ventures in contributing millions of dollars in early stage investment in the Company.

35. The Company's third round of funding took place in January 2012. Feld's Foundry Group and Callaghan's True Ventures each increased their ownership stakes in the Company.

36. On September 17, 2012, Fitbit released two new trackers: the Fitbit One and the Fitbit Zip. Each of these products was still clipped on to the user's clothing but were the Company's first wireless activity trackers to sync with users'

smartphones via Bluetooth technology. The Fitbit One recorded steps, distance, flights of stairs climbed, calories burned, minutes spent in vigorous activity and sleep efficiency and movements. The Fitbit Zip, a tiny wearable device approximately the size of a quarter, tracked only steps taken, distance traveled and calories burned.

37. In May 2013, Fitbit released its first fitness tracker designed to be worn on the wrist, a feature for which Fitbit's products would become known. The device, called the Fitbit Flex, incorporated an LED display which could indicate the number of steps taken by the user, proximity to preset fitness goals, and battery level. The Flex tracked steps taken, distance traveled, calories burned and also recorded metrics relating to sleep patterns and duration.

38. In August 2013, the Company raised millions more in venture capital, with the Foundry Group and True Ventures again increasing their ownership stakes.

39. In October 2013, Fitbit launched the Fitbit Force, a tracker worn on the wrist with an LED display that rotated through showing the time, floors climbed, distance traveled, calories burned and very active minutes. It also tracked sleep quality and duration and could be used as an alarm. The Force was ultimately a lemon, resulting in lawsuits and a recall of devices after widespread reports of skin irritation from use. The Force was pulled from the market and never re-released, leaving the Company with a dated arsenal of products in desperate need of an

innovative new device to drive sales, continue growth, and rehabilitate its reputation, in order to reward its early investors with an initial public offering.

II. FITBIT UNVEILS ITS "PUREPULSE" TECHNOLOGY

40. In October 2014, Fitbit unveiled a new, additional feature to its fitness trackers—wrist-based heart rate monitoring, which Fitbit branded as "PurePulse" technology.

41. Fitbit initially released two devices featuring PurePulse technology—the Fitbit Charge HR and the Fitbit Surge.

42. PurePulse became a major selling point on Fitbit's devices. Through Fitbit's public statements, Fitbit and its officers and directors claimed that PurePulse optical heart rate technology "provides continuous and automatic wrist-based heart rate tracking, without an uncomfortable chest strap" and routinely represented and touted that users would receive consistent, real-time, and accurate heart rate readings from PurePulse-equipped Fitbit products.

43. Heart-rate data can be extremely useful. Resting heart rate is among the most useful metrics of overall cardiovascular health. Furthermore, devices with heart-rate data can calculate calorie burn and other daily activity statistics much more accurately than devices relying solely on accelerometers and altimeters, such as Fitbit's earlier devices.

44. Real-time heart-rate data is particularly useful for athletes seeking to optimize their workouts. Athletic workouts often target particular heart rates, and real-time heart-rate data can help exercisers maintain a heart rate that is high enough to provide a good workout, but not so high as to threaten cardiovascular health.

45. Notably, incorporating the PurePulse technology into its fitness trackers enabled Fitbit to substantially raise the prices for its trackers, thus substantially increasing sales revenues. For example, after Fitbit incorporated the PurePulse technology into its "Charge" device, Fitbit priced the "Charge HR" (the "HR" stands for "heart rate") at $150—a 50% increase from the prior version of the Charge without heart rate monitoring priced at only $100.

46. Of course, the purportedly revolutionary benefits of Fitbit's PurePulse technology were valuable only if the underlying heart-rate monitoring was accurate and reliable. The heart-rate monitor must also be able to tell when an athlete's heart rate is in the target range and when it is reaching its upper limits.

47. Fitbit touted its new products and PurePulse technology leading up to its IPO. For example, on October 27, 2014, the Company issued a press release announcing its new products: the Fitbit Charge, the Fitbit Charge HR and the Fitbit Surge (the "October 27 Press Release"). The press release read, in relevant part, as follows:

Fitbit Announces Fitbit Charge, Fitbit Charge HR and Fitbit Surge - 3 New Fitness Trackers for Everyday, Active and Performance Consumers

* * *

Every Beat Counts with Fitbit Charge HR

Fitbit Charge HR is designed for more active users who are dedicated to staying fit and want a full picture of their health - in and out of the gym. ***Fitbit Charge HR features Fitbit's proprietary PurePulse™ optical heart rate technology, which provides continuous and automatic wrist-based heart rate tracking, without an uncomfortable chest strap. PurePulse uses safe LED lights to detect blood volume changes when your heart beats, right on your wrist and applies Fitbit's finely tuned algorithms to deliver heart rate tracking 24/7***. PurePulse helps users[.]

* * *

Fitbit Charge HR includes all the great benefits of Fitbit Charge, plus:

- ***Continuous heart rate right on the wrist 24/7 to get more accurate all-day calorie burn, reach target workout intensity and maximize training***
- ***All-day insights into overall heart health including resting heart rate and heart rate trends***, alongside stats like steps, distance, floors climbed, calories and active minutes
- Up to 5 days of battery life - Charge HR is specially designed with battery efficient technology, so you can spend more time tracking and less time charging

"***Whether your goal is to become more active, improve your heart health or lose weight, tracking everyday activity and heart rate is essential***," said Harley Pasternak, best-selling fitness and nutrition author, personal trainer and Fitbit brand ambassador. "***Heart rate tracking is the most accurate way to measure calorie burn, helping you maximize workouts while still properly fueling your body. With Fitbit's new heart rate feature, users have access to more information***

than ever before, making it even easier to access the information needed to track, reach and beat goals."

Train Smarter, Go Farther with Fitbit Surge

Fitbit Surge is Fitbit's most advanced tracker to date, a sleek 'Fitness Super Watch,' designed for peak performance. Featuring 8-sensor technology that combines the power of all-day fitness tracking with GPS, heart rate tracking and smartwatch functionality, Fitbit Surge is ideal for users committed to training, dedicated to health and consistently looking to maximize progress.

Fitbit Surge includes all the breakthrough features of Fitbit Charge and Fitbit Charge HR, *plus*:

- Built-in GPS delivers stats like pace, distance, elevation, split times, route history and workout summaries for smarter training
- Records multi-sport activities like running, cross-training and strength workouts; see comprehensive summaries with tailored metrics, workout intensity based on heart rate and calories burned
- Smartwatch features including Caller ID, text alerts and mobile music control let users train smarter and stay focused right from the wrist
- Eight sensors - GPS, 3-axis accelerometers, 3-axis gyroscope, digital compass, optical heart rate monitor, altimeter, ambient light sensor and touch screen-working harmoniously to give users the most advanced tracking in the thinnest, lightest design on the market
- Backlit LCD touch screen display with customizable watch faces, makes it easy to navigate through real-time stats, workout apps and alarms
- Up to 7 days of battery life - Surge is specially designed with battery efficient technology, so you can track a work week or a marathon on just one charge

"I never stop trying to shatter my personal bests, whether it's pushing myself to go longer distances, maximizing training through a variety of

different types of workouts or quickening my pace across my usual routes," said Dean Karnazes, world-renowned ultra-marathoner and Fitbit brand ambassador. "The new Fitbit Surge is ideal for fitness enthusiasts like myself. ***Having the multi-sport Fitbit Surge with me all day helps me reach peak performance and intensity through insights into my activity 24/7, so I have the information I need to train more effectively and efficiently***."

* * *

Dedicated to the Highest Product Standards

Fitbit is committed to creating the highest quality products to help customers live healthier, more active lives. ***Fitbit consults with scientific experts and also tests its products with independent labs to ensure they meet stringent standards***. This year Fitbit also created the first-ever Scientific Advisory Board for wearables that includes leading, certified dermatologists to help enhance Fitbit's testing protocols and develop product wear and care guidelines.

48. The press release repeatedly touted the ability of the new Fitbit Charge HR and the Fitbit Surge to accurately and continuously monitor users' heart rates 24 hours a day, seven days a week.

49. Fitbit promoted the efficacy of its PurePulse technology in a broad advertising campaign beginning in late 2014 and continuing throughout 2015. Advertising materials featured slogans such as "The Difference Between Good and Great…Is Heart"; "For Better Fitness, Start with Heart"; "Get More Benefits with Every Beat—Without an Uncomfortable Chest Strap"; "Every Beat Counts"; and "Know Your Heart," emphasizing the utility to consumers of live and accurate

monitoring of their heart rates.

50. Fitbit released these advertisements touting the PurePulse technology without qualification. There was no suggestion that the technology only worked at low or resting heart rates. A sample of an advertisement for the Charge HR is duplicated below:

51. This mantra was also included in the packaging for the Charge HR, which also prominently touted its ability to track "continuous heart rate."

52. Shortly after the products featuring the PurePulse technology were released to the public, on February 12, 2015, Fitbit's website featured a lengthy blog post offering glowing testimony on the importance of continuous heart rate monitoring by Dean Karnazes, a Fitbit brand ambassador and noted ultra-marathoner. Mr. Karnazes was quoted as saying:

> ***Having a heart rate monitor is an invaluable tool for maximizing your training and quantifying aerobic improvements that occur as a result. Without having such measurements you don't know whether you're improving or not and can't train as efficiently***.

> When I'm training, I monitor my heart rate to stay within certain parameters during certain stages of the run. Mostly I try to stay within the target range to help conserve energy and avoid building up too much lactic acid. But during interval training I push toward the upper ranges for set intervals of time during speed bursts.
>
> ***To make the most out of your ChargeHR or Surge, wear it 24/7 to get used to watching fluctuations in your heartbeat and correlating those with the way you feel***. This will give you a more innate understanding of how your body works throughout the course of the day.[16]

III. DEFENDANTS STRUCTURED THE IPO TO ALLOW THEM TO SELL A SIGNIFICANT BLOCK OF SHARES

53. Initial public offerings are designed to deliver the going-public corporation with a substantial cash infusion through the release of shares into a publicly-traded exchange. Insiders—including executives, employees and early investing venture capitalists—are sometimes, but not always, offered the opportunity to contribute some of their shares to the block initially offered to the public. Insiders, not the Company, receive the proceeds of this subset of an initial offering.

54. For this reason, insiders and other existing stockholders usually are permitted to sell only a portion of the overall stock to be offered; otherwise, an offering would not serve its intended purpose of providing the company, rather than its insiders, with cash. For example, in the recent Snap Inc. initial public offering,

---

[16] *See* https://blog.fitbit.com/how-dean-karnazes-uses-heart-rate-data-while-training/ (last visited March 15, 2018).

200 million total shares were offered to the market, with the holdings of insiders representing only 55 million, or 27.5%, of those shares. Other initial public offerings held a similar, or smaller, percentage of shares offered by insiders, if insiders are allowed to sell any shares at the time of the initial offering. [redacted]

55. However, in Fitbit's IPO, the Selling Defendants (along with Foundry Group Funds) represented 14,187,500 of the total 36,575,000 shares released in the IPO, or ***39% of the total.*** In addition, any overallotment up to 5,486,250 shares was also contributed by the Selling Defendants instead of the Company, for a total percentage for the Selling Defendants of nearly ***47%***. The overallotment was fully exercised.

56. [redacted]

17 [redacted]

18 [redacted]

[redacted]

57. [redacted]

58. [redacted]

59. On May 1, 2015, well before the public's uncovering the PurePulse's inaccuracy, the Selling Defendants continued to put their plans for immediate profit into place. [redacted]

19 [redacted]

20 [redacted]

21 [redacted]

[redacted]

[redacted]

[redacted]

60. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

22 [redacted]

23 [redacted]

[redacted][4]

61. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

---

24 [redacted]

25 [redacted]

62. [redacted]

63. [redacted] As discussed in greater detail herein, a majority of the Pricing Committee was interested in allowing insiders to sell stock and participate in the IPO. The purported lead independent director alone collected nearly $60 million for the investment fund he co-founded by his sale of Fitbit shares in the IPO.

64. [redacted]

[redacted]

[redacted]

65. On or about June 17, 2015, the SEC declared Fitbit's IPO Registration Statement effective, which was signed by all of the Defendants. The Registration

29 [redacted]

30 [redacted]

Statement incorporated by reference the IPO Prospectus filed on June 18, 2015, the final and amended registration statement on Form S-1 filed on June 16, 2015, and the description of Fitbit's Class A common stock contained in Fitbit's registration statement on Form 8-A filed on June 15, 2015.

66. The IPO Prospectus touted that Fitbit would be able to maintain its leadership position in the health and fitness category because of, among other things, "[o]ur connected health and fitness devices leverage industry-standard technologies, such as Bluetooth low energy, as well as proprietary technologies, such as our PurePulse continuous heart rate tracking, and our algorithms that more accurately measure and analyze user health and fitness metrics."

67. On June 18, 2015, Fitbit conducted its IPO and sold 22,387,500 Class A shares to the public at $20.00 per share, raising approximately $416 million in net proceeds for the Company.

68. The IPO Registration Statement and IPO Prospectus failed to disclose what the Selling Defendants already knew and which was not otherwise revealed publicly—that Fitbit's devices that contained the PurePulse technology did not accurately track and monitor users' heart rates and as a result, Fitbit's PurePulse heart rate monitoring systems and technology posed a serious health risk to users of that technology relying on the accuracy of the device.

69. Following the IPO, Fitbit's stock frequently traded above the IPO price, between $30.00-$40.00 per share, reaching as high as $51.64 per share on August 5, 2015.

IV. DEFENDANTS CONSPIRED TO WAIVE THE LOCK-UP AGREEMENTS, WHICH WOULD HAVE PROHIBITED THEIR PARTICIPATION IN THE SECONDARY OFFERING

70. Typically, following an initial public offering or a secondary offering of additional equity in a publicly traded company, there is a lock-up period during which insiders are prohibited from selling their shares and competing with the corporation's equity raising activity. As noted by the SEC, companies and underwriters typically bind insiders, including employees, their friends and family, and venture capitalists associated with the company, for a period of 180 days following an offering "to ensure that shares owned by these insiders don't enter the public market too soon after the offering."[31]

71. Fitbit's IPO was no different. It contained a lock-up provision which read as follows:

> Following the completion of this offering, based on the number of shares of our capital stock outstanding as of March 31, 2015, we will have a total of 36,575,000 shares of our Class A common stock outstanding and 169,146,930 shares of our Class B common stock outstanding. Of these outstanding shares, all of the 36,575,000 shares

[31] *See* https://www.sec.gov/fast-answers/answerslockuphtm.html (last visited March 15, 2018).

of Class A common stock sold in this offering will be freely tradable, except that any shares purchased by our affiliates following this offering, as that term is defined in Rule 144 under the Securities Act, would only be able to be sold in compliance with the Rule 144 limitations described below. Shares of our Class B common stock are convertible into an equivalent number of shares of our Class A common stock and generally convert into shares of our Class A common stock upon transfer.

The remaining outstanding shares of our Class A and Class B common stock will be deemed "restricted securities" as defined in Rule 144 under the Securities Act. Restricted securities may be sold in the public market only if they are registered under the Securities Act or if they qualify for an exemption from registration under Rule 144 or Rule 701 promulgated under the Securities Act, which rules are summarized below. ***In addition, all of our security holders have entered into market standoff agreements with us or lock-up agreements with the underwriters under which they have agreed, subject to specific exceptions, not to sell any of our stock for at least 180 days following the date of this prospectus***, as described below. As a result of these agreements and the provisions of our third amended and restated investors' rights agreement described above in the section titled "Description of Capital Stock—Registration Rights," subject to the provisions of Rule 144 or Rule 701, shares will be available for sale in the public market as follows:

- beginning on the date of this prospectus, the 36,575,000 shares sold in this offering will be immediately available for sale in the public market;

- ***beginning 181 days after the date of this prospectus***, subject to extension as described in the section titled "Underwriters," 169,146,930 additional shares will become eligible for sale in the public market, of which 86,990,214 shares will be held by affiliates and subject to the volume and other restrictions of Rule 144, as described below; and

- the remainder of the shares will be eligible for sale in the public market from time to time thereafter subject to vesting and, in

some cases, to the volume and other restrictions of Rule 144, as described below.

Lock-Up Agreements and Market Standoff Provisions

All of our directors, executive officers, and the holders of substantially all of our outstanding equity securities are subject to lock-up agreements with the underwriters or market standoff provisions in agreements with us that, subject to certain exceptions, prohibit them from offering for sale, selling, contracting to sell, granting any option for the sale of, transferring, or otherwise disposing of any shares of our common stock, options, or warrants to acquire shares of our common stock, or any security or instrument related to this common stock, option, or warrant ***for a period of at least 180 days following the date of this prospectus***, without the prior written consent of Morgan Stanley & Co. LLC or us, as the case may be.

72. Knowing that the clock was ticking on the time they had to dump their shares before the market realized that Fitbit's stock price was artificially inflated by the undisclosed PurePulse technology's inaccuracy, Defendants took the rare step of moving to eliminate this lock-up protection and to structure the Secondary Offering in such a manner as to allow the Selling Defendants' participation.

73. [redacted]

[redacted]

32 [redacted]

[redacted]

74. [redacted]

[redacted]

33 [redacted]

34 [redacted]

75. [redacted]

76. [redacted]

77. [redacted]

[redacted]

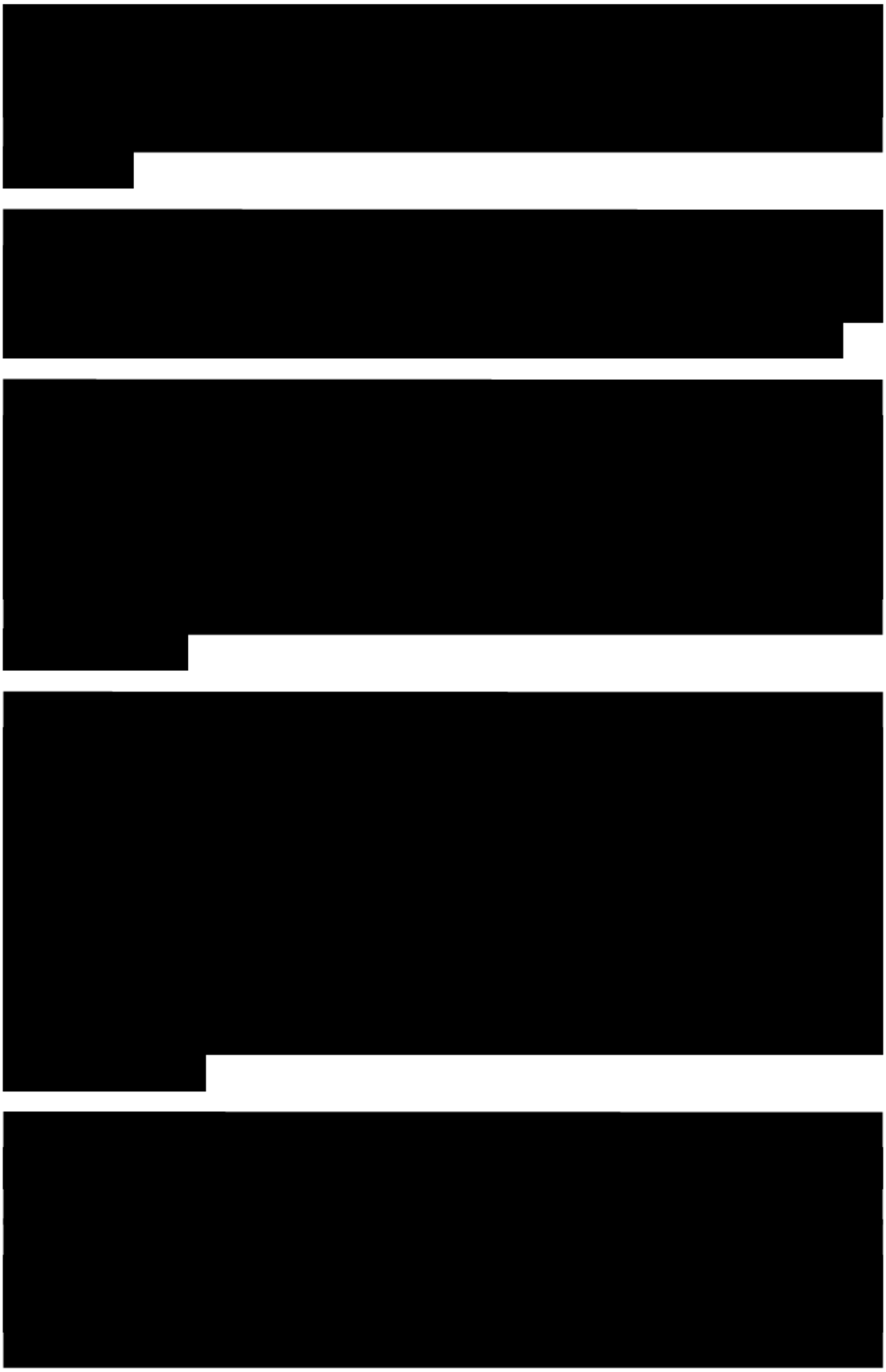
[redacted]

[redacted]

35 [redacted]

36 [redacted]

37 [redacted]



[redacted]

78. Having approved a waiver of the Lock-up Agreements designed to block their own sale of shares, Defendants then caused the Company to announce the lock-up waiver on November 2, 2015, in a Form 8-K filed with the SEC, described as follows:

> **Lock-Up Release**
>
> Fitbit also announces today that Morgan Stanley & Co. LLC, on behalf of the underwriters of Fitbit's initial public offering in June 2015, at the request of Fitbit, has agreed to release the lock-up restrictions for Fitbit's employees and consultants as of October 31, 2015 with respect to approximately 2.3 million shares, which represents up to 10% of the shares of Fitbit common stock, options, and restricted stock units held by such employees and consultants. The release will be effective on November 4, 2015. This will allow Fitbit's employees and consultants an opportunity in 2015 for liquidity prior to commencement of Fitbit's quarter end blackout period, which would prohibit any sales until that period ends after the earnings release for the fourth quarter of 2015. The lock-up restrictions are scheduled to expire with respect to the remaining shares as originally planned on December 14, 2015.

38 [redacted]

79. Also on November 2, 2015, the Company filed a Form S-1 with the SEC, wherein it announced the Secondary Offering (the "November 2 S-1"). The November 2 S-1 stated that the offering would be for 21 million shares, with Fitbit offering 7 million and the Selling Defendants (and the Foundry Group Funds) offering 14 million. The Selling Defendants also offered the underwriters an additional option for an over-allotment of 3.15 million shares. Fitbit did not offer any shares as an over-allotment option.

80. The Company reiterated the terms of the Secondary Offering in a press release issued on November 9, 2015. It read, in relevant part:

> **Fitbit Announces Launch of Proposed Follow-on Offering**
>
> SAN FRANCISCO--(BUSINESS WIRE)-- Fitbit, Inc. (NYSE: FIT), the leader in the connected health and fitness market, today announced that it has commenced a follow-on public offering of its Class A common stock pursuant to a registration statement on Form S-1 filed previously with the U.S. Securities and Exchange Commission (SEC). Fitbit is proposing to sell 7,000,000 shares of Class A common stock and certain Selling Stockholders are proposing to sell 14,000,000 shares of Class A common stock. In addition, the Selling Stockholders have granted the underwriters a 30-day option to purchase up to an additional 3,150,000 shares of Class A common stock to cover over-allotments. Fitbit will not receive any proceeds from the sale of the shares by the Selling Stockholders.
>
> Morgan Stanley, Deutsche Bank Securities, BofA Merrill Lynch, Barclays, and Citigroup will act as active joint book-running managers for the proposed offering. SunTrust Robinson Humphrey, Piper Jaffray, RBC Capital Markets, and Stifel will act as passive joint book-running managers.

81. On November 9, 2015, Fitbit filed the Secondary Offering Registration Statement and on November 13, 2015, Fitbit filed the Secondary Offering Prospectus, both of which contained the same description of the Company's competitive strengths and device descriptions that were contained in the IPO Registration Statement.

82. Although the Secondary Offering, as initially announced, allowed the Selling Defendants to sell over 71% of the stock entering the market if the overallotment was exercised, this was still not enough for Selling Defendants. After the Secondary Offering was announced, the Defendants changed the terms to further their personal interests. [redacted]

83. [redacted]

[redacted]

39 [redacted]

[redacted]

84. Thus, at the last minute, Defendants caused the Company to remove four million shares, more than half, from what Fitbit intended to sell. This increased the likelihood that Defendants' over-allotment option would be fully exercised and thereby allowed the Selling Defendants to sell even more shares before news of the PurePulse inaccuracy broke. With this change, the Selling Defendants offered approximately ***85% of the total shares*** sold in the Secondary Offering.

85. Similar to the IPO, the Defendants continued to emphasize the importance of the products containing PurePulse. In a conference call with investors on November 2, 2015, Zerella noted that "revenue growth continued to be driven by … Charge, Charge HR, and Surge, [which] collectively accounted for approximately 79% of our revenue." Park also gave a strong positive outlook on Fitbit's future, telling investors that "[b]ased on the Company's execution in the third quarter, I've never been more confident in Fitbit's future."

86. In addition to trumpeting the virtues and importance of heart rate monitoring to users and the feature's importance to Fitbit's revenues, the Company lauded continuous improvements to the PurePulse technology through press releases

40 [redacted]

disseminated through the media. On November 23, 2015, Defendants caused the Company to issue a press release entitled "Fitbit Charge HR and Fitbit Surge Now Automatically Track Common Exercises Like Biking, Hiking, Running, and Sports Including Basketball, Soccer and Tennis" (the "November 23 Press Release"). It read, in relevant part:

> **Enhanced Real-Time Heart Rate Tracking During Workouts**
>
> ***Fitbit's proprietary PurePulse heart rate technology has been updated to provide users with an even better heart rate tracking experience*** during and after high-intensity workouts like boot camp and Zumba. The update is activated when using Exercise Mode on Fitbit Charge HR and multi-sport modes on Fitbit Surge. ***PurePulse optical technology provides users with continuous, automatic wrist-based heart rate tracking including resting heart rate and heart rate trends over time - without the need for an uncomfortable chest strap***.
>
> Fitbit is dedicated to developing the most consistently accurate wrist-based activity trackers on the market***. This software update improves upon an already positive heart rate tracking offering***.

87. On the same day, a post on the Company's blog, entitled "3 New Features Make Exercising with Fitbit Better than Ever" appeared, also detailing the change to the PurePulse technology. In the November 23, 2015 blog post, Fitbit claimed that:

> **HEART RATE TRACKING DURING EXERCISE IS BETTER WITH PUREPULSE™**
>
> **A recent update to *PurePulse* heart rate technology for *Fitbit Charge HR* and *Fitbit Surge* enables an even better heart rate experience during and after your workouts**. **The update improves**

heart rate tracking performance when using Exercise Mode and multi-sport modes during certain high-intensity workouts. You might notice the enhancements while cycling, working out on cardio equipment, or during high-intensity exercises—like during your next Zumba or bootcamp class, for example.

V. THE DEFENDANTS KNEW THAT PUREPULSE WAS INACCURATE AND THAT THE COMPANY'S CLAIMS REGARDING PUREPULSE WERE FALSE WHEN THE SELLING DEFENDANTS WAIVED THEIR OWN LOCK-UP AGREEMENTS

88. Although Defendants caused the Company to tout the importance of accurate heart rate monitoring and the importance to Fitbit's bottom line of the sales of heart rate monitoring devices through press releases and public filings, the PurePulse technology was wildly inaccurate, a fact long known to the Selling Defendants.

A. Defendants Repeatedly Claimed PurePulse Was Accurate and that Management Was "Confident" in Fitbit's Future

89. Defendants repeatedly told the public about Fitbit's bright future.

- "Based on the Company's execution in the third quarter, I've never been more confident in Fitbit's future."[41]

- "With the broad industry trends in our favor, and our very strong execution against these opportunities, I trust you can see why we are so excited about Fitbit's future."[42]

---

41 James Park, November 2, 2015, Fitbit Earnings Call.

42 *Id.*

90. Defendants also caused the Company to tout the accuracy of the Fitbit devices, including PurePulse, although in fact the heart rate tracking data was so inaccurate as to be not just worthless, but potentially dangerous.

91. In the IPO Prospectus, Fitbit claimed that:

- "We dedicate significant resources developing proprietary sensors, algorithms, and software to ensure that our products have ***highly accurate measurements***, insightful analytics, compact sizes and long battery lives."[43]

- "Our connected health and fitness devices leverage industry-standard technologies, such as Bluetooth low energy, as well as proprietary technologies, ***such as our PurePulse continuous heart rate tracking, and our algorithms that more accurately measure and analyze user health and fitness metrics***."[44]

- "[T]he Fitbit Charge, Fitbit Charge HR, and Fitbit Surge … were the primary drivers of our revenue growth in the first quarter of 2015."[45]

- "Our devices, which include wrist-based and clippable fitness trackers and our Wi-Fi connected scale, feature proprietary and advanced sensor technologies and algorithms ***as well as high accuracy*** and long battery life."[46]

- "With each successive product offering, ***we have expanded the features and accuracy*** of our products and now track the following measures:

---

43 IPO Prospectus at 1, 86.

44 *Id*. at 5, 90.

45 *Id.* at 59.

46 *Id*. at 89.

> *Calories Burned*. Our users can estimate the amount of calories burned throughout the day based on several methods depending on the tracker. We believe our more advanced ***devices that use our PurePulse heart rate tracking technology provide a more accurate estimate*** of calorie burn than non-PurePulse based products.
>
> *Heart rate*. On trackers that are outfitted with our proprietary PurePulse technology, our users are able to automatically and continuously track their heart rate during everyday activity and exercise. Our PurePulse technology uses wrist-based optical LEDs, which measure heart rate using light reflection. We believe our PurePulse technology makes heart rate relevant by using heart rate zones. Additionally, our heart rate tracking technology can conveniently provide our users with their resting heart rate, which is a widely used indicator of cardiovascular fitness and conditioning."[47]

- This singular focus on health and fitness has driven us to dedicate significant resources to developing proprietary sensors, algorithmns, and software to ensure that our products, which are specifically oriented towards health and fitness, ***have accurate measurements***, insightful analytics, compact sizes, durability, and long battery lives."[48]

92. Each of these statements featured in the IPO Prospectus regarding device accuracy was reproduced identically in the Secondary Offering Prospectus.

93. The Defendants also caused the Company to laud PurePulse's accuracy in press releases. For example, the October 27 Press Release noted that PurePulse devices featured "[c]ontinuous heart rate right on the wrist 24/7 to get more accurate

---

47 *Id*. at 93.

48 *Id*. at 101.

all-day calorie burn, reach target workout intensity and maximize training." The November 23 Press Release claimed that "Fitbit's proprietary PurePulse heart rate technology has been updated to provide users with an even better heart rate tracking experience."

94. Through these repeatedly disseminated statements about PurePulse's accuracy, the public believed that PurePulse technology was a technological breakthrough allowing the easy, accurate tracking of users' heart rates. The Selling Defendants took advantage of that carefully cultivated perception and used material adverse inside information to profit by way of the IPO and Secondary Offering.

B. PurePulse Products Represented the Vast Majority of Fitbit's Revenues

95. As Board members, the Defendants owed a fiduciary duty to remain informed as to the Company's affairs, including its financial health. PurePulse was incredibly important to Fitbit's financial health and future performance.

96. [redacted] Indeed, among the statements in the IPO Prospectus was the importance of the PurePulse devices to the Company's bottom line. The IPO Prospectus stated

49 [redacted]

that "the Fitbit Charge, Fitbit Charge HR, and Fitbit Surge … were the primary drivers of our revenue growth in the first quarter of 2015."

97. After the IPO, Defendants continued to emphasize the importance of the products containing PurePulse. In a conference call with investors on November 2, 2015, Zerella noted that "revenue growth continues to be driven by … Charge, Charge HR, and Surge, [which] collectively accounted for approximately ***79% of our revenue***."

C. Despite Telling Investors PurePulse Was Accurate and that Fitbit's Future Was Bright, the Selling Defendants Rushed into an Unnecessary Secondary Offering

98. [redacted] In other words, the Secondary Offering was designed to benefit the Selling Defendants, not the Company.

99. This fact was not lost on the market at large. Analyst Josh Arnold, in a November 4, 2015 article published on the investor website *Seeking Alpha* after the Secondary Offering was announced, wrote:

> As we all know, FIT is offering up to 24.15 million shares from a combination of new shares and existing shareholders unloading their

[50] [redacted]2.

stock. ***In addition, FIT's IPO lockup restriction has been removed for up to 2.3 million shares beginning today and the rest of the lockup shares will be released on December 14***. This all adds up to an enormous amount of selling supply that will be tough for the market to absorb.

For some context, a normal day for FIT sees about 5 million shares traded; the secondary alone will provide four to five days' worth of volume just by itself. The IPO lockup expiration won't do us any favors either although that is about six weeks out at this point. The main point here is that all of this supply is very bearish not only because it provides loads of excess supply without commensurate demand but also because ***it sends a message to the market that the 14 million shares from existing shareholders want out***. FIT hasn't been public very long so for a meaningful portion of its total shares outstanding to be sold so quickly after the IPO is not a good sign. Plus, it just provides a lot of shares for buyers to mop up before we can move higher.

FIT's Q3 was amazing and guidance for Q4 was equally so but none of that matters right now. The fact is that FIT is going to have a very hard time moving higher over the next two months because there is so much supply hitting the market. ***I'll admit I'm perplexed by not only the selling shareholders but by the new shares being created by the company. FIT is crushing estimates and making lots of money and yet, it wants to raise capital despite no obvious use for it. That is very confusing to me*** and the only thing I can think is that FIT is planning an acquisition or something similar that it feels it needs additional capital for. And **for the selling shareholders, with the business flying higher I'm not sure why they'd want to sell. FIT's future looks very bright so *for 14 million shares to hit the market from those that should know the company best is alarming to me***.

100. Mr. Arnold followed up with another *Seeking Alpha* article on November 16, 2015, wherein he stated:

I was stunned by not only the size of the lot being sold by existing holders but the fact that the company was selling any shares at all. FIT's

> balance sheet is absolutely pristine so diluting shareholders to create cash it doesn't need is strange.
>
> ***The problem with this secondary is that existing holders are selling so much stock prior to the previously announced lock-up expiration***.

101. The Secondary Offering served only as a liquidity event for the Selling Defendants to allow them to sell millions of shares prior to their inside knowledge about the ineffectiveness of the PurePulse technology becoming public.

D. Defendants Knew the Truth

102. Although the investing public was unaware of the inaccuracies concerning Fitbit's heart rate tracking devices until consumers complained of fraud concerning the Company's devices, the Defendants knew since the inception of the Charge HR and Surge that the Company's PurePulse technology did not provide accurate heart rate readings.

103. [redacted]

[redacted]

51 [redacted]

52 [redacted]

[redacted]

104. [redacted]

[redacted]

105. [redacted]

[redacted]

53 [redacted]

54 [redacted]

[redacted]

106. [redacted]

107. [redacted]

55 [redacted]

56 [redacted]

[redacted]

108. [redacted]

109. [redacted]

110. [redacted]

57 [redacted]

58 [redacted]

59 [redacted]

[redacted]

111. [redacted]

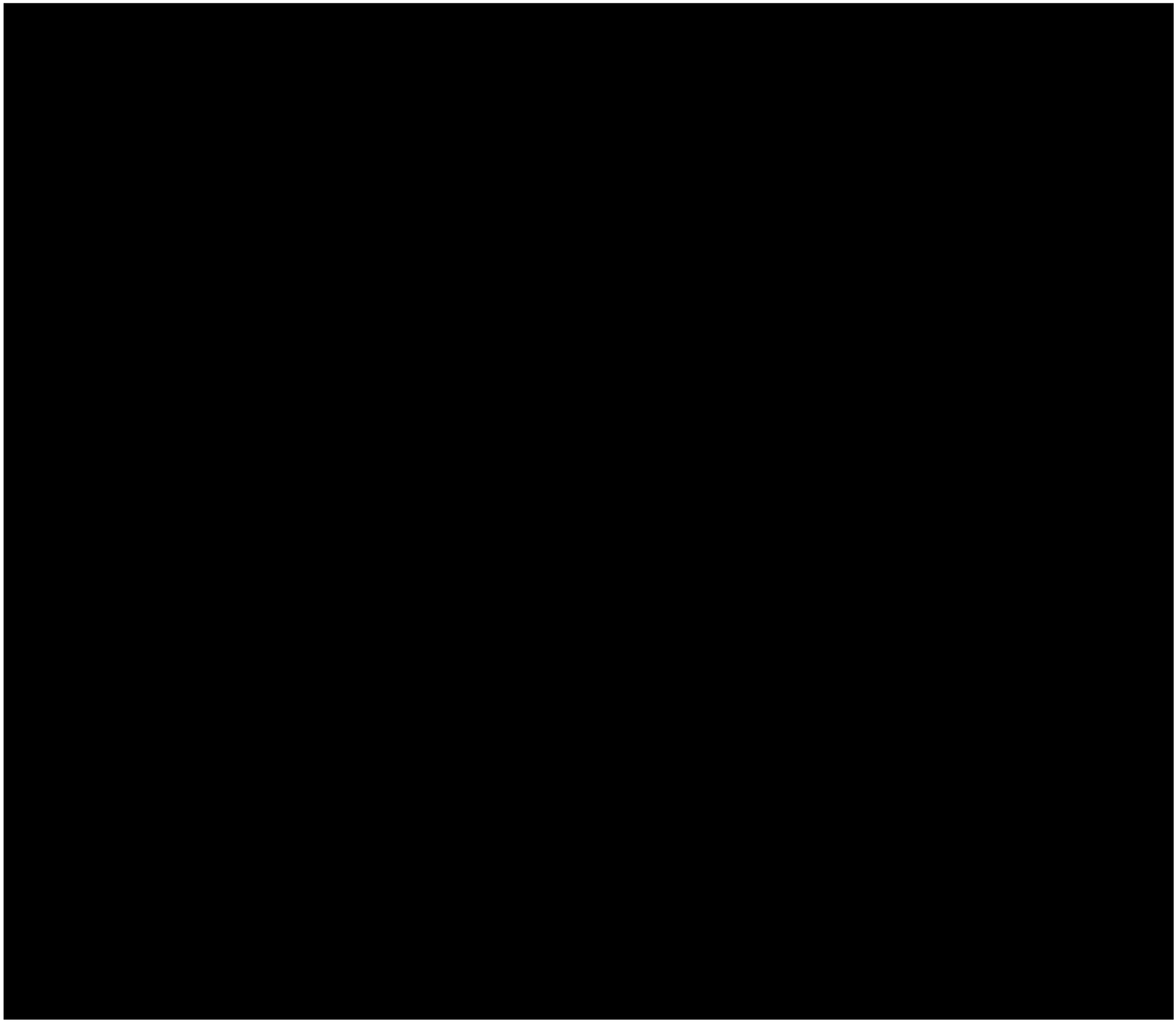
[redacted]

60 [redacted]

61 [redacted]

[redacted]

62 [redacted]



113. [redacted]

[redacted]

114. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

63 [redacted]

[redacted]

[redacted]

[redacted]

116. [redacted]

[redacted]

64 [redacted]

65 [redacted]

[redacted]

[redacted]

117. [redacted]

[redacted]

66 [redacted]

118. [redacted]

119. [redacted]

67 [redacted]

68 [redacted]

[redacted]

120. Given the severity of the faults in the PurePulse technology (as revealed by independent analyses described below and internal documents described above), and that the PurePulse technology, in Defendant Zerella's own words, "dominated" Fitbit's revenue stream as Fitbit's core product, there is no doubt that all Defendants were well aware of the rampant flaws in the Fitbit technology, long before such flaws were disclosed publicly. Information regarding Fitbit's PurePulse technology was core information of the Company. This information was therefore regularly monitored, collected, and reviewed within Fitbit.

121. [redacted]

69 [redacted]

[redacted]

122. These facts concerning the continued efficacy problems with the PurePulse technology and knowledge of such within the Company are corroborated by the allegations in the Securities Class Action derived from confidential witness statements.[70] Confidential Witnesses in the Securities Class Action, who both reported to the Company's Chief Operating Officer, stated that monthly reports within the Company "noted significant issues with the accuracy of Fitbit's heart-rate monitoring," that Fitbit's heart-rate monitoring devices were found to be "highly inaccurate, particularly during vigorous exercise," and "often inaccurate for users with either very light or very dark skin tones."[71]

123. In light of the import of the Company's devices containing the PurePulse technology to the Company (which constituted approximately 80% of the Company's revenue), it is reasonable to infer that the entirety of the Board was also informed by the Company's management about the results of the monthly reports

---

70 Ex. A at 16-17.

71 *Id.*

that indicated ongoing, significant problems with the heartrate measuring technology.

124. [redacted] Time was of the essence for the Defendants, for once the truth about the Company's chief product line became public, the Selling Defendants' ability to sell their shares at the artificially inflated prices would end.

E. Selling Defendants Ignored the Company's Insider Trading Policies by Trading on Confidential, Material Information About the Accuracy of the PurePulse Devices

125. By flouting Fitbit's well-established and elucidated policies prohibiting insider trading (*see infra* paragraphs 157-176), the Selling Defendants profited by hundreds of millions of dollars through their use of insider information.

126. As noted herein, Judge Illston has already upheld securities fraud allegations against Defendants Park and Friedman alleging that these defendants knew that the PurePulse technology was inaccurate.[72] [redacted] No fewer than ***four*** independent tests have shown, despite the Company's public claims to the contrary, wild inaccuracy in the Charge HR and/or the Surge devices' heart rate tracking.

127. The Defendants knew, as they planned the IPO and the Secondary Offering, that heart rate tracking devices represented the lion's share of Fitbit's revenue stream. The Defendants therefore knew, as they set the terms for the Offerings, that the house of cards propping up the Company's share price could collapse at any moment. The Selling Defendants used that inside information to ensure lucrative profits for their own interests by structuring the IPO to allow them to sell their shares immediately, and by waiving the Lock-Up Agreements prohibiting them from selling shares to allow their participation in the Secondary Offering.

---

[72] *See* Ex. A & B.

F. The Allegations of Fraud in the Securities Class Action Have Already Survived a Motion to Dismiss Under a Heightened Plausibility Standard

128. At the time this stockholder derivative litigation was initiated, Fitbit, its executives, and members of its Board faced a host of lawsuits in connection with the inaccuracy of the PurePulse technology. These lawsuits have demonstrated conclusively the Defendants' knowledge concerning the accuracy, or lack thereof, of PurePulse's heart rate tracking.

129. On January 5, 2016, consumers who had purchased Fitbit devices filed the Consumer Litigation in the U.S. District Court for the Northern District of California alleging violations of California's Unfair Competition Law and Consumers Legal Remedies Act, common law fraud, and unjust enrichment. The crux of the Consumer Litigation's claims are that Fitbit's devices significantly underreport users' heart rates, particularly during vigorous exercise, and that such underreporting carries potentially life-threatening implications for users relying on the PurePulse heart rate read-outs to be accurate.

130. On January 11, 2016, stockholders of Fitbit filed the Securities Class Action against Defendants and Fitbit, alleging violations of the federal securities laws. The Securities Class Action alleges that Defendants and the Company made false and misleading statements regarding the PurePulse technology in order to keep

the price of Fitbit shares artificially inflated. The defendants in the Securities Class Action are also Defendants herein: Park, Zerella, Friedman, Callaghan, Murray and Paisley.

131. In the Securities Class Action, Judge Illston has already found that the plaintiffs' allegations were "sufficient to establish scienter" as to certain of the Defendants regarding their knowledge of PurePulse's inaccuracy.[73]

132. The Motion to Dismiss Order further found that "[t]aken together, the allegations in this case are at least as cogent or compelling as a plausible alternative inference, namely that Fitbit executives were simply unaware of the high degree of inaccuracy in PurePulse devices alleged. Particularly given the contributions these devices made to Fitbit's revenue stream in 2015 …, the Court finds that a holistic review of the allegations suffices to establish scienter."[74]

133. Upon having their motion to dismiss denied entirely through the Motion to Dismiss Order, the defendants in the Securities Class Action moved the Court for reconsideration. Their motion for partial reconsideration of the issues was also denied.[75]

---

73 Ex. A at 16.

74 *Id*. at 18.

75 *See* Ex. B.

134. In the Motion to Reconsider Denial, Judge Illston found that "[i]t is far more plausible that the CEO [Park], CFO [Zerella], and CTO [Friedman] knew of the outcomes of quality assurance testing, conducted 'specifically' or 'primarily' to assess the functioning of the heart rate monitoring products that accounted for 80% of Fitbit's revenue, than is the alternative inference, 'namely that Fitbit executives were simply unaware of the high degree of inaccuracy in PurePulse devices.'"[76]

135. Judge Illston, as noted in the Motion to Reconsider Denial, further found that "specific misstatements regarding PurePulse's monitoring accuracy" were alleged, and that Defendants' knowledge went beyond involvement in day-to-day operations and familiarity with general, "automated reports about the company's financial health."[77] She found it "a 'cogent and compelling' argument that information regarding the basic functioning of products that constituted 80% of Fitbit's revenue stream … would have been known to the individual defendants."[78]

136. The Securities Class Action Court found no "strong inference that the shortcomings of a new technological feature of a company's product would deliberately have been kept secret from the company's CEO [Park], CFO [Zerella],

---

76 Ex. B at 7.

77 *Id*.

78 *Id*.

and CTO [Friedman]. This is particularly so where employees were hired specifically to test the accuracy of this [heart rate tracking] feature."[79]

VI. THE SELLING DEFENDANTS PROFITED THROUGH INSIDER INFORMATION THROUGH THEIR SALES IN THE IPO AND THE SECONDARY OFFERING

137. The Selling Defendants took advantage of their manipulation of the structure of the IPO, Secondary Offering, and Lock-Up Agreements, as discussed herein, to ensure that they could sell millions of shares of the Company before news of the inaccuracy of PurePulse was discovered by the public.

138. On June 23, 2015, as reported by Forms 4 filed with the SEC, the Selling Defendants sold millions of shares of the Company's stock in the IPO. Friedman and Park made identical sales, each selling 1,095,817 shares for more than $20.6 million. Callaghan, through True Ventures, sold 3,133,707 shares of Fitbit, collecting approximately $59 million. Murray sold 825,000 shares, for a total price of approximately $15.5 million.[80]

---

[79] *Id*. Plaintiffs in the Securities Class Action filed a motion for class certification for the Securities Class Action, which the defendants in that action did not oppose. The motion for class certification was subsequently granted on June 20, 2017. As of the time of filing this Complaint, the parties in the Securities Action received preliminary approval of a proposed settlement, providing for payment of $33 million by the Company to the settlement class.

[80] The Foundry Group Funds sold over 10.5 million shares in the IPO, collecting almost $200 million.

139. The Selling Defendants collected millions more in the Secondary Offering on or shortly after November 18, 2015, according to Forms 4 filed with the SEC. Friedman sold 1,113,490 shares, receiving over $31 million. Park sold exactly twice as many shares as Friedman, collecting nearly $63 million for the 2,226,980 shares he sold in the Secondary Offering. Murray, on his own and through Softbank, sold 1,203,579 shares, collecting approximately $34 million. Callaghan, through True Ventures, sold 4,860,338 shares for more than $136 million. Zerella sold 216,000 shares, for total proceeds of over $6 million.[81]

140. Altogether, the Selling Defendants sold over 6 million shares in the IPO and more than 9.62 million shares in the Secondary Offering, for total proceeds of over $386 million. The provisions allowing these sales, including the Lock-Up Agreement waivers, were all approved by Defendants in order to maximize their sales of Fitbit stock.

141. Most of the shares sold by the Selling Defendants were sold after the early release of the IPO Lock-Up Agreements. The early release of those agreements permitted the Selling Defendants to sell Fitbit stock as quickly as possible. The Selling Defendants knew the risk that the flaws in Fitbit's PurePulse technology

[81] The Foundry Group Funds sold over 5.4 million shares in the Secondary Offering, collecting over $150 million.

could become public at any time, which would have caused the Selling Defendants significant losses and driven down Fitbit's stock price before the Selling Defendants were permitted to sell their stock. The Selling Defendants therefore were incentivized to sell stock as soon as possible.

142. As described below, when the truth about the flawed PurePulse technology became known by the public, Fitbit's stock price collapsed. The Selling Defendants avoided substantial losses by selling off Fitbit shares before the public caught up with Fitbit's deception. The Selling Defendants, of course, knew what was coming because, as noted, Fitbit's internal documents reflected what the public later discovered: the PurePulse technology did not operate as claimed.

143. In its November 2, 2015 announcement concerning the release of the IPO Lock-Up Agreements, Fitbit explained that the release would "allow Fitbit's employees and consultants an opportunity in 2015 for liquidity prior to the commencement of Fitbit's quarter end blackout period, which would prohibit any sales until that period ends after the earnings release for the fourth quarter of 2015." That earnings release did not occur until February 29, 2016. This means that absent the lock-up release, the Selling Defendants would not have been able to sell their stock until on or around March 1, 2016.

144. On March 1, 2016, after Fitbit's stock had taken a beating as a result of disclosures described below concerning serious flaws with Fitbit's PurePulse technology, Fitbit's stock opened for trading at $12.35 share. As noted, by virtue of the early release of the IPO Lock-Up Agreements, the Selling Defendants were able to sell their shares of Fitbit stock during the Secondary Offering at a $28.13 share price. That is, the Selling Defendants avoided substantial losses as a direct result of the early release of the IPO Lock-Up Agreements.

VII. THE TRUTH EMERGES - INDEPENDENT TESTS CONFIRM PUREPULSE'S INACCURACY

145. As expected, once the truth regarding the inaccuracy of the Fitbit PurePulse technology was uncovered by the public, the share price dropped precipitously. The truth began to emerge on January 5, 2016, just weeks after the Secondary Offering, when the Consumer Litigation was filed. That lawsuit compiled widespread consumer complaints and also reported on an additional, previously unreported study that undermined Fitbit's claims concerning its PurePulse technology. The lawsuit alleged:

> Expert analysis has further corroborated the inability of the PurePulse Trackers to perform as promised and warranted. A board-certified cardiologist tested the PurePulse Trackers against an electrocardiogram ("ECG"), the gold standard of heart rate monitoring, on a number of subjects at various exercising intensities….
>
> The results were as expected: the PurePulse Trackers consistently mis-recorded the heart rates by a significant degree. At intensities over 110

> bpm [beats per minute], the Heart Rate Trackers often failed to record any heart rate at all. And even when they did record heart rates, the Heart Rate trackers were inaccurate by an average of 24.34 bpm, with some readings off by as much as 75 bpm. With those margins of error, the Heart Rate Trackers are effectively worthless as heart rate monitoring devices.

146. Fitbit common stock closed at a price of $24.30 per share, from an intraday high of $30.96 on January 5, 2016. The price of Fitbit shares continued to drop on January 6, 2016, the first full day of trading following the filing of the Consumer Litigation, dropping to $22.90 per share. As the media increasingly picked up on the story, the share price continued its free-fall. On January 7, 2016, the per share price hit a low of $20.25, more than a 33% drop in just days following the Consumer Litigation.

147. The downward spiral continued as additional details emerged. On February 22, 2016, independent Indianapolis television channel WTHR released the results of its investigation entitled "Sometimes your fitness tracker lies – a lot." The study, completed under the supervision of Dr. Alex Montoye, Assistant Professor of Clinical Exercise Physiology at Ball State University (the "Ball State Study") found that although "[t]he box for the Fitbit Charge HR says 'every beat counts' … the tracking device inside missed lots of them." For one participant in the Ball State Study, the Charge HR tracked heart rate at 68 beats per minute, although a portable

pulse oximeter worn by the participant showed the actual heart rate data at ***ninety-one*** beats per minute.

148. The investigation quoted Dr. Montoye's finding that a heart rate tracker that was off by 20 or 30 beats per minute was "too high to be acceptable [because] [h]eart rate is a measure of exercise intensity. Small changes in intensity can affect the benefit you'll receive, but they also increase your risk associated with the activity. That risk can be very real … so the heart rate has to be accurate."

149. The Ball State Study determined that the heart rate error for the Charge HR was approximately 14%, and that "[f]alling within even 5 beats per minute of the actual reading didn't happen frequently".

150. On the next trading day, Fitbit's stock plummeted an additional nearly 30%, closing at $13.08.

151. Another study, with a larger, 43 subject sample size, conducted at the Cal Poly Pomona Human Performance Research Laboratory (the "Cal Poly Study") by Edward Jo, PhD and Brett A. Dolezal, PhD, similarly found inaccuracies in the PurePulse technology contained in the Surge and Charge HR.

152. The Cal Poly Study, entitled *Validation of the Fitbit Surge and Charge HR Fitness Trackers*, found that the PurePulse products recorded a heart rate which, in moderate to high intensity exercise, differed from a time-synched

electrocardiogram by nearly 20 beats per minute. The study succinctly concluded that "The PurePulse Trackers do not accurately measure a user's heart rate, particularly during moderate to high intensity exercise, and cannot be used to provide a meaningful estimate of a user's heart rate."

153. In a study published online on October 12, 2016 in the journal JAMA Cardiology (the "Cleveland Clinic Study"), the Cleveland Clinic Heart and Vascular Institute determined that PurePulse technology exhibited only a 0.84 concordance correlation coefficient for heart rate monitoring.

154. As news about the truth of the Company's devices continues to emerge, and its financial results are affected accordingly, the price of Fitbit shares has steadily dropped, closing at just $7.05 the day of the Motion to Reconsider Denial. Fitbit currently trades around $5.00 per share. By structuring the Offerings to allow them to trade as many shares as possible while their inside information remained non-public, Defendants avoided the share price reckoning which quickly followed the PurePulse revelations.

SPECIFIC CORPORATE DUTIES OF THE DEFENDANTS

155. Fitbit holds itself to specific corporate governance principles beyond the requirements of law pursuant to particular codes of conduct and policies that the Board approved for the Company.

156. [redacted]

157. [redacted]

158. [redacted]

82 [redacted]

83 [redacted]

84 [redacted]

[redacted]

159. [redacted]

[redacted]

160. [redacted]

161. [redacted]

85 [redacted]

86 [redacted]

[redacted]

[redacted]

162. [redacted]

[redacted]

[redacted]

[redacted]

163. [redacted]

[redacted]

[redacted]

[redacted]

87 [redacted]

88 [redacted]

89 [redacted]

164. [redacted]

165. In its Corporate Governance Guidelines adopted on February 17, 2015, Fitbit described the duties undertaken by its Board of Directors and the active oversight role the Board played in its business affairs:

> It is the principal duty of the Board to exercise its powers in accordance with its fiduciary duties to the Company and in a manner it reasonably believes to be in the best interests of the Company and its stockholders. It is also the Board's duty to oversee senior management in the competent and ethical operation of the Company. Directors bring to the Company a wide range of experience, knowledge and judgment, and will use their skills and competencies in the exercise of their duties as directors of the Company.

166. Defendants are also required to conform their conduct to the Company's more specific Code of Business Ethics and Conduct for the Company's employees adopted on February 17, 2015 ("Code of Conduct for Employees" or "Code"). This Code applies to "every employee, including every officer," who was expected to read and understand the Code, uphold its standards in their day-to-day work and in their interactions with others, and to comply with all applicable policies and procedures. It stated that it was intended "to set high standards of ethical

---

[90] FIT_BERNSTEIN_0000421 at 427; FITBIT_HACKETT_0000421 at 427.

conduct and provide guidance applicable to every employee, including every officer, of the Company." As it applied to officers, the provisions of the Code of Conduct for Employees explicitly applied to Park, Zerella, and Friedman. From the outset, the Code makes clear what is expected of all directors, officers and employees: Because the Code could not address every scenario that might arise, "in complying with the letter and spirit of this Code, employees must apply common sense, ***together with high personal standards of ethics, honesty and accountability***, in making business decisions where this Code has no specific guideline."

167. With respect to corporate books, financial accounting, and public disclosure, the Code of Conduct for Employees specifically requires "corporate and business records, including all supporting entries to its books of account, must be completed honestly, accurately and intelligibly." In particular,

> Employees who collect, provide or analyze information for or otherwise contribute in any way to preparing or verifying these reports should adhere to all disclosure controls and procedures and generally assist the Company in producing financial disclosures that contain all of the information about the Company that is required by law and would be important to enable investors to understand the Company's business and its attendant risks. In particular [in pertinent part]:
>
> > • no employee shall knowingly make (or cause or encourage any other person to make) any false or misleading statement in any of the Company's reports filed with the SEC or any third party or knowingly omit (or cause or encourage any other person to omit) any information necessary to make the disclosure in any of such reports accurate in all material respects.

168. The Code of Conduct for Employees also requires that the "Chief Executive Officer, Chief Financial Officer and senior finance department personnel must adhere to the [relevant] ethical principles and accept the obligation to foster a culture throughout the Company as a whole that ensures the accurate and timely reporting of the Company's financial results and condition."

169. More specifically, the Code of Conduct for Employees requires that the "Chief Executive Officer, Chief Financial Officer, Chief Accounting Officer, controller and any other persons performing similar functions ("Senior Financial Employees"):

> - Act with honesty and integrity and use due care and diligence in performing his or her responsibilities to the Company.
> - Avoid situations that represent actual or apparent conflicts of interest with his or her responsibilities to Company, and disclose promptly to the Audit Committee of the Board ("Audit Committee"), any transaction or personal or professional relationship that reasonably could be expected to give rise to such an actual or apparent conflict. Without limiting the foregoing, and for the sake of avoiding an implication of impropriety, Senior Financial Employees shall not:
>   - accept any material gift or other gratuitous benefit from a customer, distributor, supplier, service provider or any vendor of products or services, including professional services, to the Company (this prohibition is not intended to preclude ordinary course entertainment or similar social events);
>   - except with the approval of the disinterested members of the Audit Committee, directly invest in any privately-held company that is a customer, partner, service provider,

distributor, supplier or vendor of the Company where the Senior Financial Employee, either directly or through people in his or her chain of command, has responsibility or ability to affect or implement the Company's relationship with the other company; or

- maintain more than a passive investment of greater that 1% of the outstanding shares of a public company that is a customer, partner, service provider, distributor, supplier or vendor of the Company.

- Provide constituents with information that is accurate, complete, objective, relevant, timely and understandable, including information for inclusion in the Company's submissions to governmental agencies or in public statements.

- Comply with applicable laws, rules, and regulations of federal, state and local governments, and of any applicable public or private regulatory and listing authorities.

- Achieve responsible use of and control over all assets and resources entrusted to each Senior Financial Employee

170. The Code of Conduct for Employees further contains a section specifically on insider trading, which reads:

Insider Trading

In the course of doing business for the Company, or in discussions with one of its customers, partners, service providers, distributors or suppliers, the Company's employees may become aware of material, non-public information about the Company or another organization. Information is considered "material" if it might be used by an investor to make a decision to trade in the securities of the company. Employees may only use such information for the purpose of conducting the Company's business.

Federal law and Company policy prohibit employees, directly or indirectly through their families or others, from purchasing or selling

> the Company's stock while in the possession of material, non-public information concerning the Company. This same prohibition applies to trading in the stock of other publicly held companies on the basis of material, non-public information.
>
> If an employee is considering buying or selling a stock because of inside information he or she possesses, he or she should assume that such information is material. It is also important for the employee to keep in mind that if any trade he or she makes becomes the subject of an investigation by the government, the trade will be viewed after-the-fact with the benefit of hindsight. Consequently, employees should always carefully consider how their trades would look from this perspective.
>
> If an employee's family or friends ask for advice about buying or selling the Company's stock, the employee should not provide it. Federal law and Company policy also prohibit the employee from "tipping" family or friends regarding material, non-public information that the employee learns about the Company or any other publicly traded company in the course of employment. The same penalties apply, regardless of whether the employee derives any benefit from the trade.
>
> Because of the sensitive nature of and severe penalties associated with insider trading and tipping, employees must exercise the utmost care when in possession of material non-public information. All employees shall follow the guidelines and policies on securities trading issued by [the] Company and should review the Company's Insider Trading Policy, as may be in effect.

171. Fitbit also maintains a Code of Conduct and Ethics specifically for the members of its Board, also adopted on February 17, 2015 ("Code of Conduct for Directors"). This policy requires, in part:

> Every director must always obey the law while performing his or her duties to the Company as a director. The Company's success depends upon each director operating within legal guidelines and cooperating

> with authorities. It is essential that each director knows and understands the legal and regulatory requirements that apply to the Company's business and to his or her responsibility as a director. While a director is not expected to have complete mastery of these laws, rules and regulations, directors are expected to be able to recognize situations that require consultation with others to determine the appropriate course of action. If a director has a question in the area of legal compliance, he or she should approach the Chair (or, in the case of the Chair, the Company's General Counsel) immediately.

172. The Code of Conduct for Directors also requires adherence to the legal requirements for Insider Trading and International Business Laws, and ethical requirements for Conflicts of Interest, usurping Corporate Opportunities, Gifts and Entertainment, Political Contributions and Gifts, and Financial Integrity/Public Reporting.

173. The latter requires as follows:

> The Company's disclosure controls and procedures are designed to help ensure that the Company's reports and documents filed with or submitted to the United States Securities and Exchange Commission (the "SEC") and other public disclosures are complete, fair and accurate, fairly present the Company's financial condition and results of operations and are timely and understandable. In connection with the preparation of the financial and other disclosures that the Company makes to the public, including by press release or filing a document with the SEC, directors must, in addition to complying with all applicable laws, rules and regulations, follow these guidelines:
>
> - Act honestly, ethically, and with integrity;
> - Comply with this Code;

- Endeavor to ensure complete, fair, accurate, timely and understandable disclosure in the Company's filings with the SEC;

- Raise questions and concerns regarding the Company's public disclosures when necessary and ensure that such questions and concerns are appropriately addressed;

- Act in good faith in accordance with the director's business judgment, without misrepresenting material facts or allowing independent judgment to be subordinated by others; and

- Comply with the Company's disclosure controls and procedures and internal controls over financial reporting.

If a director becomes aware that the Company's public disclosures are not complete, fair and accurate, or if the director becomes aware of a transaction or development that the director believes may require disclosure, the director should report the matter immediately to the Chair (or, in the case of the Chair, the Company's General Counsel).

174. The Company's Code of Conduct for Directors, applicable to each of the Board members, contains the following specific provision regarding insider trading:

Insider Trading

Every director is prohibited from using "inside" or material nonpublic information about the Company, or about companies with which the Company does business, in connection with buying or selling the Company's or such other companies' securities, including "tipping others who might make an investment decision on the basis of this information. It is illegal, and it is a violation of this Code and other Company policies, to tip or to trade on inside information. Directors are not permitted to use or share inside information for stock trading purposes or for any other purpose except to conduct Company business.

> Directors must exercise the utmost care when in possession of material nonpublic information. The Company's Insider Trading Policy (the "***Insider Trading Policy***") provides guidance on the types of information that might be nonpublic and material for these purposes, and guidelines on when and how a director may purchase or sell shares of Company stock or other Company securities.
>
> Please review the Insider Trading Policy for additional information.
>
> (Emphasis in original).

DERIVATIVE ALLEGATIONS

175. Plaintiffs bring this Action derivatively in the right and for the benefit of Fitbit to redress injuries suffered by the Company as a direct result of the violations of the Defendants' breaches of fiduciary duty.

176. Fitbit is named as a nominal defendant in this case solely in a derivative capacity. This Action is not a collusive one to confer jurisdiction that the Court would otherwise lack. Plaintiff Anne Bernstein is a current Fitbit stockholder and has continuously owned Fitbit stock since prior to the IPO. Plaintiff Michael Hackett is a current Fitbit stockholder and has continuously owned Fitbit stock since prior to the Secondary Offering. Plaintiff Bright Agyapong is a current Fitbit stockholder and has continuously owned Fitbit stock since prior to the close of the IPO. Plaintiffs will adequately and fairly represent the interests of similarly-situated Fitbit stockholders in enforcing and prosecuting the Company's rights. Prosecution of this

Action, independent of the current Board of Directors, is in the best interests of the Company.

177. The wrongful acts complained of herein subject, and will continue to subject, Fitbit to continuing harm because the adverse consequences of the actions are still in effect and ongoing.

178. The wrongful acts complained of herein were unlawfully concealed from Fitbit's stockholders.

DEMAND ON THE FITBIT BOARD IS EXCUSED AS FUTILE

179. Plaintiffs repeat and reallege each and every allegation above as if set forth in full herein.

180. Plaintiffs have not made any demand on the Board to institute this Action against the Defendants. Such demand would be futile and useless because, at the time this stockholder derivative litigation was initiated, the Board was incapable of making an independent and disinterested decision to institute and vigorously prosecute this Action.

181. The relevant Fitbit Board for purposes of assessing whether a demand would have been futile consists of seven directors, two of whom joined the Board after the alleged wrongdoing. The directors named as Defendants herein have also been named as defendants in the Securities Class Action. As noted herein, claims

against the Defendants, constituting a majority of the relevant Board, were upheld in the Motion to Dismiss Order and in the Motion to Reconsider Denial. Four of the directors, a majority of the Board, collectively profited $350 million by their wrongdoing and thus derived a personal benefit through the acts complained of herein. The Board is therefore incapable of disinterestedly and independently considering a demand to investigate, commence or vigorously prosecute this Action.

182. Such demand would be futile and useless, and is thereby excused, for at least four independent reasons: (i) Defendants, who comprise a majority of Fitbit's Board, faced a significant likelihood of liability in the Securities Class Action and thus could not have impartially considered a demand at the time this stockholder derivative litigation was initiated; (ii) the Selling Defendants, which constitute a majority of the Fitbit Board, are individuals who profited from the improper insider sales of stock in connection with the IPO and the Secondary Offering; (iii) a majority of the Board members stood to gain from the self-interested decision to waive the lock-up provisions of the IPO; and (iv) the insider sales in the IPO and the Secondary Offering, and the Lock-Up Agreements were not the product of a valid exercise of business judgment.

183. All seven of the Board members are conflicted due to the Securities Class Action's survival of the motion to dismiss under the rigorous standards for

pleading securities fraud. In its 10-K filed on March 1, 2017 (as well as the 10-K filed on March 1, 2018), the Company stated: "The Company believes that the plaintiffs' allegations in these actions are without merit, and intends to vigorously defend against the claims." If the Board brought the claims at issue here, it would be tantamount to admitting liability in the Securities Class Action. If the Company pressed forward with its rights of action in this case, then the Company's efforts would undercut or even compromise the defense and settlement of the Securities Class Action, making demand futile.

184. Moreover, Defendants Park, Friedman, and Callaghan dominated the Board by controlling stockholder voting power at the time this stockholder derivative litigation was initiated. As of April 2017, Park beneficially owned over 18 million Fitbit shares, representing approximately 28% of the total voting power of Fitbit stockholders; Friedman beneficially owned over 19 million Fitbit shares, representing approximately 30% of the total voting power of Fitbit stockholders; and Callaghan beneficially owned over 15 million Fitbit shares, representing approximately 15% of the total voting power of Fitbit stockholders. These three defendants collectively control a majority of the Board with approximately 73% of the stockholder voting power, and controlled a majority of Fitbit's stockholder voting power at all relevant times hereto. As disclosed in the Company's its 10-K

filed with the SEC on March 1, 2017 (as well as the 10-K filed on March 1, 2018), Park, Friedman, and Callaghan "control a majority of the combined voting power of [Fitbit's] common stock and therefore are able to control all matters submitted to [its] stockholders for approval," and will continue to do so for the foreseeable future, thereby "limit[ing] or preclud[ing] [stockholders'] ability to influence corporate matters … including the election of directors."

185. In May 2015, the Board designated Defendant Callaghan as the lead independent director, despite having found earlier that "[n]either Jon [Callaghan] … can serve on the audit committee due to a lack of independence." Callaghan's insufficient independence from the Company resulted in his resignation from the Audit Committee on February 17, 2015.

186. The remaining Board members are, and have been, wholly under the domination of Defendants Park, Friedman, and Callaghan, preventing them from taking remedial action for the wrongdoing alleged herein. As majority voting stockholders, Defendants Park, Friedman, and Callaghan have the exclusive power not to re-elect any director who votes to discipline them for their improper acts.

187. Therefore, if any current Board member took an action antithetical to the wishes of Defendants Park, Friedman, and Callaghan, they would be easily removed from the Fitbit Board. Non-defendants Alber and Flanagan and Defendants

Murray and Paisley are all highly compensated for their service on the Board of Directors. In fiscal year 2016, for instance, Alber received total compensation from the Company of $200,490; Flanagan received total compensation from the Company of $203,536; Murray received total compensation from the Company of $229,535; and Paisley received total compensation from the Company of $238,537. This makes the current Board, including non-defendants Alber and Flanagan and Defendants Murray and Paisley disabled from objectively considering pre-suit demand to bring these claims against Defendants Park, Friedman, and Callaghan. A demand is therefore futile and excused. Demand is further excused for the additional reasons that follow.

188. Defendant Park is independently incapable of objectively considering pre-suit demand to bring these claims, inasmuch as he is a co-founder of the Company and currently serves as its CEO, receiving extensive salary and other compensation (approximately $2 million in fiscal year 2015 and nearly $4.2 million in fiscal year 2016). According to the Company's 2017 Proxy Statement, Park is not an independent director under applicable listing standards, excusing demand. Park would never vote to pursue action because to do so would jeopardize his primary source of income and livelihood through his executive position at Fitbit, including substantial executive compensation. Thus, Park is not disinterested and

cannot exercise independent business judgment on the issue of whether Fitbit should prosecute this Action.

189. Defendant Friedman is independently incapable of objectively considering pre-suit demand to bring these claims, inasmuch as he is a co-founder of the Company and currently serves as its CTO, receiving extensive salary and other compensation (approximately $700,000 in fiscal year 2015 and nearly $2.3 million in fiscal year 2016). According to the Company's 2017 Proxy Statement, Friedman is not an independent director under applicable listing standards, excusing demand. Friedman would never vote to pursue action because to do so would jeopardize his primary source of income and livelihood through his executive position at Fitbit, including substantial executive compensation. Thus, Friedman is not disinterested and cannot exercise independent business judgment on the issue of whether Fitbit should prosecute this Action.

A. A Majority of the Seven-Member Fitbit Demand Board Was Interested in the Insider Sales and the Lock-Up Agreement Waivers

190. ***Defendant Park*****,** as the co-founder, CEO, President and Chairman of the Company, is not independent of the Company. He owned or controlled, at the time of the IPO and Secondary Offering, approximately 11% of the voting power of the Company. Park sold 1,095,817 shares in the IPO and 2,226,980 shares in the

Secondary Offering. Through his sales in these stock offerings, which were motivated in whole or in part by material non-public information based of the inaccuracy of the Fitbit PurePulse technology, he has realized more than $83 million. It would be antithetical to his economic interests to initiate and pursue derivative claims challenging his own sales, through which he used inside information to enrich himself. [redacted] Park, together with the other Defendants, circumvented the IPO lock-up and purposefully allowed the improper enrichment of all of the Selling Defendants. This represented a massive breakdown in the Company's internal control environment, including its Code of Conduct for Directors, for which Park is directly responsible. For these fiduciary duty violations, Park faces a substantial likelihood of liability in this Action, rendering him incapable of impartially considering a stockholder demand as to the wrongdoing alleged herein. Moreover, Park is a named defendant in the Securities Class Action**,** where claims for fraud had been upheld against him under the particularized pleading standards of the federal securities laws at the time this stockholder derivative litigation was initiated. The Section 11 claims were also upheld against Park for causing Fitbit to issue materially false and misleading information regarding Fitbit's heart rate

monitoring technology. The pendency of these claims for violating the federal securities laws in the Securities Class Action, where Park faced a substantial likelihood of liability, renders it impossible for Park to objectively and disinterestedly consider a stockholder demand as to the wrongdoing alleged herein.

191. ***Defendant Friedman*** as the co-founder, CTO, and director of the Company, is not independent of the Company. He owned or controlled, at the time of the IPO and Secondary Offering, approximately 11% of the voting power of the Company. Friedman sold 1,095,817 shares in the IPO and 1,113,490 shares in the Secondary Offering. Through his sales in these stock offerings, which were motivated in whole or in part by material non-public information based of the inaccuracy of the Fitbit PurePulse technology, he has realized more than $51 million. It would be antithetical to his economic interests to initiate and pursue derivative claims challenging his own sales, through which he used inside information to enrich himself. [redacted] Friedman, together with the other Defendants, circumvented the IPO lock-up and purposefully allowed the improper enrichment of all of the Selling Defendants. This represented a massive breakdown in the Company's internal control environment, including its Code of Conduct for

Directors, for which Friedman is directly responsible. For these fiduciary duty violations, Friedman faces a substantial likelihood of liability in this Action, rendering him incapable of impartially considering a stockholder demand as to the wrongdoing alleged herein. Moreover, Friedman is a named defendant in the Securities Class Action, where claims for fraud had been upheld against him under the particularized pleading standards of the federal securities laws at the time this stockholder derivative litigation was initiated. The Section 11 claims were also upheld against Friedman for causing Fitbit to issue materially false and misleading information regarding Fitbit's heart rate monitoring technology. The pendency of these claims for violating the federal securities laws in the Securities Class Action, where Friedman faced a substantial likelihood of liability, renders it impossible for Friedman to objectively and disinterestedly consider a stockholder demand as to the wrongdoing alleged herein.

192. ***Defendant Callaghan*** as a director of and significant stockholder in the Company, is not independent of Fitbit. He owned or controlled, at the time of the IPO and Secondary Offering, more than 22% of the voting power of the Company. Callaghan sold 3,133,707 shares in the IPO and 4,860,338 shares in the Secondary Offering. Through his sales in these stock offerings, which were motivated in whole or in part by material non-public information based of the inaccuracy of the Fitbit

PurePulse technology, he has realized more than $168 million. It would be antithetical to his economic interests to initiate and pursue derivative claims challenging his own sales, through which he used inside information to enrich himself. [redacted] Callaghan, together with the other Defendants, circumvented the IPO lock-up and purposefully allowed the improper enrichment of all of the Selling Defendants. This represented a massive breakdown in the Company's internal control environment, including its Code of Conduct for Directors, for which Callaghan is directly responsible. For these fiduciary duty violations, Callaghan faces a substantial likelihood of liability in this Action, rendering him incapable of impartially considering a stockholder demand as to the wrongdoing alleged herein. Callaghan is also a named defendant in the Securities Class Action, where claims for violating Section 11 of the Securities Act of 1933 for causing Fitbit to issue materially false and misleading information regarding Fitbit's heart rate monitoring technology were upheld at the time this stockholder derivative litigation was initiated. The pendency of these claims for violating the federal securities laws in the Securities Class Action, where Callaghan faced a substantial

likelihood of liability, renders it impossible for Callaghan to objectively and disinterestedly consider a stockholder demand as to the wrongdoing alleged herein.

193. ***Defendant Murray*** as a director of and significant stockholder in the Company, is not independent of Fitbit. He owned or controlled, at the time of the IPO, approximately 5.5% of the voting power of the Company. He owned or controlled approximately 5.5% of the voting power of the Company at the time of the Secondary Offering. Murray sold 825,000 shares in the IPO and 1,203,579 shares in the Secondary Offering. Through his sales in these stock offerings, which were motivated in whole or in part by material non-public information based of the inaccuracy of the Fitbit PurePulse technology, he has realized more than $48 million. It would be antithetical to his economic interests to initiate and pursue derivative claims challenging his own sales, through which he used inside information to enrich himself. [redacted] Murray, together with the other Defendants, circumvented the IPO lock-up and purposefully allowed the improper enrichment of all of the Selling Defendants. This represented a massive breakdown in the Company's internal control environment, including its Code of Conduct for Directors, for which Murray is directly responsible. For these fiduciary duty

violations, Murray faces a substantial likelihood of liability in this Action, rendering him incapable of impartially considering a stockholder demand as to the wrongdoing alleged herein. Murray is also a named defendant in the Securities Class Action, where claims for violating Section 11 of the Securities Act of 1933 for causing Fitbit to issue materially false and misleading information regarding Fitbit's heart rate monitoring technology were upheld at the time this stockholder derivative litigation was initiated. The pendency of these claims for violating the federal securities laws in the Securities Class Action, where Murray faced a substantial likelihood of liability, renders it impossible for Murray to objectively and disinterestedly consider a stockholder demand as to the wrongdoing alleged herein.

194. ***Defendant Paisley*** [redacted] Paisley helped circumvent the IPO lock-up and purposefully allowed the improper enrichment of all of the Selling Defendants. As reflected by the concerted nature of the Selling Defendants' selling, Paisley knew of the unlawful acts in which these directors were engaged and participated in the actions of his colleagues. Paisley permitted the Selling Defendants to enrich themselves, demonstrating an utter disregard for his fiduciary duties and the integrity of the Company's internal control environment, including its Code of Conduct for

Directors, for which Paisley is directly responsible. He could never evaluate the claims asserted herein in a disinterested fashion, given his personal responsibility for the alleged misconduct. Paisley faces a substantial likelihood of liability for these breaches of fiduciary duties, rendering demand on him excused. Paisley is also a named defendant in the Securities Class Action, where claims for violating Section 11 of the Securities Act of 1933 for causing Fitbit to issue materially false and misleading information regarding Fitbit's heart rate monitoring technology were upheld at the time this stockholder derivative litigation was initiated. The pendency of these claims for violating the federal securities laws in the Securities Class Action, where Paisley faces a substantial likelihood of liability, renders it impossible for Paisley to objectively and disinterestedly consider a stockholder demand as to the wrongdoing alleged herein.

195. Together, the Defendants comprised an overwhelming majority of the Board which approved the insider sales complained of herein, and still constituted a majority of the Board at the time this stockholder derivative litigation was initiated. Thus, a majority of the seven-member Board is incapable of objectively and disinterestedly considering a demand to investigate or prosecute the derivative claims alleged herein, and demand on the Board is excused as futile. Moreover, the Selling Defendants collectively represent a controlling interest in the Company, as

they, the executive officers and their affiliates, according to the IPO Prospectus, "hold in the aggregate 53.0% of the voting power" of the Company.

B. Defendants' Conduct Is Not a Valid Exercise of Their Business Judgment

196. As detailed herein, the processes leading to the approval of the insider sales were heavily conflicted, fatally flawed and did not adequately protect the Company. There was little to no analysis conducted as to the effect on the Company of the insider sales made in either the IPO or of the Secondary Offering.

197. Instead, the Board cared only about how many shares insiders could sell, particularly in the Secondary Offering, and did not consider the needs of the Company or the effect on the Company of having a 17 million share secondary offering, of which the Company received proceeds for only 3 million shares. In addition, because a majority of the Board is interested in the self-dealing actions (including waiver of the lock-up provision) being challenged here the entire fairness standard of review presumptively applies.

198. Thus, demand on the Board is excused as futile for this additional reason.

CLAIMS FOR RELIEF

COUNT I

DERIVATIVE CLAIM FOR BREACH OF FIDUCIARY DUTY AGAINST THE DEFENDANTS

199. Plaintiffs repeat and reallege each and every allegation above as if set forth in full herein.

200. The Defendants, as Fitbit directors, officers, or both owe the Company the utmost fiduciary duties of due care and loyalty. By virtue of their positions as directors, officers, or both or by virtue of their exercise of control and ownership over the voting power and business and corporate affairs of the Company, the Defendants have, and at all relevant times had, the power to control and influence and did control and influence and cause the Company to engage in the practices complained of herein.

201. The Defendants breached their duty of loyalty in connection with the IPO and Secondary Offering by, *inter alia*, (a) allowing the Selling Defendants to engage in the sale of stock based on insider information in the IPO and the Secondary Offering; and (b) improperly waiving the lock-up provisions which would have otherwise prevented the Defendants and their affiliates from selling their shares in the IPO and the Secondary Offering.

202. As a direct and proximate result of the Defendants' conscious failure to perform their fiduciary duties, Fitbit has sustained, and will continue to sustain, significant damages – both financially and to its corporate image and goodwill.

203. As a result of the bad faith misconduct and other misconduct alleged herein, Defendants are liable to the Company.

204. Plaintiffs, on behalf of Fitbit, have no adequate remedy at law.

COUNT II

DERIVATIVE CLAIM FOR BREACH OF FIDUCIARY DUTY AND MISAPPROPRIATION OF INFORMATION UNDER *BROPHY* AGAINST THE SELLING DEFENDANTS

205. Plaintiffs repeat and reallege each and every allegation above as if set forth in full herein.

206. When the Selling Defendants made the sales alleged of herein, the Selling Defendants were in possession of material, adverse, non-public information regarding serious flaws with the PurePulse technology. This technology affected the Company's most important business products representing *80%* of the Company's revenue and otherwise "dominated" Fitbit's revenue stream and business prospects. The Selling Defendants designed the structure and timing of the Offerings and participated in the Offerings on the basis of such adverse information while the price of the Company's shares were artificially inflated.

207. Once the truth of the PurePulse technology problems became known to the investing public, the price of the Company's stock plummeted.

208. The inside information was proprietary, non-public information regarding the Company's future business prospects known to the Selling Defendants. The information which formed the basis for their participation in the Offerings was the type of information which the Selling Defendants, in accordance with the Insider Trading and Corporate Governance policies of the Company were specifically barred from trading upon. The inside information was a proprietary asset belonging to Fitbit which was usurped for the Selling Defendants' benefit.

209. The Selling Defendants' use of this information was a breach of internal corporate policies and their fiduciary duty of loyalty. These defendants' trades were motivated in whole or in part by their possession of material, non-public information.

210. At the time of their stock sales, the Selling Defendants knew that the public disclosure of this information would adversely affect the market price of Fitbit's stock, as these defendants knew that the IPO and the Secondary Offering represented likely high points for Fitbit's stock. Thus, the Selling Defendants took the opportunity to sell their shares before the public fully appreciated serious flaws with the PurePulse technology.

211. Since the use of the Company's own propriety information for their own gain constitutes a disloyal act in breach of the Selling Defendants' fiduciary duties, Plaintiffs, as stockholders of Fitbit and on its behalf, seek restitution from the Selling Defendants and an order of this Court imposing a constructive trust and disgorging all profits, benefits, and other compensation obtained by them as a result of their wrongful conduct and fiduciary breaches.

RELIEF REQUESTED

WHEREFORE, Plaintiffs demand judgment as follows:

A. Declaring that Plaintiffs may maintain this Action on behalf of Fitbit, and that Plaintiffs are adequate representatives of the Company;

B. Finding the Defendants liable for breaching their fiduciary duties owed to the Company;

C. Finding the Selling Defendants liable for breach of fiduciary duty and misappropriation of information;

D. Finding that demand on the Fitbit Board is excused as futile;

E. Imposing a constructive trust and awarding the Company the disgorgement of all profits made by the Selling Defendants as a result of the *Brophy* fiduciary breaches alleged herein;

F. Awarding the Company compensatory damages for the other wrongdoing alleged herein;

G. Awarding Plaintiffs the costs and disbursements of this Action, including attorneys', accountants', and experts' fees; and

H. Awarding such other and further relief as is just and equitable.

ANDREWS & SPRINGER LLC

By: */s/ Peter B. Andrews*
Peter B. Andrews (#4623)
Craig J. Springer (#5529)
David M. Sborz (#6203)
3801 Kennett Pike
Building C, Suite 305
Wilmington, DE 19807
(302) 504-4957

Co-Lead Counsel for Plaintiffs

OF COUNSEL:

KAHN SWICK & FOTI, LLC
Melinda A. Nicholson
Michael R. Robinson (#4452) (inactive)
206 Covington Street
Madisonville, LA 70447
(504) 455-1400

Co-Lead Counsel for Plaintiffs

OF COUNSEL:

SCHUBERT JONCKHEER & KOLBE LLP
Robert C. Schubert
Three Embarcadero Center, Suite 1650
San Francisco, California 94111
(415) 788-4220

SHAPIRO HABER & URMY LLP
Edward F. Haber
Seaport East
Two Seaport Lane
Boston, Massachusetts 02210
(617) 439-3939

Dated: March 15, 2018

ROSENTHAL, MONHAIT & GODDESS, P.A.
Jessica Zeldin (#3558)
919 N. Market Street, Suite 1401
P.O. Box 1070
Wilmington. DE 19899-1070
(302) 656-4433

Delaware Counsel for Plaintiffs