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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BRIAN H. ROBB, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

v.

FITBIT INC., JAMES PARK, WILLIAM R. ZERELLA, ERIC N. FRIEDMAN, JONATHAN D. CALLAGHAN, STEVEN MURRAY, CHRISTOPHER PAISLEY, MORGAN STANLEY & CO. LLC, DEUTSCHE BANK SECURITIES INC., and MERRILL LYNCH, PIERCE, FENNER & SMITH INC.,

Defendants.

No. 3:16-cv-00151-SI

CLASS ACTION

PLAINTIFFS' REPLY IN FURTHER SUPPORT OF MOTIONS FOR FINAL APPROVAL OF SETTLEMENT, CLASS CERTIFICATION, AND PLAN OF ALLOCATION AND FOR AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND COMPENSATORY AWARDS FOR PLAINTIFFS

Date: April 20, 2018
Time: 10:00 a.m.
Judge: Hon. Susan Illston
Courtroom: 1 – 17th Floor

INTRODUCTION

Lead Plaintiffs and Class Representatives Timothy Flynn, Jesse M. Koth, Kelley Koth, Viet Tran, and Mark Cunningham, on behalf of themselves and the Settlement Class[1], respectfully submit this reply memorandum to update the Court regarding claims, objections, and requests for exclusion received from Settlement Class members since the filing of Plaintiffs' opening papers on March 16, 2018. *See* Motion for Final Approval of Settlement, Class Certification and Plan of Allocation (ECF No. 209) (the "Final Approval Motion") and Motion for Award of Attorneys' Fees, Reimbursement of Expenses and Compensatory Awards for Plaintiffs (ECF No. 210) (the "Fee Motion").

The reaction of the Settlement Class has been overwhelmingly positive, further confirming the fairness, adequacy, and reasonableness of the Settlement, the Plan of Allocation, and the request for attorneys' fees, expenses, and compensatory awards. Following an extensive notice program—including long-form notice mailed to over 359,241 potential Settlement Class Members or their nominees—over 10,500 Settlement Class Members have filed claims, only eleven have requested exclusion from the Settlement Class, and only two have filed objections. Supplemental Declaration of Brian Manigault ("Manigault Supp. Decl.") ¶¶ 6–10; Manigault Decl. (ECF No. 214) ¶¶ 5–11; Letter from Jack McRoberts (ECF No. 221); Letter from Christopher Brown (ECF No. 222).[2] Moreover, both objections are meritless and should be overruled.

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[1] The Settlement Class includes (subject to certain exclusions) "all persons who purchased or otherwise acquired Fitbit securities on the open market between June 18, 2015, and May 19, 2016, both dates inclusive (the 'Exchange Act Class Period')" and "all persons who purchased or otherwise acquired Fitbit Class A common stock pursuant and/or traceable to the Company's initial public offering on or about June 18, 2015…or the Company's follow-on public offering on or about November 13, 2015…" Preliminary Approval Order (ECF No. 207) ¶ 4.

[2] The objection from Jeff M. Brown, filed on the Court's docket April 12, 2018 (ECF No. 223), has been withdrawn. *See* Exhibit A to the Declaration of Garth A. Spencer, filed herewith.

THE REACTION OF THE CLASS SUPPORTS APPROVAL

Pursuant to the Preliminary Approval Order (ECF No. 207), as of April 13, 2018, the Settlement Administrator has distributed 359,241 Notice Packets to potential Settlement Class members and nominees, published the Publication Notice over the *Business Wire*, and posted the Notice, Stipulation, Proof of Claim and Release Form, and Preliminary Approval Order along with the relevant Court-ordered deadlines on its website (http://www.fitbitsecuritieslitigation.com/). Manigault Supp. Decl. ¶ 6; Manigault Decl. (ECF No. 214) ¶¶ 5–11. Also pursuant to the Preliminary Approval Order, Plaintiffs timely filed the Motion for Final Approval of Settlement, Class Certification and Plan of Allocation (ECF No. 209) (the "Final Approval Motion") and Motion for Award of Attorneys' Fees, Reimbursement of Expenses and Compensatory Awards for Plaintiffs (ECF No. 210) (the "Fee Motion") on March 16, 2018. *See* Preliminary Approval Order ¶ 24.

The response from the Settlement Class has been overwhelmingly positive. Under the Preliminary Approval Order, objections had to be filed with the Court by April 3, 2018; requests for exclusion had to be submitted to the Settlement Administrator by April 10, 2018; and Proofs

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Class Counsel and Defendants' Counsel received an email on April 2, 2018 from Patrick Sweeney and/or Jeff M. Brown (the email listed both names, the sender's identity was not clear) attaching this objection. Patrick Sweeney and Jeff Brown are well-known serial objectors. *See, e.g.*, *Chambers v. Whirlpool Corp.*, 214 F. Supp. 3d 877, 890 (C.D. Cal. 2016) (characterizing Sweeney as one of several "serial objectors who are well-known for routinely filing meritless objections to class action settlements for the improper purpose of extracting a fee rather than to benefit the Class"); *In re Amgen Inc. Sec. Litig.*, No. 07-cv-2536, 2016 WL 10571773 at *5 (C.D. Cal. Oct. 25, 2016) (characterizing Jeff Brown as a "professional objector" who "has objected in at least twelve other class actions"). Because of Sweeney and Brown's reputations and because the purported objection did not include any documentation or details about Mr. Brown's transactions in Fitbit securities—as required under the Court's Preliminary Approval Order (ECF No. 207) and as necessary to determine whether Mr. Brown was in fact a Settlement Class member with standing to object—Class Counsel subsequently served Mr. Brown with a subpoena for, *inter alia*, documents sufficient to establish Settlement Class membership and a deposition. Just before the subpoena response deadline, Sweeney and Brown agreed to formally withdraw the objection in exchange for the cancellation of the deposition. *See* Spencer Decl. at ¶¶ 4-15.

of Claim and Release had to be submitted to the Settlement Administrator by April 15, 2018. Preliminary Approval Order ¶¶ 17, 18, 23. As of April 13, 2018, more than 10,500 Settlement Class Members have submitted claims, only eleven have requested exclusion, and only two have timely filed objections. Manigault Supp. Decl. ¶¶ 7–10; Letter from Jack McRoberts (ECF No. 221); Letter from Christopher Brown (ECF No. 222).

This exceptionally positive response confirms the fairness, adequacy, and reasonableness of the Settlement, the Plan of Allocation, and the request for attorneys' fees, expenses, and compensatory award. *See Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir. 2004) (where 45 out of the 90,000 class members objected and only 500 requested exclusion, the reaction of the class weighed in favor of settlement approval); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) (that the "overwhelming majority" stayed in the class is "objective positive commentary as to its fairness"); *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004) ("It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members."); *In re Heritage Bond Litig.*, No. 02-ML-1475, 2005 U.S. Dist. LEXIS 13627, at *50, 2005 WL 1594389, at *27 (C.D. Cal. June 10, 2005) (the "lack of significant objections to the requested fees justifies an award of one-third of the Settlement Fund"); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 594 (S.D.N.Y. 2008) (few or no objections to fee award is "powerful evidence that the requested fee is fair and reasonable").

THE OBJECTIONS SHOULD BE OVERRULED

Only two objections have been filed. Both are meritless and should be overruled. *See In re Hewlett-Packard Co. S'holder Derivative Litig.*, Nos. 15-16688, 15-16690, 2017 U.S. App. LEXIS 24055, at *4 (9th Cir. Nov. 28, 2017) (a "district court is not required to respond to settlement objections with formal findings of fact and conclusions of law so long as it gives a 'reasoned response' in the record").

I. Jack McRoberts's Objection is Meritless and Should Be Overruled

As demonstrated in the Final Approval Motion, the proposed $33 million Settlement provides an excellent recovery for the Settlement Class and should be approved as fair, reasonable, and adequate. Jack McRoberts fails to offer any reason for the Court to conclude otherwise.

Jack McRoberts objects to the "Settlement proposed by Counsel." He asserts that he "lost $20,000.00 because of these actions Fitbit is accused of." He then writes "3000 shares x $.07 = $210.00" and that he is "asking for my $20,000.00 plus $50,000.00 in damages for mental anguish, depression, [and] loss of trust in the stock market." Letter from Jack McRoberts (ECF No. 221).

His argument fails for many reasons. First, he provides no documentation for his purported loss of $20,000, no explanation for how he calculated this number, and no information concerning any transactions in Fitbit securities that could have caused any such losses. Such information is essential for ascertaining class membership and is often necessary to comprehend the basis for an objection. Accordingly, the Court's Preliminary Approval Order explicitly required that anyone filing an objection must "***provide documentation*** sufficient to establish the amount of publicly traded Fitbit securities purchased and sold during the Exchange Act Class Period and the ***prices and dates of such transactions***." Preliminary Approval Order ¶ 23 (emphasis added). The Notice of Proposed Class-Action Settlement (ECF No. 214-1) (the "Notice") likewise made clear that objections must include details of the objector's transactions in Fitbit securities:

> To object, you must send a letter saying you object to the Settlement in the *Fitbit Securities Litigation*, Case No. 16-cv-00151-SI. ***Be sure to include***: (A) your name, address, telephone number, signature, and e-mail address (if any); (B) the ***date, number, and dollar amount of all purchases, acquisitions, sales, or dispositions of Common Stock, Call Options, and Put Options between June 18, 2015 and May 19, 2016, both dates inclusive; (C) the number of Common Stock, Call Options, and Put Options held by you as of May 19, 2016***; and (D) a description of the specific part of the Stipulation or Settlement to which you object and all grounds for your objection, including any evidence you wish to bring to the Court's attention and any legal support known to you or your counsel.

Notice at 10 (emphasis added).

Nevertheless, McRoberts failed to provide any transactional information or documentation, thereby failing even to satisfy his burden to establish his standing as a member of the Settlement Class. *See In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*, 33 F.3d 29, 30 (9th Cir. 1994) (only "an aggrieved class member" has standing to object to a proposed class settlement); *In re Tracfone Unlimited Serv. Plan Litig.*, 112 F. Supp. 3d 993, 1008 (N.D. Cal. 2015) (an objector bears the burden of establishing standing); *see also In re Hydroxycut Mktg. and Sales Practices Litig.*, No. 09-cv-1088 BTM, 2013 U.S. Dist. LEXIS 133413, at *61, 2013 WL 5275618, at *2 (S.D. Cal. Sep. 17, 2013) (striking objection because objector had not "carried his burden of proving standing as a class member").

Having failed to provide any transactional information or documentation, McRoberts also fails to show that his claimed losses were attributable to anything alleged in the Complaint. It is entirely possible that he purchased 3000 shares of Fitbit stock at some point during the Exchange Act Class Period and later sold them all for $6.66 less than the purchase price, resulting in $20,000 in transactional losses. But without knowing the dates of these purchases and sales, there is no way to determine whether any such transactional losses were attributable to anything alleged in the Complaint, as opposed to the numerous other factors that affected Fitbit's stock price. The securities laws do not exist to reimburse investors for all trading losses regardless of cause. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345 (2005) (securities fraud actions serve "not to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause"). This is also explained in the Plan of Allocation set forth in the Notice:

> Federal securities laws allow investors to recover for losses caused by disclosures which corrected Defendants' previous misleading statements or omissions. Thus, in order to have been damaged by the alleged violations of the federal securities laws, Fitbit Common Stock and Call Options purchased or otherwise acquired during the Exchange Act Class Period must have been held until such time when its price declined due to the disclosure of information which corrected an allegedly misleading statement or omission.

Notice at 13. Nor do the securities laws provide "damages for mental anguish, depression, [and] loss of trust in the stock market."

Finally, while it is impossible to estimate how much McRobert might receive under the Settlement given his failure to provide any transactional information or documentation, his calculation of "3000 shares x $.07 = $210.00" (presumably an estimate of how much he expected to receive under the Settlement) is undoubtedly incorrect. Among other things, it is unclear where "$.07" comes from.[3]

II. Christopher Brown's Objection is Meritless and Should Be Overruled

As demonstrated in the Fee Motion, the requested fee award of 25% of the Settlement Fund, or $8,250,000, is entirely fair and reasonable under applicable legal standards, especially in light of the contingency risk undertaken. Christopher Brown fails to offer any reason for the Court to conclude otherwise.

Christopher Brown objects to the requested fee award. He states that he is "a member of the class" and that he has "submitted claim documentation to be part of the settlement claim and expect to be awarded if and when the settlement is approved." He argues that an "award of 28% percent of the Settlement Fund ($9.24 Million) does not appear to be reflective of the attorneys' efforts in this matter including pricing in all factors of risk."[4] He asserts that "[i]n accepting this case, the class attorneys have positioned themselves to become investment partners in the litigation" and that "the members of the class bought and sold 1.94 Billion Shares of Fitbit stock representing a total exchange of $51.5 Billon (USD)," which "is more than the GOP of Slovenia and represents a tremendous risk bore by the members of the class." He urges the Court to "cap the attorneys' awards to 15%" of the Settlement Fund, which he claims is "industry norm per Brian Fitzpatrick of Vanderbilt Law School." He also argues that he has not "been provided

[3] The Notice stated that the requested *fee and expense award and compensatory awards* would total "approximately $0.07 per share" and that the "estimated average recovery, after deducting attorneys' fees and expenses, administrative costs, and Class Representative awards of reasonable costs and expenses (if approved by the Court), is $0.17 per share." Notice at 1. Otherwise, there is no reference to "$.07" in the Notice.

[4] The requested fee award is actually ***25%*** of the Settlement Fund, not 28% as Mr. Brown states.

evidence for the work performed by the attorneys in this matter" and demands "a strict accounting of the attorneys' time and expenses and risk in the present case." Letter from Christopher Brown (ECF No. 222).

This objection fails for many reasons.

First, Mr. Brown is simply wrong in his assertion that he has "not been provided evidence for the work performed by the attorneys in this matter." The Fee Motion amply detailed Class Counsel's efforts in this Action, supported by three separate declarations with detailed compilations of the hours worked by each attorney and their hourly rates, as well as a breakdown of different categories of expenses incurred in prosecuting this litigation. *See* Declaration of Brian Murray (ECF No. 211); Declaration of Murielle J. Steven Walsh (ECF No. 212); Declaration of Laurence Rosen (ECF No. 213). The Fee Motion also showed that a lodestar cross-check based on these submissions fully confirms the reasonableness of the requested fee award. Fee Motion at 16–17. Courts have consistently found the level of detail provided here adequate for a lodestar cross-check and have rejected objectors who insisted on a higher, onerous level of detail. *See Hartless v. Clorox Co.*, 273 F.R.D. 630, 644-45 (S.D. Cal. 2011) ("Neither California courts or federal courts require counsel to submit complete time records when requesting an attorneys' fee award. A court may review the summaries provided in declarations by counsel without reviewing contemporaneous time records."), *aff'd*, 473 F. App'x 716 (9th Cir. 2012); *Lobatz v. U.S. W. Cellular of Cal., Inc.*, 222 F.3d 1142, 1148-49 (9th Cir. 2000) (affirming fee award where "district court relied on class counsel's documented costs and summaries of the time they spent on the case and the fees applicable for the services they rendered" and "did not examine class counsel's contemporaneous time records, but… carefully reviewed the requests and summaries they submitted").[5]

Second, 15% is *not* the "industry norm" for fee awards as Mr. Brown claims, and the article Mr. Brown cites for this proposition does not say this. *See* Letter from Christopher Brown

[5] Although the Ninth Circuit has consistently rejected any *requirement* that district courts examine more detailed billing records, Class Counsel can certainly make them available to the Court if they would be helpful in assessing the reasonableness of the requested fee award.

(citing Fitzpatrick, Brian T., *An Empirical Study of Class Action Settlements and Their Fee Awards* (July 7, 2010), Journal of Empirical Legal Studies, Vol. 7, 2010, available at https://ssrn.com/abstract=1442108 or http://dx.doi.org/10.2139/ssrn.1442108). In fact, that article calculated that, among federal class action settlements in 2006 and 2007, the "average [fee] award was 25.4% and the median was 25%" and "[m]ost fee awards were between 25% and 35%." *Id*. at 26–27. The article similarly shows mean and median fee awards of 24.7% and 25.0% in securities cases, and 23.9% and 25.0% in the Ninth Circuit. *Id*. at 29–30.[6]

These findings are consistent with Ninth Circuit precedent establishing "twenty-five percent of the recovery as a 'benchmark' for attorneys' fees calculations under the percentage-of-recovery approach." *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000). It is also consistent with more recent research finding that, in cases settling for between $25 million and $100 million (like the $33 million Settlement in this case), the median fee award between 1996 and 2011 was 26.8%; between 2012 and 2017, it was 25%. *NERA Economic Consulting; Recent Trends in Securities Class Action Litigation: 2017 Full-Year Review* (2018) at 42, http://www.nera.com/content/dam/nera/publications/2018/PUB_Year_End_Trends_Report_0118_final.pdf.

Fourth, the Fee Motion demonstrated that contingency risk assumed by counsel in bringing this case strongly supports the requested 25% fee award, and Mr. Brown fails to show otherwise. Class Counsel elected to pursue this Action knowing full well that it was embarking on a complex, expensive, and lengthy litigation requiring tens of thousands of dollars and hundreds of hours of attorney time, with no guarantee of being compensated for time spent or reimbursed for expenses incurred—ultimately spending more than 6,647.3 hours and

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[6] The 15% figure cited by Mr. Brown appears to come from the article's statement that "judges approved 688 class action settlements over this two-year period, involving nearly $33 billion," of which "roughly $5 billion was awarded to class action lawyers, or about 15% of the total." *Id*. at 1. But the article makes clear that this aggregate percentage is heavily skewed by the $6.6 billion Enron settlement in 2006 and a few other extremely large settlements with smaller percentage fee awards. *See id*. at 23, 32 ("fee percentages are strongly and inversely related to the size of the settlement both in securities fraud and other cases").

$242,402.37. *See* Fee Motion at 11–14; Final Approval Motion at 10–12; Murray Declaration ¶¶5–20. In such circumstances, as the Ninth Circuit has explained:

> It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases. Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose.

In re Wash. Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1300 (9th Cir. 1994) (citations omitted). Accordingly, it is an "abuse of discretion to fail to apply a risk multiplier…when (1) attorneys take a case with the expectation that they will receive a risk enhancement if they prevail, (2) their hourly rate does not reflect that risk, and (3) there is evidence that the case was risky." *Fischel v. Equitable Life Assurance Soc'y of the United States*, 307 F.3d 997, 1008 (9th Cir. 2002). Thus, the contingency risk assumed by counsel strongly supports the requested 25% fee award. *See Vizcaino*, 290 F.3d at 1048, 1050 (affirming 28% fee award in part because the case was "extremely risky for class counsel" and "entailed hundreds of thousands of dollars of expense").

Unable to challenge any of this either factually or legally, Mr. Brown tries to argue that the requested fee award is "disproportionate to the amount of risk assumed by the attorneys for the class" because the Settlement Class actually "bore the lion share of risk" because "the members of the class bought and sold 1.94 Billion Shares of Fitbit stock representing a total exchange of $51.5 Billon (USD)" which "is more than the GDP of Slovenia." But it is unclear how Fitbit's trading volume could have exposed the Settlement Class to any "risk" that has anything to do with this Action, and regardless the issue has nothing to do with the contingency risk (and the resulting financial burden) assumed by Class Counsel for the benefit of the Settlement Class or the reasonableness of the requested fee award in light of that risk.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court overrule the objections in their entirety and (1) finally certify the Settlement Class, (2) grant final approval to the Settlement, (3) enter the proposed Order and Final Judgment in the form filed herewith, which is substantially the same as that submitted with the Final Approval Motion (*see* ECF No. 209-1) but has been updated to include an Exhibit A listing persons who have validly and timely requested exclusion from the Settlement Class, (4) award attorneys' fees in the amount of 25% of the Settlement Fund, or $8,250,000, plus interest, and reimbursement of $242,402.37 in litigation expenses necessarily and reasonably incurred in this Action, and (5) grant the requested compensatory awards to the Class Representatives, totaling $6,025, for their efforts expended in this Action.

DATED: April 13, 2018

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Lead Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

BRIAN H. ROBB, Individually and on Behalf of All Others Similarly Situated,

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FITBIT INC., JAMES PARK, WILLIAM R. ZERELLA, ERIC N. FRIEDMAN, JONATHAN D. CALLAGHAN, STEVEN MURRAY, CHRISTOPHER PAISLEY, MORGAN STANLEY & CO. LLC, DEUTSCHE BANK SECURITIES INC., and MERRILL LYNCH, PIERCE, FENNER & SMITH INC.,

Defendants.

No. 3:16-cv-00151-SI

CLASS ACTION

[PROPOSED] ORDER AND FINAL JUDGMENT

Hon. Susan Illston

On the 20th day of April, 2018, a hearing having been held before this Court to determine whether the terms and conditions of the Stipulation and Agreement of Settlement dated January 18, 2018 (the "Stipulation") are fair, reasonable, and adequate for the settlement of all claims asserted by the Settlement Class against Fitbit Inc. ("Fitbit"), James Park, William R. Zerella, Eric N. Friedman, Jonathan D. Callaghan, Steven Murray, and Christopher Paisley (the "Individual Defendants," and together with Fitbit, the "Fitbit Defendants"), Morgan Stanley & Co. LLC, Deutsche Bank Securities Inc., and Merrill Lynch, Pierce, Fenner & Smith Incorporated (the "Underwriter Defendants" and together with the Fitbit Defendants, "Defendants")[1];

The Court having considered all matters submitted to it at the hearing and otherwise; and

It appearing that the Notice substantially in the form approved by the Court in the Order Preliminarily Approving Settlement (Dkt. No. 207) ("Preliminary Approval Order") was mailed to all reasonably identifiable Settlement Class Members; and

[1] Plaintiffs, on behalf of themselves and the Settlement Class, and Defendants are collectively referred to as the "Parties".

It appearing that the Publication Notice substantially in the form approved by the Court in the Preliminary Approval Order was published in accordance with the Court's specifications;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. Unless indicated otherwise, all capitalized terms used herein have the same meanings as set forth and defined in the Stipulation.

2. The Court has jurisdiction over the subject matter of this action (the "Action"), Plaintiffs, all Settlement Class Members, and the Defendants, including all Settlement Class Members who did not timely file a request for exclusion from the Settlement Class by the relevant deadline pursuant to the Preliminary Approval Order.

3. Pursuant to Fed. R. Civ. P. 23(a) and (b)(3) and for the purposes of the Settlement only, the Court hereby certifies the Settlement Class, and appoints Lead Plaintiff the Fitbit Investor Group (comprised of Timothy Flynn, Jesse M. Koth and Kelley Koth, Viet Tran, and Mark Cunningham) as Class Representative for the Settlement Class, and Lead Counsel Glancy Prongay & Murray LLP and Pomerantz LLP as Class Counsel for the Settlement Class.

4. The Court hereby finds that the forms and methods of notifying the Settlement Class of the Settlement and its terms and conditions: met the requirements of due process, Rule 23 of the Federal Rules of Civil Procedure, and 15 U.S.C. § 78u-4(a)(7) (added to the Exchange Act by the Private Securities Litigation Reform Act of 1995); constituted the best notice practicable under the circumstances; and constituted due and sufficient notice to all persons and entities entitled thereto of these proceedings and the matters set forth herein, including the Settlement and Plan of Allocation. No Settlement Class Member is relieved from the terms of the Settlement, including the releases provided for therein, based upon the contention or proof that such Settlement Class Member failed to receive actual or adequate notice. A full opportunity has been offered to the Settlement Class Members to object to the proposed Settlement and to participate in the hearing thereon. The Court further finds that the notice provisions of the Class Action Fairness Act, 28 U.S.C. § 1715, were fully discharged and that the statutory waiting period has elapsed. Thus, it is hereby determined that all members of the Settlement Class are bound by this Order and Final Judgment except those listed on Exhibit A hereto.

5. The Settlement is approved as fair, reasonable, adequate, and in the best interests of the Settlement Class. The Court further finds that there was no collusion, that the Settlement set forth in the

Stipulation is the result of arm's-length negotiations between experienced, competent counsel representing the interests of the Settlement Class Members and the Defendants, and that the record is sufficiently developed and complete to have enabled the Plaintiffs and the Defendants to have adequately evaluated and considered their positions. Plaintiffs and Defendants are directed to consummate the Settlement in accordance with the terms and provisions of the Stipulation.

6. Except with respect to individual claims by persons who have validly and timely requested exclusion from the Settlement Class (listed on Exhibit A), all of the claims asserted in the Amended Complaint or the Action against the Defendants are hereby dismissed with prejudice.

7. Plaintiffs and each of the other Settlement Class Members, on behalf of themselves and their respective spouses, heirs, executors, beneficiaries, administrators, successors, assigns, and any Person(s) (claiming now or in the future) through or on behalf of any of them directly or indirectly, regardless of whether such Plaintiff or Settlement Class Member ever seeks or obtains by any means (including, without limitation, by submitting a Claim to the Settlement Administrator) any distribution from the Net Settlement Fund: (a) shall be deemed by this Settlement to have, and by operation of law and of the Judgment shall have, fully, finally, and forever released, relinquished, waived, dismissed, and discharged each and all of the Settlement Class Claims (including Unknown Claims), against each and all of the Released Persons, and shall have covenanted not to sue any Released Person with respect to any Settlement Class Claims (including any Unknown Claims) except to enforce the releases and other terms and conditions contained in this Stipulation or the Judgment entered pursuant hereto and (b) shall be forever permanently barred, enjoined and restrained from commencing, instituting, asserting, maintaining, enforcing, prosecuting or otherwise pursuing, either directly or in any other capacity, any of the Settlement Class Claims (including any Unknown Claims) against any Released Person in the Action or in any other action or any proceeding, in any state, federal or foreign court of law or equity, arbitration tribunal, administrative forum or other forum of any kind.

8. Defendants, for themselves and on behalf of each of their respective spouses, heirs, executors, beneficiaries, administrators, successors, assigns and any Person(s) (claiming now or in the future) through or on behalf of any of them directly or indirectly: (a) shall be deemed to have, and by operation of law and of the Judgment shall have, fully, finally and forever released, relinquished, waived, discharged, and dismissed each and all of the Defendant Claims (including Unknown Claims)

against Plaintiffs in the Action, Lead Counsel and their attorneys, and all other Settlement Class Members, the members of each Settlement Class Member's immediate family, any entity in which any member of any Settlement Class Member's immediate family has or had a controlling interest (directly or indirectly), any estate or trust of which any Settlement Class Member is the settlor or which is for the benefit of any Settlement Class Member and/or members of his or her family and (b) shall be forever permanently barred, enjoined and restrained from commencing, instituting, asserting, maintaining, enforcing, prosecuting or otherwise pursuing, either directly or in any other capacity, any of the Defendant Claims (including any Unknown Claims) against the Plaintiffs, Lead Counsel and their attorneys, and all other Settlement Class Members in the Action or in any other action or any proceeding, in any state, federal or foreign court of law or equity, arbitration tribunal, administrative forum or other forum of any kind.

9. The Court finds that all parties and their counsel have complied with each requirement of Fed. R. Civ. P. 11 as to all proceedings herein.

10. Neither this Order and Final Judgment, the Preliminary Approval Order, the Stipulation (including the exhibits thereto), the Memorandum Of Understanding ("MOU"), nor any of the negotiations, documents or proceedings connected with them shall be argued to be or offered or received:

a. against any of the Released Persons as evidence of, or construed as evidence of, any presumption, concession, or admission by any of the Released Persons with respect to the truth of any fact alleged by the Plaintiffs in the Amended Complaint or the Action, or the validity of any claim that has been or could have been asserted against any of the Defendants in the Amended Complaint or the Action, or the deficiency of any defense that has been or could have been asserted in the Action, or of any wrongdoing or liability by any of the Defendants, or any liability, fault, misrepresentation, or omission with respect to any statement or written document approved or made by any of the Defendants;

b. against the Plaintiffs or any Settlement Class Member or Lead Counsel as evidence of, or construed as evidence of, any infirmity of the claims alleged by the Plaintiffs in the Amended Complaint or the Action or of any lack of merit to the claims or the

Amended Complaint or the Action or of any bad faith, dilatory motive, or inadequate prosecution of the claims or the Amended Complaint or the Action;

c. against any of the Defendants, the Plaintiffs, or any Settlement Class Member, or their respective legal counsel, as evidence of, or construed as evidence of, any presumption, concession, or admission by any of the Defendants, the Plaintiffs, or any Settlement Class Member, or their respective legal counsel, with respect to any liability, negligence, fault, or wrongdoing as against any of the Defendants, the Plaintiffs, or any Settlement Class Member, or their respective legal counsel, in any other civil, criminal, or administrative action or proceeding, other than such actions or proceedings as may be necessary to effectuate the provisions of this Stipulation, provided, however, that if this Stipulation is approved by the Court, the Defendants, the Plaintiffs, and any Settlement Class Member, or their respective legal counsel, may refer to it to effectuate the liability protection and releases granted them hereunder;

d. against any of the Defendants as evidence of, or construed as evidence of, any presumption, concession, or admission by any of them that the Settlement Consideration represents the amount which could or would have been received after trial of the Action against them;

e. against the Plaintiffs or any Settlement Class Member as evidence of, or construed as evidence of, any presumption, concession, or admission by any of the Plaintiffs or any Settlement Class Member that any of their claims are without merit, or that any defenses asserted by the Defendants have any merit, or that damages recoverable in the Action would not have exceeded the Settlement Fund; or

f. as evidence of, or construed as evidence of, any presumption, concession, or admission that the modifications to the class definitions as ordered in the Preliminary Approval Order are appropriate in this Action, except for purposes of this Settlement.

11. Notwithstanding the foregoing Paragraph 10, the Settling Parties and other Released Persons may file or refer to this Order and Final Judgment, the Stipulation, Preliminary Approval

Order, and/or any Claim Form: (a) to effectuate the liability protections granted hereunder or thereunder, including without limitation, to support a defense or counterclaim based on principles of *res* judicata, collateral estoppel, release, good-faith settlement, judgment bar or reduction, or any theory of claim preclusion or issue preclusion or similar defense or counterclaim; (b) to obtain a judgment reduction under applicable law; (c) to enforce any applicable insurance policies and any agreements relating thereto; or (d) to enforce the terms of the Stipulation and/or this Order and Final Judgment.

12. Exclusive jurisdiction is hereby retained over the Settling Parties for all matters relating to the Action, including the administration, interpretation, effectuation or enforcement of the Stipulation, or Settlement and this Order and Final Judgment, and including any application for fees and expenses incurred in connection with administering and distributing the Settlement proceeds to the Settlement Class Members.

13. Without further order of the Court, the Settling Parties may agree to reasonable extensions of time to carry out any of the provisions in the Stipulation.

14. There is no just reason for delay in the entry of this Order and Final Judgment and immediate entry by the Clerk of the Court is directed pursuant to Fed. R. Civ. P. 54(b).

15. Any order approving or modifying the Plan of Allocation, Class Counsel's application or award of attorneys' fees and expenses, or Plaintiffs' application or award for payment of reasonable costs and expenses, shall be separate from, and shall not in any way disturb or affect, the finality of this Judgment, the Stipulation, or the Settlement contained therein, nor any act performed or document executed pursuant to or in furtherance of the Stipulation or the Settlement.

16. In the event that the Settlement does not become Final and effective in accordance with the terms and conditions set forth in the Stipulation, then this Judgment shall be vacated, rendered null and void and be of no further force and effect, except as otherwise provided by the Stipulation, and this Judgment shall be without prejudice to the rights of the Settling Parties, and the Settling Parties shall be deemed to have reverted *nunc pro tunc* to their respective status prior to the execution of the MOU, and the Settling Parties shall proceed in all respects as if the MOU and the Stipulation had not been executed and the related orders had not been entered, without prejudice in any way from the negotiation, fact, or terms of the Settlement, and preserving all of their respective claims and defenses in the Action, and shall revert to their respective positions in the Action. In such circumstances, the

parties shall thereafter work together to arrive at a mutually agreeable schedule for resuming litigation of the Action. For the avoidance of doubt, in the event of such an occurrence the Fitbit Defendants' previously filed motion for summary judgment shall remain withdrawn and inoperative until and unless re-noticed, at which time a new briefing schedule shall be set for that motion if not already agreed.

17. In the event the Judgment does not become Final or the Settlement is terminated in accordance with the terms and conditions set forth in the Stipulation, within ten (10) business days of entry of the order rendering the Settlement and Judgment non-Final or notice of the Settlement being terminated, all monies then held in the Escrow Account, including interest earned but less any costs or expenses properly incurred as set forth herein, shall be returned to the Defendants. Plaintiffs and the Settlement Class Members shall have no responsibility for the return of such consideration.

18. The Court's orders entered during this Action relating to the confidentiality of information shall survive this Settlement.

SO ORDERED in the Northern District of California on _____, 2018.

_____

THE HON. SUSAN ILLSTON

UNITED STATES DISTRICT JUDGE

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Exhibit A

Name	Location
Paul Edwards	Bayfield, Colorado
Frederick E. Edwards	Bayfield, Colorado
Marzio Giacchetta	Dornach, Switzerland
Peter W. Richards	San Francisco, California
Lorene Carter Ohman	Duncan, South Carolina
Henry M. Gowin	Minneapolis, Minnesota
Lisa Anne Halford	Lenox, Massachusetts
Benjamin J. Schauer	Denmark, Wisconsin
Judy S. Mathus	Lynchburg, Virginia
Albert S. Moy	Warren, Michigan
William J. Krizsan	Twinsburg, Ohio