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**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF CALIFORNIA**

| | |
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| BRIAN H. ROBB, Individually and on Behalf of All Others Similarly Situated,<br><br>Plaintiffs,<br><br>v.<br><br>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.,<br><br>Defendants. | No. 3:16-cv-00151-SI<br><br>CLASS ACTION<br><br>**PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT, CLASS CERTIFICATION, AND PLAN OF ALLOCATION**<br><br>Date: April 20, 2018<br>Time: 10:00 a.m.<br>Judge: Hon. Susan Illston<br>Courtroom: 1 – 17th Floor |

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## NOTICE OF MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on April 20, 2018 at 10:00 a.m., or as soon thereafter as counsel may be heard, at a Settlement Fairness Hearing before the Honorable Susan Illston, United States District Judge, at the United States District Court for the Northern District of California, 450 Golden Gate Avenue, Courtroom 1, 17th Floor, San Francisco, California, 94102, Class Representatives Timothy Flynn, Jesse M. Koth III, Kelley S. Koth, Viet Tran, and Mark Cunningham will move for an order (1) granting final approval to the settlement set forth in the Stipulation and Agreement of Settlement dated January 18, 2018 (Dkt. No. 203) (the "Stipulation"), (2) approving the Plan of Allocation[1] as fair, reasonable and adequate, (3) determining that the notice program satisfied due process and complied with Fed. R. Civ. P. 23(e), (4) certifying the Settlement Class, and (5) entering the proposed order filed herewith and dismissing the Action with prejudice.

This Motion is supported by the incorporated memorandum of points and authorities; the proposed order filed herewith; the Stipulation and exhibits thereto; the declarations of Brian Murray, Murielle J. Steven Walsh, Laurence Rosen, Brian Manigault, Timothy Flynn, Jesse M. Koth III, Kelley S. Koth, Viet Tran, and Mark Cunningham; Plaintiffs' Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Compensatory Awards for Plaintiffs, filed herewith (the "Fee & Expense Motion"); the Court's file in this Action; and any other argument or evidence that Lead Counsel may present at the Settlement Fairness Hearing or that the Court may otherwise request.

The Settlement provides a total Settlement Amount of thirty three million dollars ($33,000,000.00). To date, despite the mailing of 359,136 notices, no objections to the Settlement have been filed and only one Settlement Class Member has requested exclusion. *See* Manigault Decl. ¶¶ 8, 12, 13. The deadline for filing any such objection is April 3, 2018. To the extent any such objections are filed, Lead Counsel will respond to each such filing by April 13, 2018.

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[1] All capitalized terms, unless otherwise defined herein, have the same meaning herein as set forth in the Stipulation.

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**STATEMENT OF ISSUES TO BE DECIDED**

1. Whether the Settlement, on the terms and conditions provided for in the Stipulation, should be finally approved as fair, reasonable, and adequate.

2. Whether the Plan of Allocation should be approved as fair, reasonable, and adequate.

3. Whether the notice program satisfied due process and complied with Fed. R. Civ. P. 23(e).

4. Whether the Court should grant final certification to the Settlement Class.

5. Whether the Court should enter the proposed Order and Final Judgment and dismiss the Action with prejudice.

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## 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, are pleased to present, for the Court's approval, a $33 million cash settlement resolving all claims in this Action (the "Settlement"), under the terms set forth in the Stipulation and Agreement of Settlement dated January 18, 2018 (Dkt. No. 203) (the "Stipulation").

This Settlement is not merely fair, reasonable, and adequate, but is an outstanding result. As detailed herein, the Settlement provides the Settlement Class with almost 20% of reasonably recoverable damages—significantly better than the historical norm for settlements in securities class actions. Moreover, Plaintiffs and their counsel have a thorough understanding of the strengths and weaknesses of their claims, including the potential limitations on damages and recovery. The Settlement was reached after almost two years of litigation, including (1) an extensive investigation conducted by Class Counsel; (2) the preparation of the detailed Amended Complaint; (3) contentious motion practice with respect to Defendants' motion to dismiss, motion for reconsideration, and motion for summary judgment, each involving a voluminous documentary record; (4) discovery, including review and analysis of documents produced by Defendants as well as by analysts and other third parties; (5) briefing of class certification; (6) extensive consultations with experts to evaluate potential damages; (7) review and analysis of the documentary record and docket of the factually related Fitbit consumer case; (8) vigorous arm's-length settlement negotiations including two formal mediation sessions, extensive interim negotiations, further consultations with experts, and the preparation and exchange of formal mediation statements; and (9) the preparation of the preliminary and final approval motions and related documents.

Having evaluated the facts and applicable law, and recognizing the risks and expense of continued litigation, Plaintiffs and Lead Counsel respectfully submit that the proposed Settlement is in the best interests of the Settlement Class. Before entering into the Settlement, Plaintiffs and Lead Counsel understood the strengths and weaknesses of the claims and defenses and engaged in significant efforts to protect the interests of the Settlement Class. While

Plaintiffs believe the merits of the case are strong, the proposed Settlement is an excellent result and is in the best interests of the Settlement Class in light of the risks and costs of litigating this Action through trial. Accordingly, Plaintiffs request final approval of the Settlement as fair, reasonable, and adequate.

## FACTUAL AND PROCEDURAL BACKGROUND

This is a federal securities class action against Fitbit Inc. ("Fitbit"); certain of Fitbit's officers and directors (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"); and certain investment banks that served as underwriters in Fitbit's initial public offering (Morgan Stanley & Co. LLC, Deutsche Bank Securities Inc., and Merrill Lynch, Pierce, Fenner & Smith Incorporated) (the "Underwriter Defendants").

Fitbit develops, manufactures, and sells wearable fitness-tracking devices. Fitbit's products monitor a user's fitness level by tracking daily activity statistics, including steps taken, distance traveled, calories burned, and stairs climbed. In October 2014, Fitbit announced two new products featuring its new "proprietary PurePulse™ optical heart rate technology," which claimed to provide "continuous and automatic wrist-based heart rate tracking." Fitbit subsequently held its initial public offering ("IPO") on or about June 18, 2015 and a secondary public offering ("SPO") on or about November 13, 2015, raising net proceeds of $416 million and $82.7 million, respectively. Plaintiffs allege that Defendants unlawfully inflated Fitbit's stock price by making materially false or misleading statements and/or failing to disclose material facts concerning the accuracy of Fitbit's heart-rate tracking devices. Plaintiffs further allege that investors were harmed when the truth was revealed through a series of partial corrective disclosures between January 2016 and May 2016. Defendants denied these allegations.

### A. The Litigation

This action was filed on January 11, 2016. On May 10, 2016, the Court appointed the Fitbit Investor Group (consisting of Timothy Flynn, Jesse M. Koth, Kelley Koth, Viet Tran, and

Mark Cunningham) as Lead Plaintiff and approved Lead Plaintiff's selection of Pomerantz and GPM as Lead Counsel.

On July 1, 2016, drawing upon a substantial investigation of Defendants' public statements and statements by three confidential witnesses, Plaintiffs filed the operative Amended Complaint for Violations of the Federal Securities Laws (Dkt No. 89) ("AC"). The AC asserted claims under §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act"), and §§ 11 and 15 of the Securities Act of 1933 ("Securities Act"), arising from alleged misstatements and omissions that artificially inflated the price of Fitbit's stock between June 18, 2015 and May 19, 2016, inclusive (the "Exchange Act Class Period"). Murray Decl. ¶8. Plaintiffs alleged that the misleading nature of the Defendants' statements remained hidden until January 5, 2016, when the truth began to emerge that Fitbit devices' heart-rate tracking technology was highly inaccurate. Murray Decl. ¶5.

On July 29, 2016 and August 5, 2016, respectively, the Fitbit Defendants and Underwriter Defendants moved to dismiss. (Dkt. Nos. 107, 110.) Defendants argued that, among other things, the challenged statements were neither false nor actionable because they did not specify any particular level of accuracy of the products, the AC failed to plead scienter, and the alleged corrective disclosures did not reveal the falsity of the challenged statements. On October 26, 2016, the Court denied Defendants' motions to dismiss. (Dkt. No. 122.) The Fitbit Defendants later filed a motion for reconsideration on the issue of scienter, which the Court denied on January 19, 2017 (Dkt. No. 147). Murray Decl. ¶9.

On March 3, 2017, Plaintiffs filed a motion for class certification (Dkt No. 150), supported by multiple declarations and an expert report (Dkt Nos. 151, 152). Murray Decl. ¶12. The Defendants filed a statement of non-opposition to the class certification motion (Dkt No. 153). On June 21, 2017, the Court so-ordered the parties' stipulation (Dkt. No. 184), appointing Lead Plaintiff the Fitbit Investor Group (composed of Timothy Flynn, Jesse M. Koth, Kelley Koth, Viet Tran, and Mark Cunningham) as Class Representatives, appointing Lead Counsel Glancy Prongay & Murray LLP and Pomerantz LLP as Class Counsel, and certifying the following classes:

a. The Exchange Act Class: 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"). Excluded from the Exchange Act Class are (i) Defendants and the Individual Defendants' family members; (ii) directors and officers of Fitbit and their families; (iii) any entity in which the Fitbit Defendants have or had a controlling interest; and (iv) any entity in which the Underwriter Defendants have or had a majority interest.

b. The Securities Act Class: 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 (the "IPO"). Excluded from the Securities Act Class are (i) Defendants and the Individual Defendants' family members; (ii) directors and officers of Fitbit and their families; (iii) any entity in which the Fitbit Defendants have or had a controlling interest; and (iv) any entity in which the Underwriter Defendants have or had a majority interest.

Following the Court's denial of Defendants' motions to dismiss, Plaintiffs conducted substantial discovery. Plaintiffs served requests for production on the Fitbit Defendants and Underwriter Defendants on December 6, 2016. The Parties exchanged initial disclosures on December 15, 2016. On March 10, 2017, Plaintiffs served interrogatories on Fitbit, the Individual Defendants, and the Underwriter Defendants. On April 18, 2017, Defendants responded to Plaintiffs' interrogatories. Over the course of February 13, 2017 to April 28, 2017, the Parties negotiated the terms of the Protective Order (Dkt No. 169) and ESI Protocol (Dkt No. 168). From June to August 2017, Plaintiffs sent third-party subpoenas to various stock analysts and a former Fitbit contractor, and received hundreds of pages of documents in response to these subpoenas. On or about August 3, 2017 the Fitbit Defendants produced thousands of pages of documents in response to certain of Plaintiffs' requests for production. On or about August 4, 2017 the Underwriter Defendants produced tens of thousands of pages of documents in response to certain of Plaintiffs' requests for production. On or about November 10, 2017, the Fitbit Defendants continued to meet their discovery obligations by producing tens of thousands of pages of additional documents to Plaintiffs. Plaintiffs conducted an exhaustive analysis of public documents as well was the documents obtained in discovery, in order to assess the fairness, reasonableness, and adequacy of the Settlement. Murray Decl. ¶13.

On April 26, 2017, the Fitbit Defendants filed a motion for summary judgment (Dkt No. 158), along with declarations and voluminous exhibits (Dkt Nos. 159-163), arguing that factors

1 other than the correction of the alleged omissions and misrepresentations had caused the decline
2 in Fitbit's stock price. On May 10, 2017, Plaintiffs filed their opposition and a motion (with
3 numerous exhibits) to stay consideration of Defendants' motion for summary judgment pending
4 the completion of relevant discovery. (Dkt. Nos. 170–71.) On May 12, 2017, before further
5 briefing on either motion, the parties informed the Court that they intended to pursue mediation,
6 and the Court agreed to defer consideration of the motions until after mediation. Murray Decl.
7 ¶14.

8 **B. The Settlement**

9 Settlement negotiations included two all-day mediation sessions on August 9, 2017 and
10 September 14, 2017 before nationally regarded mediators Hon. Daniel Weinstein and Jed
11 Melnick, Esq. of JAMS. In advance of these sessions, the parties exchanged detailed mediation
12 statements addressing liability and damages. During the mediation sessions, both sides made
13 adversarial presentations about the merits of Plaintiffs' claims and the defenses to those claims.
14 The negotiations were at all times hard-fought and at arms-length and produced a result that the
15 Parties believe to be in their respective best interests. After extensive negotiations, the Parties
16 reached an oral agreement in principle at the September 14, 2017 mediation session, and the
17 Parties signed a Memorandum of Understanding ("MOU") on September 26, 2017. After
18 extensive further negotiations—including written and telephonic discussions, and exchanges of
19 detailed redlines—the parties executed the original Stipulation and Agreement of Settlement
20 and its exhibits on December 26, 2017. (Dkt No. 202.) An amended Stipulation and Agreement
21 of Settlement with exhibits was executed and filed on January 18, 2018 (Dkt No. 203) after
22 further discussions and negotiations. Murray Decl. ¶15.

23 While Plaintiffs and Lead Counsel believe the Settlement Class has valid claims against
24 Defendants, they faced significant risks in ultimately proving all elements of their claims.
25 Defendants denied any liability or damages and would have had numerous opportunities to
26 convince the Court, a jury, or appellate courts. No doubt, they would have raised such
27 challenges at every opportunity, including in a motion for summary judgment, at trial, and
28 appeals, making successful recovery uncertain. The Settlement eliminates these risks and

provides the Settlement Class with a certain total recovery of $33 million in cash. In light of the obstacles to recovery and the substantial time and expense that continued litigation would require, Plaintiffs and Lead Counsel believe the Settlement is a good result for the Settlement Class, and provides a fair and reasonable resolution of the claims against Defendants.

### C. Preliminary Approval and Dissemination of Notice

On January 8, 2018, Plaintiffs moved for preliminary approval of the Settlement and for certain other relief including modification of class definitions (Dkt No. 201). An amended Stipulation and Agreement of Settlement was executed and filed on January 18, 2018 (Dkt No. 203). On January 19, 2018, following a preliminary approval hearing with all parties, the Court entered an order preliminarily approving the Settlement and the Plan of Allocation and directing that notice be disseminated to the Settlement Class Members (Dkt No. 207) (the "Preliminary Approval Order"). Murray Decl. ¶16.

Pursuant to the Preliminary Approval Order, the Settlement Administrator disseminated 359,136 copies of the Court-approved[2] Notice of Proposed Class-Action Settlement (the "Notice") to potential Settlement Class Members and nominees thereof who could be identified with reasonable effort. Manigault Decl. ¶ 8. The Court-approved Notice included all the information required by Rule 23(c)(2)(B) or the PSLRA or that was otherwise necessary for Settlement Class Members to make an informed decision regarding the proposed Settlement, including: (i) an explanation of the nature of the Action and the claims asserted; (ii) the definition of the Settlement Class; (iii) the $33 million amount of the Settlement; (iv) how to file a claim, and a description of the Plan of Allocation; (v) the parties' reasons for proposing the Settlement; (vi) that Lead Counsel would apply for an award of attorneys' fees not to exceed 28% of the Settlement Fund, litigation expenses not to exceed $250,000.00, and compensatory awards of up to $5,000 each for Lead Plaintiffs; (vii) how to opt out of the Class; (viii) how to object to the Settlement, Plan of Allocation, or the requested attorneys' fees or expenses; (ix)

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[2] Certain minor modifications were made to the Notice approved by the Court prior to dissemination to the Settlement Class. *See infra* at n.7. The final Notice remained substantially in the form approved by the Court.

how to contact Lead Counsel with any questions; (x) the dates and deadlines for certain Settlement-related events; and (xi) the binding effect of a judgment on Settlement Class members. *See* Manigault Decl. Exs. A (Notice) and C (Publication Notice).

The Settlement Administrator first mailed the Notice and Proof of Claim to the 202 individuals and organizations identified on Fitbit's shareholder transfer records as well as to 3,387 banks, brokerage companies, institutions, and other third-party nominees that frequently purchase and hold securities on behalf of others. Manigault Decl. ¶¶5-6. The Notice directed nominees to either forward copies of the Notice to the beneficial owners or to provide the addresses of such beneficial owners to the Settlement Administrator so the Settlement Administrator could send them directly. In total, the Settlement Administrator mailed 359,136 Notices and Proof of Claim forms to potential Settlement Class members or nominees. *Id.* at ¶8.

In addition, the Court-approved Publication Notice was published over *Business Wire* on February 8, 2018. *Id.* ¶ 10. The Proof of Claim and Release Form, Notice, Stipulation, and Preliminary Approval Order were also posted on the Settlement Administrator's website, along with the relevant Court-ordered deadlines. *Id.* ¶ 9. To date, there have been zero objections to any aspect of the Settlement, and only one request for exclusion. *Id.* ¶¶ 12–14.

## ARGUMENT

### I. The Settlement Warrants Final Approval

#### A. Standards for Judicial Approval of Class-Action Settlements

"Fed. R. Civ. P. 23(e) requires the district court to determine whether a proposed settlement is fundamentally fair, adequate, and reasonable." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). The Ninth Circuit recognizes "a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008); *see also* 2 H. Newberg & A. Conte, *Newberg on Class Actions* § 11.41 (4th ed. 2002) ("The compromise of complex litigation is encouraged by the courts and favored by public policy."). The question is "not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Id.* at 1027; *see also Carson v. Am. Brands*, 450 U.S. 79, 88 n.14 (1981) (courts

should "not decide the merits of the case or resolve unsettled legal questions"). Accordingly, courts "put a good deal of stock in the product of arms-length, non-collusive, negotiated resolution." *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). Consequently, a settlement hearing is "not to be turned into a trial or rehearsal for trial on the merits," nor should a proposed settlement "be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Officers for Justice v. Civil Serv. Com.*, 688 F.2d 615, 625 (9th Cir. 1982).

**B. The Settlement Process Was Procedurally Fair**

"The recommendation of experienced counsel carries significant weight in the court's determination of the reasonableness of the settlement." *Kirkorian v. Borelli*, 695 F. Supp. 446, 451 (N.D. Cal. 1988). Here, the Settlement is the product of arm's-length negotiations among counsel with extensive experience in securities class-action litigation following almost two years of vigorous litigation, including formal class certification proceedings and considerable motion practice and discovery. Class Counsel, Pomerantz LLP and Glancy Prongay & Murray LLP, are highly experienced in federal securities class actions and had a thorough understanding of the strengths and weaknesses of the parties' respective positions before agreeing to settle. This was a hard-fought case, involving a hotly contested motion to dismiss with a voluminous documentary record, a motion for reconsideration as to scienter, and a hotly contested motion for summary judgment with an even more voluminous documentary record. Defendants have produced tens of thousands of pages of documents, and third parties have produced hundreds of pages as well.

Class Counsel had a thorough understanding of the action and of the strengths and weaknesses of the parties' respective positions, and have determined that the Settlement is in the best interests of the Settlement Class, especially considering the expense, risks, difficulties, delays, and uncertainties of litigation. *See* Murray Decl. ¶¶17-20. Settlement negotiations included the exchange of detailed mediation statements addressing liability and damages and two all-day mediation sessions before nationally regarded mediators Hon. Daniel Weinstein and Jed Melnick, Esq. of JAMS, during which both sides made adversarial presentations about the merits of Plaintiffs' claims and the defenses thereto. The negotiations were at all times hard-fought and

at arms-length, and they produced a result that the parties believe to be in their respective best interests. The arms-length nature of the settlement negotiations and the involvement of an experienced mediator supports the conclusion that the Settlement is fair and was achieved free of collusion. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (a "mediator's involvement in . . . settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure"); *In re Cylink Sec. Litig.*, 274 F. Supp. 2d 1109, 1112 (N.D. Cal. 2003) ("oversight of the settlement negotiations" by former Magistrate Judge "provides every indication that those discussions were conducted at arms length"). Moreover, the mediators support the Settlement, the Settlement was reached only after formal class certification, and it has none of the indicia of collusion identified by the Ninth Circuit. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011) ("subtle signs" of collusion include a "disproportionate distribution of the settlement" between the class and class counsel, "a 'clear sailing' arrangement providing for the payment of attorneys' fees separate and apart from class funds," or an agreement for "fees not awarded to revert to defendants rather than be added to the class fund").

### C. The *Hanlon* Factors Confirm That the Settlement Is Fair, Reasonable, and Adequate

To evaluate the substantive fairness of a settlement, courts in the Ninth Circuit consider the *Hanlon* factors: "the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Hanlon*, 150 F.3d at 1026; *see also Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) (referring to these as the "*Hanlon* factors"). The factors are non-exclusive and not all need be shown. *Churchill Vill. v. GE*, 361 F.3d 566, 576 n.7 (9th Cir. 2004).

**i. The Overall Strength Of Plaintiffs' Case And The Risk, Expense, Complexity, And Likely Duration Of Further Litigation**

Although Lead Counsel and Plaintiffs believed (based on the substantial research, investigation, and discovery conducted) that the case was strong, they were cognizant that the "risk, expense, complexity, and likely duration of further litigation" were substantial. Lead Counsel, highly experienced in litigating and resolving complex securities class actions, carefully evaluated the merits, in light of all risks and weaknesses, before Plaintiffs entered into the Settlement. If the parties did not agree to settle, they would have faced an expensive, time-consuming litigation process with an uncertain outcome. *See, e.g., In re Heritage Bond Litig*., No. 02-ML-1475 DT, 2005 WL 1594403, at *7 (C.D. Cal. June 10, 2005) ("It is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced"); *In re Sumitomo Cooper Litig*., 189 F.R.D. 274, 282 (S.D.N.Y. 1999) (discussing several instances where settlement was rejected by a court only to have the class' ultimate recovery be less than the proposed settlement). Thus, based on an exhaustive analysis of public documents as well as of documents obtained in discovery, Plaintiffs and Lead Counsel made a reasoned strategic decision to settle before risking potentially unfavorable decisions at summary judgment, trial or appeals.

A central issue in the case is loss causation. Plaintiffs contend that a significant part of the declines in Fitbit's stock price was attributable to new information correcting Defendants' earlier misrepresentations regarding the accuracy of Fitbit's heart-rate monitoring (namely, the January 5, 2016 filing of a consumer class action lawsuit alleging inaccurate heart-rate monitoring, and news reports published on February 22 regarding a study confirming such inaccuracy). Defendants argued that the price declines on the dates of alleged corrective disclosures were entirely attributable to confounding factors such as investor disappointment at Fitbit's new product announcement on January 5, 2016, and further investor disappointment at weak financial guidance released on February 22, 2016. The Parties advocated their respective positions on loss causation in considerable detail during the summary judgment briefing and throughout the mediation and settlement process. Plaintiffs believe their case is strong as to loss

causation and that Defendants' arguments in their motion for summary judgment were insufficient to defeat loss causation as a matter of law. But even if Plaintiffs survived the Fitbit Defendants' early motion for summary judgment, merits discovery would likely have involved thousands of additional documents and a substantial number of depositions, including of the Individual Defendants and other personnel from Fitbit and the Underwriter Defendants. Expert discovery would present additional expense and complexity. Thereafter, Defendants likely would have filed a second summary judgment motion at the close of discovery, requiring additional briefing and entailing further risk to Plaintiffs.

If Plaintiffs survived summary judgment, Plaintiffs would have faced significant obstacles proving loss causation and damages at trial. Plaintiffs would face the very difficult task of proving which portion of the stock drops were related to the fraud as opposed to confounding factors such as disappointment in the Blaze or in the Company's guidance. Disentangling the market's reaction to various pieces of news would have required expert testimony based on methodologies that are highly contested among economists, resulting in an unpredictable and expensive "battle of the experts." *See, e.g.*, *In re Celera Corp. Secs. Litig.*, No. 5:10-cv-02604-EJD, 2015 WL 7351449, at *6 (N.D. Cal. Nov. 20, 2015) (finding that this weighed in favor of settlement approval); *In re Cendant Corp. Litig.*, 264 F.3d 201, 239 (3d Cir. 2001) (finding no error in district court's determination "that establishing damages at trial would lead to a 'battle of experts,' with each side presenting its figures to the jury and with no guarantee whom the jury would believe"). At the very least, Defendants' arguments were likely to impose significant limits on potential damages.

Similarly, Plaintiffs believe their case was strong with respect to falsity and scienter[3], in large part for the reasons explained in the Court's orders denying the motions to dismiss and for reconsideration. But scienter is notoriously difficult to prove in securities-fraud cases. *See, e.g.*, *Hayes v. MagnaChip Semiconductor Corp.*, No. 14-cv-01160-JST, 2016 WL 6902856, at *5

[3] Although scienter is not an element of the Securities Act Claims, a significantly greater portion of the damages at issue in this Action are attributable to the fraud-based Exchange Act Claims that require proof of scienter.

(N.D. Cal. Nov. 21, 2016). For example, a trier of fact could find that the accuracy of Fitbit's heart-rate tracking was contested, with different reviewers reaching different conclusions; that the market was generally aware of these differing conclusions; and that Defendants' public statements adequately acknowledged the devices' limitations and otherwise fairly reflected Defendants' honest beliefs.

Regardless of the ultimate outcome, there is no question that further litigation against the Defendants would have been expensive and complex. *See, e.g.*, *Nobles v. MBNA Corp.*, 2009 WL 1854965, at *2 (N.D. Cal. June 29, 2009) (finding a proposed settlement proper "given the inherent difficulty of prevailing in class action litigation"); *Heritage*, 2005 WL 1594403, at *6 (class actions have a well-deserved reputation as being the most complex). Accordingly, the likely duration and expense of further litigation also supports a finding that the Settlement is fair, reasonable, and adequate. A more favorable outcome than the current Settlement is highly uncertain at best. *See Aarons v. BMW of North America, LLC*, No. 11-cv-7667, 2014 WL 4090564, at *11 (C.D. Cal. Apr. 29, 2014) ("Aggressively litigating class certification, fending off summary judgment, and taking this case to trial would consume significant time and resources. Moreover, there is a considerable risk that Plaintiffs would come away from this case empty-handed."). After trial, any appeal would be resolved by the Ninth Circuit, one of the busiest circuit courts in the nation. Thus, the present value of a certain recovery now, as opposed to the mere chance for a greater one years later, supports approval of a settlement that eliminates the expense and delay of continued litigation and the risk that the Settlement Class could receive no recovery.

At this point, after substantial discovery, summary judgment briefing, and extensive settlement negotiations, Plaintiffs and Lead Counsel know the strengths and weaknesses of their case and made an informed decision to avoid the additional risk, delay, expense, and complexity of further litigation. *See Nat'l Rural Telecomms. Coop. v. DirecTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) ("[U]nless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.").

**ii. The Risks Of Maintaining Class Action Status Throughout Trial**

Although Defendants did not oppose class certification, it is entirely possible that in the course of protracted litigation Defendants would have sought and even succeeded at having the Class de-certified. *See, e.g., In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1041 (N.D. Cal. 2007) (even if a class is certified, "there is no guarantee the certification would survive through trial, as Defendants might have sought decertification or modification of the class"). Thus, the risks of maintaining class certification support approval.

**iii. The Amount Obtained In The Settlement**

The law and public policy that favors settlements is particularly strong here where an eight-figure recovery provides an immediate and tangible benefit to the Settlement Class that is well within a range of reasonableness in light of the possible recoveries and the substantial risks presented by the litigation.

The determination of a "reasonable" settlement is not susceptible to a mathematical equation yielding a particularized sum. It is exceedingly difficult to compare the Settlement to any theoretical amount that the Settlement Class could have potentially obtained from the Defendants had it successfully defeated the motion for summary judgment, ultimately established liability at trial, and fended off any appeals. Such outcomes are highly speculative, and would have required years of additional efforts at high cost. Moreover, a settlement is not "to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Officers for Justice*, 688 F.2d at 625. "Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation." *Officers for Justice*, 688 F.2d at 624. A settlement may be acceptable even if it amounts to only a fraction of the potential recovery that might be available at trial. *See Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454 (9th Cir. 2000).

Nonetheless, even measured against hypothetical scenarios of recoverable damages, the $33 million Settlement is an excellent result. With respect to the Exchange Act Claims, Plaintiffs would have attempted to recover damages at trial based on two corrective disclosures

alleged in the Amended Complaint, both of which were followed by a decline in Fitbit's stock price: (i) the January 5, 2016 filing of the Consumer Class Action; and (ii) a February 22, 2016 news report disclosing a study's findings that the Charge HR had an error rate of 14%, "bordering on dangerous." With respect to January 5, 2016, Plaintiffs' argument was that the entire day's price decline was attributable to the alleged fraud except for $1.07 per share, which was attributable to disappointment in Fitbit's new Blaze tracker.[4] With respect to February 23, 2016, Plaintiffs' argument was that 50% of the day's price decline was attributable to the alleged fraud. Accordingly, Plaintiffs' damages expert estimated that Plaintiffs' potential total recovery would be $454.7 million (using the expert's "80/20 Multi-Trader Model") over the Exchange Act Class Period. Compared to this best-case damages range, the $33 million Settlement would provide 7.3% of damages[5]—certainly a fair, adequate, and reasonable recovery for the Settlement Class. For example, the median securities class-action settlement in 2016 was for 2.5% of the estimated maximum recovery. *See* Cornerstone Research, *Securities Class Action Settlements: 2016 Review and Analysis* at 7 (2017), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Settlements-2016-Review-and-Analysis; *cf. City of Detroit v. Grinnell Corp*., 495 F.2d 448, 455 n.2 (2d Cir. 1974) ("there is no reason…why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.").

Plaintiffs believe it appropriate to discount maximum recoverable damages so as to arrive at a more realistic estimate for the amount potentially recoverable at trial. Defendants had strong arguments regarding loss causation. With respect to January 5, 2016, Defendants argued that Plaintiffs could not establish loss causation for any stock price decline before 2:51 p.m. that

[4] According to a SunTrust analyst report, even "[i]n the worst-case scenario, if we assume that the Blaze doesn't sell a single unit," the maximum potential impact on Fitbit would be $1.07 per share. Robert S. Peck, Rodney A. Hull, Kunal Madhukar, & Sagar Vachhani, *$1.4B Lost in a 'Blaze'? Reaction Creates Buying Opportunity*, SunTrust Robinson Humphrey, at 2 (Jan. 6, 2016).

[5] The Securities Act Claims do not affect these damages estimates because investors cannot recover twice for the same stock price decline. *See* 15 U.S.C.S. § 78bb.

day, when the Consumer Class Action was filed. Similarly, Defendants argued that analyst commentary around the February 23, 2016 price decline focused almost entirely on Fitbit's February 22, 2016 release of financial guidance significantly below analyst expectations, and did not mention the February 22 news report regarding heart-rate tracking inaccuracy. Although Defendants argued that none of the February 23 price decline was attributable to that alleged corrective disclosure, Plaintiffs would have pursued their claims for this date and sought to develop evidence on this issue in discovery. Therefore, Plaintiffs believe that a reasonable damages scenario should attribute a modest percentage of the total February 23 stock price decline to the corrective disclosure. If Plaintiffs were only able to recover damages based on (1) the stock price decline on January 5, 2016 after 2:51 p.m. and (2) 15% of the stock price decline on February 23, 2016, then damages would range between $169.3 million and $179.4 million (depending on trading models and other assumptions). Compared to this more realistic range, the $33 million Settlement provides 18.4–19.5% of reasonably recoverable damages.

The $33 million Settlement is significantly greater than 100% of recoverable damages for the Securities Act Claims, which were calculated by Plaintiffs' damages expert to be $20.2 million (using the 80/20 Multi-Trader Model).

Whether measured against either the best-case scenario or the more realistic scenario, the $33 million Settlement is an excellent recovery. The immediacy and certainty of this substantial recovery strongly supports final approval.

#### iv. The Extent Of Discovery Completed And The Stage Of The Proceedings

As detailed above, this was a hard-fought case, involving a hotly contested motion to dismiss with a voluminous documentary record, a motion for reconsideration as to scienter, and a hotly contested motion for summary judgment with an even more voluminous documentary record. Class Counsel also conducted an extensive investigation while preparing the detailed Amended Complaint; prepared and served discovery requests on Defendants and subpoenas on nonparties; reviewed tens of thousands of pages of documents produced by Defendants as well as by analysts and other third parties; and consulted extensively with experts on class

certification and to evaluate numerous different potential damages scenarios for each alleged corrective disclosure under a variety of different assumptions and methodologies.

Plaintiffs conducted an exhaustive analysis of public documents as well was the documents obtained in discovery, in order to assess the fairness, reasonableness, and adequacy of the Settlement. Murray Decl. ¶13. Furthermore, the multiple rounds of contested motion practice, and the months-long course of settlement negotiations gave the Parties ample opportunity to present the strengths of their respective cases and to hear one another's perspectives. As a result, Lead Counsel is thoroughly familiar with the facts and had ample opportunity to assess the strengths and weaknesses of the claims so as to appraise the Settlement's sufficiency. Murray Decl. ¶¶17-20.

Accordingly, Lead Counsel and Plaintiffs gained sufficient information to negotiate and evaluate the Settlement before more time or resources were expended on further litigation with the Defendants. Courts in this Circuit have recognized that, "[t]hrough protracted litigation, the settlement class could conceivably extract more, but at a plausible risk of getting nothing." *In re Critical Path, Inc. Sec. Litig.*, No. 01-cv-00551 WHA, 2002 WL 32627559, at *7 (N.D. Cal. June 18, 2002). As a result, courts regularly approve settlements reached even relatively early in the formal litigation process. *See, e.g.*, *Mego*, 213 F.3d at 459 (finding that even absent extensive formal discovery, class counsel's significant investigation and research supported settlement approval); *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998) ("In the context of class action settlements, 'formal discovery is not a necessary ticket to the bargaining table' where the parties have sufficient information to make an informed decision about settlement."). This case, however, is not in the early stages. Among the motions briefed or adjudicated in this case are motions to dismiss, a motion to reconsider, a class certification motion, and a summary judgment motion. Also, extensive discovery has taken place and tens of thousands of pages of documents produced by Defendants have been reviewed by Plaintiffs' counsel. Further, two all-day mediation sessions between the parties have occurred. This developed stage of proceedings weighs in favor of approval. *See, e.g., Moore v. Verizon Commc'ns Inc.*, No. C 09-1823 SBA, 2013 WL 4610764, at *7 (N.D. Cal. Aug. 28, 2013)

(settlement reached "after the parties engaged in discovery, litigated a motion to dismiss, and participated in mediation that involved an extensive exchange of information, multiple briefings, and six all-day mediation sessions," supported "the conclusion that the parties' decision to settle was a fully informed one").

**v. Experienced Counsel Negotiated The Settlement In Good Faith And At Arm's-Length And Believe It Is Fair, Reasonable, And Adequate**

Class Counsel's informed determination that the Settlement is in the best interest of the Settlement Class should be afforded significant weight. *See Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 528 ("'Great weight' is accorded to the recommendation of counsel . . . because 'parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation'"); *Omnivision*, 559 F. Supp. 2d at 1043 ("The recommendations of plaintiffs' counsel should be given a presumption of reasonableness."). This makes sense, as counsel is "most closely acquainted with the facts of the underlying litigation." *Heritage*, 2005 WL 1594403, at *9. Plaintiffs' strong support of the Settlement, as well as the arm's-length nature of the negotiations here, further favor approval. *See* Flynn Decl. ¶6; J. Koth Decl. ¶5; K. Koth Decl. ¶5; Tran Decl. ¶5; Cunningham Decl. ¶5.

"Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Class Counsel, Pomerantz LLP and Glancy Prongay & Murray LLP, are highly experienced in federal securities class actions and had a thorough understanding of the strengths and weaknesses of the parties' respective positions before agreeing to settle. Co-Lead Counsel Pomerantz is one of the oldest plaintiff-side securities litigation firms in the country, with decades of experience litigating securities class actions nationwide – including within this Circuit and District. *See* Walsh Decl. ¶5 and Ex. A (Pomerantz firm resume). Co-Lead Counsel GPM similarly has decades of experience in complex class action litigation, and is recognized as a top plaintiffs' securities law firm. *See* Murray Decl. ¶24 and Ex. 5 (GPM firm resume). Throughout the litigation and settlement

negotiations, the Defendants were represented by very skilled and highly respected counsel at Morrison & Foerster LLP and O'Melveny & Myers LLP. The Parties' negotiations were thorough, and the Settlement was reached without collusion after good-faith bargaining among the parties. *See* Murray Decl. ¶15. Through months of negotiations, Lead Counsel achieved a fair Settlement, taking into account the costs and risks of continued litigation, including the substantial risk that the Fitbit Defendants would succeed on their motion for summary judgment. Thus, "the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *Heritage*, 2005 WL 1594403, at *9.

**vi. The Absence Of A Governmental Participant**

There was no governmental participant litigating on behalf of or alongside the Plaintiffs in this Action. Without this private civil action, there would have been no recovery for the Settlement Class. Accordingly, this factor supports approval of the Settlement. *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 966 (9th Cir. 2009).

**vii. The Positive Reaction Of The Settlement Class**

To date, following the mailing of 359,136 notices, no Settlement Class member has objected to the Settlement or any aspect thereof, and only one has opted out of the Settlement Class.[6] Manigault Decl. ¶¶ 8, 12, 13. This favorable reaction by the Settlement Class further supports the fairness and adequacy of the Settlement. *See Omnivision*, 559 F. Supp. 2d at 1043; *In re Rambus Inc. Derivative Litig.*, No. 06-cv-3513 JF (HRL), 2009 WL 166689, at *3 (N.D. Cal. Jan. 20, 2009) ("[T]he 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.").

[6] Consistent with *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010), which requires counsel's fee motion to be filed before the deadline for objections to afford class members the opportunity to "thoroughly examine counsel's fee motion," the deadline for filing any objections is April 3, 2018.

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## II. Notice to the Settlement Class Satisfied Rule 23 and Due Process

Lead Counsel provided the Settlement Class with adequate notice of the Settlement. The Settlement Administrator disseminated 359,136 copies of the Court-approved Notice and Proof of Claim form to potential Settlement Class Members and their nominees who could be identified with reasonable effort. Manigault Decl. ¶ 8. Nominees were requested to forward copies of the Notice to all beneficial owners of such shares or, alternatively, to provide their names and addresses so that the Settlement Administrator could mail them the Notice directly. The Notice included all the information required by Rule 23(c)(2)(B) or the PSLRA or that was otherwise necessary for Settlement Class Members to make an informed decision regarding the proposed Settlement. *See* Manigault Decl. Exs. A, C; 15 U.S.C. §§ 77z-1(a)(7), 78u-4(a)(7). It thus described "'the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'" *In re Online DVD-Rental Antitrust Litig*., 779 F.3d 934, 946 (9th Cir. 2015) (quoting *Lane v. Facebook, Inc*., 696 F.3d 811, 826 (9th Cir. 2012)). In addition, the Publication Notice was published over the *Business Wire*, and the Notice, Stipulation, Proof of Claim and Release Form, and Preliminary Approval Order were all posted on the Settlement Administrator's website along with the relevant Court-ordered deadlines. Manigault Decl. ¶¶ 9–10. To date, there have been zero objections to any aspect of the Settlement, and only one request for exclusion. *Id*. ¶¶ 12–13.

The foregoing notice program, previously approved by the Court, fairly apprised Settlement Class Members of their rights with respect to the Settlement, complied with the Court's Preliminary Approval Order, Rule 23, the PSLRA, and due process, and provided the "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-74 (1974) (citing Fed. R. Civ. P. 23(c)(2)); *see also Rannis v. Recchia*, 380 F. App'x 646, 650 (9th Cir. 2010) (mail to last-known address of class members sufficient); *In re Celera Corp. Sec. Litig*., No. 5:10-cv-02604-EJD, 2015 WL 7351449, at *4-5 (N.D. Cal. Nov. 20, 2015) (mailing notice, publishing summary notice, and posting on settlement-specific website sufficient).

## III. The Plan of Allocation Is Fair, Reasonable, and Adequate

In the Preliminary Approval Order, the Court preliminarily approved the Notice and the Plan of Allocation.[7] Plaintiffs now request final approval of the Plan of Allocation.

A plan of allocation in a class action "is governed by the same standards of review applicable to approval of the settlement as a whole: the plan must be fair, reasonable and adequate." *Omnivision*, 559 F. Supp. 2d at 1045. "It is reasonable to allocate the settlement funds to class members based on the extent of their injuries or the strength of their claims on the merits." *Id.*; *see also Nguyen v. Radient Pharms. Corp.,* No. 11-cv-00406, 2014 WL 1802293, at *5 (C.D. Cal. May 6, 2014) ("A settlement in a securities class action case can be reasonable if it fairly treats class members by awarding a *pro rata* share to every Authorized Claimant, but also sensibly makes interclass distinctions based upon, *inter alia*, the relative strengths and weaknesses of class members' individual claims and the timing of purchases of the securities at issue."). "[C]ourts recognize that an allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent counsel." *Nguyen*, 2014 WL 1802293, at *5.

Here, the Plan of Allocation was fully described in the Notice mailed to Settlement Class Members and posted on the Settlement Administrator's website, and has a rational basis. *See* Manigault Decl. Ex. A at 12-19. Lead Counsel formulated the Plan of Allocation with the help of a damages expert (*see* Manigault Decl. Ex. A at 12) and with the goal of reimbursing

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[7] The Court preliminarily approved the Notice (and the Plan of Allocation described therein) "substantially in the form" filed as Exhibit B (Dkt No. 203-2) to the Stipulation. *See* Preliminary Approval Order (Dkt No. 207) ¶ 11. The version of the Notice (Manigault Decl. Ex. A) disseminated to the Settlement Class contained various formatting changes as well as one substantive change affecting the Plan of Allocation. The January 18 Notice version did not address the treatment of potential Settlement Class Members who purchased or sold *options* on Fitbit stock. This oversight was corrected in the version of the Notice disseminated to Settlement Class Members, while limiting total payments to options holders to 2% of the Net Settlement Fund commensurate with the relative volumes of trading in Fitbit stock and options during the Exchange Act Class Period. *See* Manigault Decl. Ex. A at 18 n.9 and accompanying text.

1 Settlement Class Members in a fair and reasonable manner. *See* Murray Decl. ¶21-22. The Plan
2 of Allocation is based on an estimation as to the amount of artificial inflation in the price of
3 Fitbit stock during the Exchange Act Class Period. Murray Decl. *Id*. It is substantively similar to
4 other plans that have been approved in other securities class actions. Plaintiffs respectfully
5 submit that the Plan of Allocation is fair, reasonable and adequate, and should be approved.

6 The Plan of Allocation distributes the Net Settlement Fund on a *pro rata* basis,
7 calculating a Claimant's relative loss proximately caused by Defendants' alleged false and
8 misleading statements and material omissions, based on factors such as when and at what prices
9 the Claimant purchased and sold Fitbit securities. For stockholders in the Exchange Act
10 Settlement Class it accounts for the two most significant corrective disclosure dates (January 5,
11 2016 and February 23, 2016) within the Exchange Act Class Period of June 18, 2015 through
12 May 19, 2016. The Plan of Allocation assigns greater weighting to claims arising from the
13 January 5, 2016 corrective disclosure, which are comparatively stronger. *See* Manigault Decl.
14 Ex. A at 12-17. For options holders in the Exchange Act Settlement Class, the Plan of
15 Allocation calculates recognized losses to reflect out of pocket loss, while limiting the total
16 payments to options holders to 2% of the Net Settlement Fund, commensurate with the relative
17 volumes of trading in Fitbit stock and options during the Exchange Act Class Period. *Id*. at 18
18 n.9 and accompanying text. For members of the Securities Act Settlement Class, the Plan of
19 Allocation accounts for the pre-suit corrective disclosure date of January 5, 2016, though in a
20 lesser amount than in connection with the Exchange Act Claims, due to the statutory damages
21 limitations applicable to the Securities Act Claims. *See id*. at 12-17.

22 Here, there have been no objections and only one exclusion request from any potential
23 Settlement Class Member, despite 359,136 notices mailed. *Heritage*, 2005 WL 1594403, at *39-
24 40 ("In light of the lack of objectors to the plan of allocation at issue, and the competence,
25 expertise, and zeal of counsel in bringing and defending the action, the Court finds the plan of
26 allocation as fair and adequate."). Lead Counsel therefore believes the Plan of Allocation fairly
27 compensates Settlement Class Members and should be approved.
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## IV. Settlement Class Certification Remains Warranted

As part of the Settlement, the Parties agreed to modify the definitions of the Exchange Act Class and the Securities Act Class, which the Court previously certified on June 21, 2017 (Dkt No. 184). Whereas the Securities Act Class included only purchasers of Fitbit Class A common stock pursuant and/or traceable to Fitbit's initial public offering on or about June 18, 2015 (the "IPO"), the proposed Securities Act Settlement Class now *also* includes purchasers of Fitbit Class A common stock pursuant and/or traceable to Fitbit's follow-on public offering on or about November 13, 2015 (the "SPO"). In addition, the definitions of the Exchange Act Settlement Class and the Securities Act Settlement Class (together the "Settlement Class") both now clarify that Opt-Outs are excluded.

Accordingly, the Settlement Class should be certified because, like the Exchange Act Class and the Securities Act Class previously certified by the Court, it meets the requirements of Rule 23 for the reasons set forth in the Court's June 21, 2017 order (Dkt No. 184), and for the reasons set forth in Lead Plaintiff's motion for class certification (Dkt No. 150).

The Settlement Class was agreed by the Parties and preliminarily certified by the Court in the Preliminary Approval Order, and consists of two sub-classes defined as:

a. The Exchange Act Settlement Class: 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"). Excluded from the Exchange Act Settlement Class are (i) Defendants and the Individual Defendants' family members; (ii) directors and officers of Fitbit and their families; (iii) any entity in which the Fitbit Defendants have or had a controlling interest; (iv) any entity in which the Underwriter Defendants have or had a majority interest; and (v) any Person who submits a request for exclusion from the Settlement Class that is accepted by the Court; and

b. The Securities Act Settlement Class: 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 (the "IPO") or the Company's follow-on public offering on or about November 13, 2015 (the "SPO"). Excluded from the Securities Act Settlement Class are (i) Defendants and the Individual Defendants' family members; (ii) directors and officers of Fitbit and their families; (iii) any entity in which the Fitbit Defendants have or had a controlling interest; (iv) any entity in which the Underwriter Defendants have or had a majority interest; and (v) any Person who submits a request for exclusion from the Settlement Class that is accepted by the Court.

*See* Preliminary Approval Order (Dkt No. 207) at 3-4; Stipulation (Dkt No. 203) at §IV, ¶1 (dd).

**A. The Settlement Class Satisfies Rule 23(a)**

The Settlement Class meets the requirement of Fed. R. Civ. P. 23(a)(1) because the class is so numerous that joinder of all members is impracticable. Here, 359,136 Notices were mailed to potential Settlement Class Members. Manigault Decl. ¶ 8. Fitbit has more than 100 million shares of common stock outstanding. AC at ¶190. A class of this size is sufficiently numerous to make individual joinder impracticable. *See, e.g.*, *In re UTStarcom Sec. Litig.*, No. 04-cv-04908 JW, 2010 WL 1945737, at *4 (N.D. Cal. May 12, 2010).

Under Fed. R. Civ. P. 23(a)(2), questions of law and fact common to all Settlement Class Members include, *inter alia*: (i) whether the federal securities laws were violated by the Defendants' alleged acts; and (ii) whether the price of Fitbit securities during the Exchange Act Class Period was artificially inflated by the Defendants' conduct. Securities actions containing common questions such as these have been held to be prime candidates for class certification. *See UTStarcom*, 2010 WL 1945737, at *4 (common questions of law and fact as to whether Defendants engaged in fraudulent scheme, stock was artificially inflated, and misstatements and omissions caused class members to suffer economic losses).

Under Fed. R. Civ. P. 23(a)(3) Plaintiffs' claims and defenses are typical of the Settlement Class's claims. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 625 (1997). Differences in the amount of damages, the size or manner of purchase, the nature of the purchaser, and the date of purchase are insufficient to defeat class certification. *See Alfus v. Pyramid Tech. Corp.*, 764 F. Supp. 598, 606 (N.D. Cal. 1991). Plaintiffs, like the other Settlement Class Members, purchased Fitbit shares in the same manner and pursuant to the same alleged fraud during the same time period. *See In re VeriSign, Inc. Sec. Litig.*, No. 02-cv-02270-JW, 2005 WL 7877645, at *10 (N.D. Cal. Jan. 13, 2005). Moreover, Plaintiffs are not subject to any unique defenses that could make them atypical. *See Hodges v. Akeena Solar, Inc.*, 274 F.R.D. 259, 266-67 (N.D. Cal. 2011).

Finally, to satisfy the adequacy prong of Fed. R. Civ. P. 23(a)(4), a proposed class representative must be free of interests antagonistic to other class members, and counsel representing the class must be qualified, experienced and capable of conducting the litigation.

*See Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978); *Hanlon*, 150 F.3d at 1020. Plaintiffs' interests are the same as those of the Settlement Class Members, since they have typical and coextensive claims, and under the proposed Plan of Allocation Plaintiffs will receive the same *pro rata* share of the Net Settlement Fund as the rest of the Settlement Class. Plaintiffs are represented by highly-qualified counsel with extensive experience in securities class action litigation (*see* Murray Decl. Ex. 5; Walsh Decl. Ex. 1). Plaintiffs have regularly communicated with Lead Counsel throughout the Action, and have fairly and adequately protected and advanced the interests of the Settlement Class. Murray Decl. ¶40; Flynn Decl. ¶5; J. Koth Decl. ¶4; K. Koth Decl. ¶4; Tran Decl. ¶4; Cunningham Decl. ¶4. Thus, Plaintiffs are adequate representatives of the Settlement Class, and Co-Lead Counsel, are qualified, experienced, and capable of prosecuting this Action.

**B. The Settlement Class Satisfies Rule 23(b)(3)**

This Action also meets the requirements of Rule 23(b)(3). Questions of law or fact common to the Settlement Class predominate over questions affecting only individual members, and a class action is the superior method of adjudication. *See, e.g. In re LDK Solar Sec. Litig.*, 255 F.R.D. 519, 525 (N.D. Cal. 2009).

As discussed above, common questions predominate over individual questions because the Defendants' alleged conduct impacted all Settlement Class Members in the same way. *See, e.g.*, *In re Cooper Cos. Inc. Sec. Litig.*, 254 F.R.D. 628, 632 (C.D. Cal. 2009) ("The common questions of whether misrepresentations were made and whether Defendants had the requisite scienter predominate over any individual questions of reliance and damages."). Issues relating to the Defendants' liability are common to all Settlement Class Members. *See In re Emulex Corp., Sec. Litig.*, 210 F.R.D. 717, 721 (C.D. Cal. 2002) ("The predominant questions of law or fact at issue in this case are the alleged misrepresentations defendants made during the class period and are common to the class.").

Because the Settlement Class meets the requirements of Rules 23(a) and (b)(3), there are no issues that would prevent the Court from certifying this Settlement Class for settlement

purposes, appointing Plaintiffs as Settlement Class Representatives, and appointing Lead Counsel as counsel for the Settlement Class.

## CONCLUSION

The complexity of the facts at issue, the substantial expenses if this litigation were to continue to trial, and the risks attendant to prevailing at summary judgment, trial, and appeals, weigh heavily in favor of accepting a recovery of $33,000,000 cash now. The Settlement presents a sizable, immediate, and certain benefit to the Settlement Class. Accordingly, Plaintiffs respectfully request that this Court approve the Settlement and Plan of Allocation as fair, reasonable and adequate; find that the Notice and the procedures for its dissemination satisfied due process and complied with the PSLRA and Fed. R. Civ. P. 23(e); grant final certification to the Settlement Class for settlement purposes; enter the proposed Order and Final Judgment in the form filed herewith, which is substantially the same (with the addition of final certification of the Settlement Class) to the Proposed Order and Final Judgment previously submitted to the Court as Exhibit E to the revised Stipulation on January 18, 2018 (Dkt No. 203-5);[8] and dismiss the Action with prejudice.

DATED: March 16, 2018

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[8] Plaintiffs respectfully request that the Court's approval of the Plan of Allocation be made by entry of the Proposed Order appended to Plaintiffs' Fee & Expense Motion.

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**CERTIFICATE OF SERVICE**

I hereby certify that this document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants on March 16, 2018.

*/s/ Brian P. Murray*
Brian P. Murray

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**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF CALIFORNIA**
**SAN FRANCISCO DIVISION**

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

**[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".

1 It appearing that the Publication Notice substantially in the form approved by the Court in the
2 Preliminary Approval Order was published in accordance with the Court's specifications;
3 **NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:**
4 1. Unless indicated otherwise, all capitalized terms used herein have the same meanings as
5 set forth and defined in the Stipulation.
6 2. The Court has jurisdiction over the subject matter of this action (the "Action"),
7 Plaintiffs, all Settlement Class Members, and the Defendants, including all Settlement Class Members
8 who did not timely file a request for exclusion from the Settlement Class by the relevant deadline
9 pursuant to the Preliminary Approval Order.
10 3. Pursuant to Fed. R. Civ. P. 23(a) and (b)(3) and for the purposes of the Settlement only,
11 the Court hereby certifies the Settlement Class, and appoints Lead Plaintiff the Fitbit Investor Group
12 (comprised of Timothy Flynn, Jesse M. Koth and Kelley Koth, Viet Tran, and Mark Cunningham) as
13 Class Representative for the Settlement Class, and Lead Counsel Glancy Prongay & Murray LLP and
14 Pomerantz LLP as Class Counsel for the Settlement Class.
15 4. The Court hereby finds that the forms and methods of notifying the Settlement Class of
16 the Settlement and its terms and conditions: met the requirements of due process, Rule 23 of the Federal
17 Rules of Civil Procedure, and 15 U.S.C. § 78u-4(a)(7) (added to the Exchange Act by the Private
18 Securities Litigation Reform Act of 1995); constituted the best notice practicable under the
19 circumstances; and constituted due and sufficient notice to all persons and entities entitled thereto of
20 these proceedings and the matters set forth herein, including the Settlement and Plan of Allocation. No
21 Settlement Class Member is relieved from the terms of the Settlement, including the releases provided
22 for therein, based upon the contention or proof that such Settlement Class Member failed to receive
23 actual or adequate notice. A full opportunity has been offered to the Settlement Class Members to
24 object to the proposed Settlement and to participate in the hearing thereon. The Court further finds that
25 the notice provisions of the Class Action Fairness Act, 28 U.S.C. § 1715, were fully discharged and that
26 the statutory waiting period has elapsed. Thus, it is hereby determined that all members of the
27 Settlement Class are bound by this Order and Final Judgment except those listed on Exhibit A hereto.
28 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

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

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

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

25 8. Defendants, for themselves and on behalf of each of their respective spouses, heirs,
26 executors, beneficiaries, administrators, successors, assigns and any Person(s) (claiming now or in the
27 future) through or on behalf of any of them directly or indirectly: (a) shall be deemed to have, and by
28 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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