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**SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES**

CAROLYN LEVIN, in Her Individual
and Representative Capacity on Behalf
of a Class of All Persons Similarly-
Situated,

Plaintiff,

v.

NIKE, INC.; an Oregon Corporation;
APPLE, INC., a California Corporation;
and DOES 1 through 10, inclusive,

Defendants.

CASE NO. **BC 509363**

COMPLAINT FOR DAMAGES

COUNTS:

1. NEGLIGENT MISREPRESENTATION;
2. FRAUDULENT MISREPRESENTATION;
3. VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE § 17200, *ET SEQ.*;
4. VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE § 17500, *ET SEQ.*

DEMAND FOR JURY TRIAL

BY FAX

CIT/CASE: BC509363
 LER/DEF#: _____
 RECEIPT #: CCH476057110
 DATE PAID: 05/17/13 04:19 PM
 PAYMENT: \$1,435.00
 RECEIVED: _____
 CHECK: \$1,435.00
 CASH: \$0.00
 CHARGE: \$0.00
 CRO: \$0.00

1 physical activity while wearing the FuelBand;

- 2 • Whether Defendants violated California Business & Professions Code
- 3 §§ 17500 *et seq.* by affirmatively promulgating and implementing false
- 4 and misleading advertising to the specific effect that the Nike+ FuelBand
- 5 could accurately track every calorie burned by a FuelBand user engaged
- 6 in physical activity while wearing the FuelBand;
- 7 • Whether Defendants caused the Class Members damages by reason of
- 8 their misrepresentations;
- 9 • Whether Defendants caused the Class Members damages by reason of
- 10 their fraudulent conduct;
- 11 • Whether Defendants unfairly or fraudulently took money from the Class
- 12 Members by conduct perpetrated in violation of California Business &
- 13 Professions Code § 17200 *et seq.*;
- 14 • Whether Defendants unfairly or fraudulently took money from the Class
- 15 Members by conduct perpetrated in violation of California Business &
- 16 Professions Code § 17500 *et seq.*; and
- 17 • Whether Defendants committed acts with fraud, oppression, and/or
- 18 malice.

19 11. These common questions predominate over all Class Members' claims,
20 including those of the Class Representative. Indeed, there is essentially no difference
21 between the Class Representative's claims and the other Class Members' claims. As a
22 result, the Class Representative's claims are typical of, if not identical to, claims owned by
23 and to be asserted by the rest of the Class Members.

24 12. Class action treatment is superior to the alternatives, if any, for the fair and
25 efficient adjudication of the controversy alleged herein. Such treatment will permit a large
26 number of similarly situated persons to prosecute their common claims in a single forum
27 simultaneously, efficiently, and without duplication. Separate trials adjudicating
28 Defendants' liability will be inefficient, and will create the risk of producing inconsistent

1 verdicts. Consolidating the litigation of all Class Members will enhance judicial economy
2 and promote substantial justice. Class treatment will also permit the adjudication of
3 relatively small claims by many of the Class Members who could not individually afford to
4 litigate the claims asserted herein. There are no absolutely difficulties that would preclude
5 class action treatment of this lawsuit, and no superior alternative exists for the fair and
6 efficient adjudication of the controversies asserted herein.

7 13. Concentrating the Class Members' claims in the Los Angeles Superior Court is
8 preferable to maintaining this action in any other venue. This venue has a logical
9 connection to the events underlying action, since the lion's share of the conduct underlying
10 this suit occurred here, and since a substantial number of the Class Members purchased their
11 Nike+ FuelBands in Los Angeles County and reside here.

12 VENUE & JURISDICTION

13
14 14. Plaintiff files this action in Los Angeles Superior Court, where venue has been
15 and remains proper under California Code of Civil Procedure § 395.

16 15. The California Superior Court is the proper jurisdiction for this case pursuant
17 to 28 U.S.C. § 1332 because:

- 18 • All Class Members are California citizens;
- 19 • Apple is a California citizen from whom significant relief is sought by
20 the proposed Class and whose conduct described herein forms a
21 significant basis for the claims asserted by the proposed Class;
- 22 • Plaintiff and the proposed Class' principal injuries resulting from the
23 conduct of each Defendant were incurred in California, where this action
24 is originally filed; and
- 25 • Plaintiff is unaware of any other class action that has been filed asserting
26 the same or similar factual allegations against any of the defendants on
27 behalf of the same or other persons.

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GENERAL ALLEGATIONS

16. Nike has dominated the sports apparel and technology industries for decades, and has established itself as a global leader in both the professional and consumer sports and fitness advertising and sales sectors. The Nike+ FuelBand has been a major component of Nike's overall equipment sales since its early 2012 release.

17. Apple has dominated the personal technology industries for decades, establishing itself as the most widely-known and prolific advertiser and distributor of personal technology items available to consumers today.

18. Since approximately 2006, Nike and Apple have embarked upon various partnership ventures in the sporting technology sector, forming a powerful alliance designed to massively increase profit for both companies, and to supply evolving sporting technology products to the purchasing consumer such as Levin and others similarly-situated.

19. The Nike+ FuelBand, one such product manufactured and sold by Defendants, is wearable personal technology in the form of a wristband that Defendants advertise as capable of tracking every calorie burned by a FuelBand user engaged in physical activity while wearing the FuelBand. In particular, both Defendants consistently advertise to the general public in the promotional materials and at points of sale that the FuelBand "measures each step taken *and calorie burned*," "[t]racks steps, *calories*, and time of day" and "tracks *calories burned*, steps taken and more" (emphasis added).

20. In truth, the Nike+ FuelBand cannot and does not track each calorie burned, and users experience wildly inaccurate calorie burn readings when using the FuelBand. Defendants were aware when the FuelBand was first marketed, advertised and sold to Levin and the buying public, and remained aware throughout the Class Period, that the FuelBand was incapable of accurately tracking ever calorie burned by FuelBand users, and that their advertising was therefore false and misleading. As a result of Defendants' conduct, buyers of the FuelBand, including the Class Members, were in fact misled into purchasing a device that Defendants purported would track calories burned when it in fact cannot and cannot track calories burned, misleading and damaging consumers.

1 21. Despite their knowledge of the FuelBand's inability to accurately track each of
2 a user's calories burned, during the Class Period Defendants promulgated and implemented
3 the false and misleading advertising alleged herein as part of a business scheme designed to
4 unfairly and unlawfully reap substantial profits at the expense of Levin and the Class.

5 22. To accomplish their scheme, Defendants each advertised and offered to the
6 Class Members, by means of various media, the opportunity to purchase the Nike+
7 FuelBand. Attached hereto as Exhibits 1-4 are some examples of Defendants'
8 advertisements. Levin witnessed and received several such offers throughout the Class
9 Period.

10 23. Levin, like all FuelBand purchasers, reasonably expected that the FuelBands
11 she purchased were capable of accurately tracking every calorie burned while wearing the
12 device and in fact bought the device because she believed it would in fact accurately track
13 calories burned. Based on that expectation, based further on the claims made by
14 Defendants, and also based upon what Levin believed were trustworthy reputations by
15 Defendants, Levin purchased multiple Nike+ FuelBands in Los Angeles County, for both
16 personal use and to give as gifts.

17 24. Despite Defendants' promises to Levin, the FuelBands purchased by Levin,
18 and in fact all of the FuelBands sold by Defendants, are and remain incapable of performing
19 that accurate calorie burn tracking function that Defendants represented they are able to
20 perform, and Defendants' misrepresentations as such have continued throughout the Class
21 Period.

22 25. Throughout the Class Period and continuing to this day, Defendants have
23 dramatically increased their sales of the Nike+ FuelBand by means of utilizing the false and
24 misleading representations and advertising promulgated and implemented by them as
25 alleged herein, and Defendants have failed to remedy the inability of the FuelBand to
26 accurately track the number of calories burned by a FuelBand user. As a result, despite
27 Defendants' claims that the Nike+ FuelBand accurately tracks every calorie burned, the
28 FuelBand remains wholly unable to calculate or provide an accurate caloric burn reading,

1 no matter who the user of the FuelBand is, and no matter what type of activity that user
2 engages in.

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4 **CAUSES OF ACTION**

5 **FIRST CAUSE OF ACTION: NEGLIGENT MISREPRESENTATION**

6 (Against All Defendants by Plaintiff in Her Individual and Representative Capacity on
7 Behalf of the Class)

8 26. Plaintiff hereby incorporates by reference all of the above paragraphs as though
9 set forth fully herein in form and substance.

10 27. Throughout the Class Period, Defendants had a duty to accurately represent the
11 capabilities of the Nike+ FuelBand for sale to the public, and to refrain from making
12 representations about the FuelBand that were likely or certain to mislead the buying public,
13 including Levin and the Class Members and all others similarly-situated, and likewise had a
14 duty to refrain from making material representations they knew or should have known to be
15 false and misleading regarding the FuelBand and its technological capabilities.

16 28. By means of the conduct alleged herein, including without limitation the
17 making of misrepresentations regarding the FuelBand's ability to track every calorie
18 burned, which misrepresentations Defendants knew or should have known were false and
19 likely to mislead Levin and the Class Members and all those similarly-situated, Defendants
20 breached their duties to Levin and all Class Members.

21 29. At all times, Levin was unaware of the falsity of Defendants' representations.

22 30. As a direct and proximate result of Defendants' misrepresentations, Levin
23 purchased FuelBands that in fact do not accurately track calories burned, suffering damages
24 in amounts to be determined at trial within the jurisdiction of this Court, said damages to
25 include at least the full price paid by Levin for each Nike+ FuelBand.

26 31. Defendants' intentional conduct in misleading Levin and violating her rights,
27 and in willfully concealing from Plaintiff those facts Defendants knew made their
28 representations and advertisements false, was carried out with such depravity, malice and

1 fraudulent intent directed at Levin and all others similarly-situated, and with such conscious
2 disregard for Levin's rights and financial and other well-being, as to fall squarely within the
3 definition of conduct justifying an award of exemplary damages to punish and make an
4 example of Defendants and each of them.

5
6 **SECOND CAUSE OF ACTION: FRAUDULENT MISREPRESENTATION**

7 (Against All Defendants by Plaintiff in Her Individual and Representative Capacity on
8 Behalf of the Class)

9 32. Plaintiff hereby incorporates by reference all of the above paragraphs as though
10 set forth fully herein in form and substance.

11 33. Throughout the Class Period, Defendants represented to Levin that in exchange
12 for her payment of money, Defendants would provide a Nike+ FuelBand specifically
13 capable of accurately tracking every calorie burned by her as a result of her physical activity
14 undertaken while wearing the FuelBand on her wrist. Defendants made these
15 representations in various media, including without limitation Internet marketing, product
16 packaging and in-store advertising, some of which are attached hereto as Exhibits 1-4.

17 34. Defendants' representations were false at the time they made them because
18 Defendants in fact the FuelBand cannot and does not track every calorie burned by a
19 FuelBand user, and in fact Defendants knew that their FuelBand product was entirely
20 unable to track each calorie burned as Defendants had falsely represented. Defendants
21 knew their representations were false at the time they made them, and had no reason, at any
22 time, upon which to base a belief in their truth.

23 35. By Defendants' misrepresentations, Defendants wrongfully sought to induce
24 Levin to purchase one or more Nike+ FuelBands, and Levin was in fact induced to purchase
25 several FuelBands, believing that each would do as Defendants had represented, *to wit*,
26 track every calorie burned by a FuelBand user engaged in physical activity while wearing a
27 FuelBand.

28 ///

1 36. At all times, Levin was unaware of the falsity of Defendants' representations.

2 37. As a direct and proximate result of Defendants' misrepresentations, Levin
3 purchased FuelBands that in fact do not accurately track calories burned, suffering damages
4 in amounts to be determined at trial within the jurisdiction of this Court, said damages to
5 include at least the full price paid by Levin for each Nike+ FuelBand.

6 38. Defendants' intentional conduct in misleading Levin and violating her rights,
7 and in willfully concealing from Plaintiff those facts Defendants knew made their
8 representations and advertisements false, was carried out with such depravity, malice and
9 fraudulent intent directed at Levin and all others similarly-situated, and with such conscious
10 disregard for Levin's rights and financial and other well-being, as to fall squarely within the
11 definition of conduct justifying an award of exemplary damages to punish and make an
12 example of Defendants and each of them.

13
14 **THIRD CAUSE OF ACTION: VIOLATION OF CALIFORNIA BUSINESS AND**
15 **PROFESSIONS CODE §§ 17200 ET SEQ.**

16 (Against All Defendants by Plaintiff in Her Individual and Representative Capacity on
17 Behalf of the Class)

18 39. Plaintiff hereby incorporates by reference all of the above paragraphs as though
19 set forth fully herein in form and substance.

20 40. By reason of the conduct alleged herein, Defendants engaged in unlawful,
21 fraudulent and unfair business practices that included, but were not limited to:

- 22 • Misleading Levin and the Class into purchasing the FuelBand, that
23 Defendants falsely represented was capable of accurately tracking every
24 calorie burned as a result of physical activity undertaken while wearing
25 the FuelBand, knowing that these statements were false and likely to
26 induce Levin and the Class Members into purchasing the FuelBand;
- 27 ■ Promulgating and implementing advertising that was false and was both
28 designed to and likely to mislead Levin and the Class in order to reap a

1 tremendous profit at Levin and the Class' expense; and

- 2 • Accepting from Levin and the Class payment for Nike+ FuelBands that
3 were sold under false pretenses and that Defendants knew were not as
4 Defendants represented them to be, namely, that they could not track
5 every calorie burned by a FuelBand user as Defendants represented they
6 could.

7 41. Defendants' actions constitute unlawful business acts or practices within the
8 meaning of California Business & Professions Code §§ 17200 *et seq.*

9 42. Accordingly, Plaintiff may obtain and is entitled to all remedies and penalties
10 authorized by the statute, including without limitation restitution, disgorgement, injunctive
11 relief, and other penalties for each illegal or fraudulent business act or practice, and
12 attorneys' fees pursuant to statute and the Court's equitable powers, in amounts subject to
13 proof.

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15 **FOURTH CAUSE OF ACTION: VIOLATION OF CALIFORNIA BUSINESS AND**
16 **PROFESSIONS CODE §§ 17500 *ET SEQ.***

17 (Against All Defendants by Plaintiff in Her Individual and Representative Capacity on
18 Behalf of the Class)

19 43. Plaintiff hereby incorporates by reference all of the above paragraphs as though
20 set forth fully herein in form and substance.

21 44. As alleged herein, Defendants engaged in false advertising practices that
22 included, but were not limited to:

- 23 • Using false and misleading advertizing to offer and induce Levin and the
24 Class into purchasing the FuelBand, that Defendants falsely represented
25 was capable of accurately tracking every calorie burned as a result of
26 physical activity undertaken while wearing the FuelBand, knowing that
27 these statements were false and likely to induce Levin and the Class
28 Members into purchasing the FuelBand;

- Promulgating and implementing advertising that was false and was both designed to and likely to mislead Levin and the Class in order to reap a tremendous profit at Levin and the Class' expense; and
- Accepting from Levin and the Class payment for Nike+ FuelBands that were marketed and sold under false pretense and that Defendants knew were not as Defendants represented them to be, namely, that they could not track every calorie burned by a FuelBand user as Defendants represented they could.

45. Defendants' actions constitute unlawful business acts or practices within the meaning of California Business & Professions Code §§ 17200, *et seq.*

46. Accordingly, Plaintiff may obtain and is entitled to all remedies and penalties authorized by the statute, including without limitation restitution, disgorgement, and other penalties for each illegal or fraudulent business act or practice, and attorneys' fees pursuant to statute and the Court's equitable powers, in amounts subject to proof.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment and relief as follows:

1. For a declaration that this lawsuit may properly maintained as a class action, and a declaration certifying the Class Representative's claims herein;
2. For general damages in an amount to be proven at trial;
3. For special damages in an amount to be proven at trial;
4. For disgorgement of profits and for restitution in amounts to be proven at trial;
5. For injunctive relief;
6. For any other available penalties for each illegal or fraudulent business act or practice;
7. For attorneys' fees pursuant to statute and the Court's equitable powers, in amounts subject to proof;

- 1 8. For exemplary damages pursuant to California Code of Civil Procedure §3294;
2 9. For prejudgment interest; and
3 10. For such other and further relief as may be just and proper.
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5 **DEMAND FOR JURY TRIAL**

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7 Plaintiff hereby demands trial of the within causes by jury.
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9 Dated: May 17, 2013

GIRARDI | KEESE

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11 By: 

12 **THOMAS V. GIRARDI**
13 **GRAHAM B. LIPPSMITH**
14 Attorneys for Plaintiff

15 Dated: May 17, 2013

LAW OFFICES OF PAUL N. PHILIPS, APLC

16
17 By: 

18 **PAUL N. PHILIPS**
19 Attorneys for Plaintiff
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