

**FITNESS VERSUS FACT:
FITBIT'S STRUGGLE WITH ALLEGED CONSUMER FRAUD**

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I. Introduction

Our ancestors lived in the steel age, the world wars, and the age of the cold war but now we have been thrust into the age of information. Today people are intrigued with the science of their daily lives. This intrigue has flowed into the specialty of fitness analytics. Athletes and other fitness enthusiasts are fascinated with knowing the data of their athletic performance in an effort to increase the productivity while “working out.” To meet this relatively new niche market companies have released products that monitor and track physical activity. In the past few years these devices have taken the form of high tech clip-ons, watches, and necklaces with features that track steps, calories burned, sleep quality, and heart rate. These developing technologies come with a risk to consumers as they focus around activities that affect a consumer’s health. Increasingly consumers are relying on these untested devices’ data outputs to make health and wellness decisions. The claims that companies make in this multi-billion-dollar market do not always align with the product’s performance. The scientific community has recently become concerned with the validity of these physical activity monitors because of the motivational effect it has on consumers and the subsequent use of these devices in medical research. The issue of protecting consumers both physically and financially is now a concern of the legal circuit. The cases addressed in this paper reveal the concern for protecting consumers and evaluates the claims that companies make regarding the accuracy of their devices.

II. The Two Fronts

In an effort to protect their fellow consumers and seek restitution for their financial injuries the alleged victims of consumer fraud have brought cases against the corporate leader in activity

monitors, Fitbit Inc. The Plaintiffs in the two cases argue that the claims Fitbit made about their products are dangerously inequivalent to the products' actual performance. The first case filed against Fitbit solely addresses the alleged misrepresentations Fitbit made about their products compared to the actual performance of the activity monitors. The second case recently filed against the company focuses on the injury Fitbit stockholders suffered when the news of their products alleged inaccuracies was publicized. Fitbit purchasers and stockholders across the country are being represented in these two class action suits against the wearable technology giant. As these two fronts are being pursued both consumers and companies are evaluating the statements made about the performance of popular health related products.

A. The Beginning of Fitbit's Legal Troubles

In 2015, the previously stated concerns emerged on the docket of the Northern District Court of California. This case, *McLellan et al v. Fitbit*,¹ was the origin of the public awareness towards the alleged misstatements and fraudulent claims. The case outlines several of the alleged injuries suffered by the Plaintiffs. For example, Plaintiff James Schorr, a resident of Ohio, was advised by his physician to lose weight by exercising. Mr. Schorr suffers from mild atrial fibrillation so he was advised for health safety reasons to keep his heart rate below 120 beats per minute (bpm). Based on recommendations and Fitbit's representation of their products ability to accurately record heart rate, he purchased a Fitbit Charge HR. The Plaintiff reported that the device was woefully inaccurate, putting him at a serious risk of physical harm.² This accusation of inaccuracy is one example of the fraud and misrepresentations that the plaintiffs allege. Fitbit in

¹ U.S. District Court for the Northern District of California No. 3:16-CV-00151-SI, 2016.

² *Id.*

their marketing campaigns for the Charge HR and Surge activity monitors frequently used slogans such as “every beat counts,” “make every beat count,” and “never miss a beat.”³ When Fitbit filed their IPO Prospectus Summary they stated, in part, that they “dedicate significant resources to developing proprietary sensors, algorithms, and software to ensure that our products have highly accurate measurements, insightful analytics, compact sizes, durability, and long battery lives.”⁴ The prospectus also claimed, “[o]ur devices... feature proprietary and advanced sensor technologies and algorithms as well as high accuracy and long battery life.”⁵ The Plaintiffs, citing a few research studies conducted on the validity of Fitbit’s products, allege that the Defendants made materially false and misleading statements and specially failed to disclose the inaccuracy of their heart rate monitoring technology which poses a health risk to the public. The Plaintiff’s counsel in this case referenced two specific sections of the California Civil Code in alleging misconduct.

Fitbit in their presentation of their products allegedly violated California Civil Code § 1770(a) by failing to disclose the defective nature of the PurePulse heart rate technology, representing that the technology had characteristics and benefits that it did not, representing their products as having a particular standard, quality, or grade when it was another, and advertising the PurePulse technology in their products with the intent not to sell them as they were described to the public.⁶ These purported inaccurate statements and claims are also being referred to as violating the California Business & Professions Code § 17200. This California Civil Code prohibits acts of “unfair competition” including any “unlawful, unfair or fraudulent business act

³ Id.

⁴ Id.

⁵ Id.

⁶ U.S. District Court for the Northern District of California No. 3:16-CV-00036, 2016.

or practice” and “unfair, deceptive, untrue, or misleading advertising.”⁷ Fitbit, a corporation based in San Francisco, California, does not deny their alleged actions of misrepresenting their products to consumers through misleading advertising. However, they do dispute the legality for which their customers can sue them.

After purchasing a Fitbit product from a brick-in-mortar store or a third party the consumer must go to Fitbit’s website and create an account with the company. During this process the customer is required to electronically sign the terms and conditions to finish the process. Within the clauses of the terms and conditions is a statement that when agreed to binds all purchasers of Fitbit products to an arbitration agreement and class action ban. The Plaintiffs in this case are arguing that the method of requiring consumers to agree to the terms and conditions, which include this arbitration claim, in order to use their products constitutes unfair and deceptive trade practices that are prohibited by California Civil Code. The question of whether purchasers of Fitbit products, in agreeing to the arbitration clause, sacrificed their constitutional rights to a trial by jury, and their right to join a class action suit is still being pursued by the defense.⁸ For the time being the district court judge in Northern California has moved to resolve this conflict outside of court with arbitration.

Despite the encouraged arbitration of *McLellan et al v. Fitbit, Inc.* a new class action suit has emerged that addresses Fitbit’s alleged misstatements in a different sense. The case of *Robb v. Fitbit, Inc.*⁹ is a federal securities class action suit on behalf of all persons of the public who purchased Fitbit Securities. The Plaintiffs allege that the statements “every beat counts” and “never miss a beat” are not only misleading in comparison to the corporation’s products

⁷ Id.

⁸ Id.

⁹ Supra note, 1.

performance but that these misstatements influenced the market price of their publicly offered securities.¹⁰ If the claims of grossly inaccurate products and the belligerent misleading of consumers are accurate, then Fitbit securities were traded at inflated prices. The Plaintiffs in this case are pursuing these claims as accurate and purposeful violation of the Securities Act of 1933 (“Securities Act”) and the Securities Exchange Act of 1934 (“Exchange Act”).¹¹ Most recently the defense has moved to challenge the allegations by disputing the inaccuracies of their products, the complaint’s ability to sufficiently plead scienter, and the role the misstatements made in the sale of their securities.

On the allegations of their products being grossly inaccurate Fitbit has responded by confirming their product’s accuracy as health and wellness devices not intended for medically relevant decisions. Fitbit has been quick to argue that the statements the company made via press releases and advertising were simply human error that resulted in the slight overstatement of the facts. This “optimistic” approach that Fitbit takes toward their products was addressed in the case of *Kaplan v. Rose*.¹² This Ninth Circuit Court case defines the point at which a projection becomes actionable and a “factual” misstatement under Section 10(b) of the Securities Act when “the statement is not actually believed, there’s no reasonable basis for the belief, or the speaker is aware of undisclosed facts tending seriously to undermine the statement’s accuracy.”¹³ Additionally, in *Brinkman v. Fitbit*¹⁴ the court noted “Advertising which merely states in general terms that one product is superior is not actionable” but “mis-descriptions of specific or absolute characteristics of a product are actionable.” The “optimistic” defense held by Fitbit is lacking

¹⁰ Id.

¹¹ Id.

¹² 49 F.3d 1363, 1375 (9th Cir. 1994)

¹³ Id.

¹⁴ U.S. District Court for the Northern District of California No. 15-CV-02077-JD, 2016.

precedence as the Plaintiffs demonstrate further evidence of misleading and inaccurate statements. A major part of these accuracy accusations is the academic studies referenced in the case of *McLellan et al v. Fitbit* and two confidential witnesses who were closely related to product accuracy and assurance at Fitbit. Confidential Witness 1 (CW 1) was a contracted data scientist for Fitbit that was hired to develop quality-assurance analytics. CW 1 provided monthly reports to the Chief Operations Officer (COO) and by June 2015, CW 1 “noted significant issues with the accuracy of Fitbit’s heart-rate monitoring, relative to other types of failures.”¹⁵ Confidential Witness 2 (CW 2) was a contract fitness tester at Fitbit, Inc. It was ultimately reported to the COO that CW 2 “found Fitbit’s heart-rate monitoring devices to be highly inaccurate, particularly during vigorous activities.”¹⁶ The court has yet to rule on the validity of these accusations, but the confidential witness statements prove, according to the Plaintiffs, that Fitbit executives were aware of their products inaccuracies.

Fitbit, however, has challenged the Plaintiffs ability to sufficiently demonstrate scienter despite the confidential witness testimony and other elements of the Plaintiff’s evidence. The Defense has stated that the evidence provided by the Plaintiffs does not sufficiently plead scienter, with “particular facts” that the Defendants acted with a particular state of mind.¹⁷ However, the Supreme Court has previously explained the inquiry “is whether all of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, securitized in isolation, meets the standard.”¹⁸ The court recently has denied the

¹⁵ Supra note, 1.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id.

Defense's motions to dismiss on this basis because of the strong evidence the Plaintiffs have provided prior to the jury trial.

B. An Different Approach

Despite the individual liability each Defendant has from the fact that they were high level executives and agents of Fitbit, Inc., the central focus of *Robb v. Fitbit* is the role these allegations played in the minds of Fitbit securities owners and the overall value of such securities. On June 18, 2015, Fitbit completed its Initial Public Offering (IPO).¹⁹ The company issued, in total, over 36 million shares raising net proceeds of approximately 732 million.²⁰ The public allegations of misleading statements and fraud reached the media on January 6, 2016. A direct consequence of these allegations Fitbit's stock price per share fell from \$30.96 to \$13.99 by May 19, 2016.²¹ After the filing of *McLellan v. Fitbit* the individual shares lost half of their previous estimated value. The holders of Fitbit Securities are the Plaintiffs of this class action suit as they seek retribution for Fitbit's alleged misconduct that significantly affected their share prices. The Plaintiffs of this case, citing the previous facts mentioned, accuse Fitbit of violating Section 10(b) of the Exchange Act (specifically Rule 10b-5) by (1) employing devices to defraud, (2) making untrue and misleading statements, and (3) by engaging in acts that operated as a fraud to deceive purchasers of their company's securities in an effort to artificially inflate market prices of the securities.²² These three points of violation are supported by the reports Fitbit submitted to the Securities and Exchange Commission (SEC). In their IPO Prospectus

¹⁹ Id.

²⁰ Id.

²¹ Id.

²² 15 U.S.C. § 78j(b)

Summary the Plaintiffs stated in part “We dedicate significant resources to developing proprietary sensors, algorithms, and software to ensure that our products have highly accurate measurements, insightful analytics, compact sizes, durability, and long battery lives.”²³ The prospectus also claimed, “[o]ur devices... feature proprietary and advanced sensor technologies and algorithms as well as high accuracy and long battery life.”²⁴ When these statements and reports were filed with the SEC the individual defendants certified, pursuant to the Sarbanes-Oxley Act of 2002, that the information contained in the reports were accurate.²⁵ Relying on the Fraud-On-The-Market Doctrine the Plaintiffs state that the proof is evident that (1) the defendants made public misrepresentations or failed to disclose material facts, (2) the misrepresentations alleged would tend to induce any reasonable investors to misjudge the value of Fitbit’s securities, and (3) the Plaintiff’s purchased Fitbit Securities during the time the Defendants allegedly misrepresented or failed to disclose material facts.²⁶ Although Fitbit continually filed reports with the SEC and regularly communicated with public investors via press releases and other means the Plaintiffs are concerned with the nature of the information they were presented with.

The result is that the Plaintiffs in *Robb v. Fitbit* are continuing to pursue their allegation against the technology company. Allegedly the defendants made materially false and misleading statements and specifically failed to disclose the inaccuracy of their heart rate monitoring technology, and the health risk such inaccuracy poses to the public. This case, however, has yet

²³ Supra note 1.

²⁴ Id.

²⁵ Id.

²⁶ Id.

to be resolved as consumers are growingly concerned about both the scientific accuracy of devices and the legal accuracy of advertising.

III. The Effects On Consumers and Clinicians

Beside the legal restitution for the affected plaintiffs in the two cases mentioned above, they are effecting the ways consumers gage physical activity and how clinicians are conducting their work. Consumers and Clinicians should be concerned with the use of consumer available activity monitors because of the lack of data verification and standardization. Consumers are often the first to embrace technology but this acceptance of the future comes with a risk. Devices are exercise accessories that provide rough estimations of activity data. While consumers are moving toward data driven lives not much is known about the accuracy of these devices. The basis of this problem is that the responsibility of insuring accuracy of these devices falls to their manufacturers, like Fitbit. Conducting validation studies is not scientifically glamorous nor is it properly funded. The use of these devices in a clinical fashion or in any reference toward health changing decisions must be taken with a grain of salt until each device can be validated. Investigators and consumers must be willing to relinquish the ease that these devices offer for more reliable metrics that have been validated. This task is increasingly difficult to do as innovation out paces the validation effort, but that does not diminish the overall importance. However, consumer protection is far more important. After reviewing these two cases, consumers should be warier of the next generation of products they buy, especially when the product relates to the consumers' health.

IV. Conclusion

In this new age of data and technology the awareness and literacy of consumers regarding the innovative products they invest in is paramount. People are fascinated with the data of their everyday lives so companies such as Fitbit have capitalized on this trend. Devices called activity monitors are readily available to consumers who wish to know such information. However, the data and results represented by these consumer devices must be carefully perceived as information on each device's accuracy is limited. Consumers run the risk of basing health and medical decisions off this data. Activity monitors are currently being held in the spotlight for their advanced technology and ease of use that manufactures claim. The consequences of actions such as this have been outlined in this paper regarding the two class action suits against Fitbit. Consumers simply must put their physical and financial safety above novelty and ease of use as the world continues into the age of technology and data.