

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable James Donato, Judge

KATE MCLELLAN, TERESA BLACK,)
and DAVID URBAN, Individually)
and on Behalf of All Others)
Similarly Situated,)
)
Plaintiffs,)
)
VS.)
)
FITBIT, INC.,)
)
Defendant.)
)

NO. C 16-00036 JD

San Francisco, California
Thursday, May 31, 2018

TRANSCRIPT OF PROCEEDINGS

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1 Thursday - May 31, 2018

10:25 a.m.

2 P R O C E E D I N G S

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4 **THE CLERK:** Calling Civil 16-36, McLellan versus
5 Fitbit.

6 (Whereupon a document was tendered to the Court.)

7 **THE COURT:** Thank you.

8 **THE CLERK:** You're welcome.

9 **MR. SELBIN:** Good morning, Your Honor.
10 Jonathan Selbin, on behalf of plaintiffs.

11 **MR. BUDNER:** Your Honor, Kevin Budner, also on behalf
12 of plaintiffs.

13 **MR. BARTOLOMEO:** Good morning, Your Honor.
14 Kai Bartolomeo, on behalf of the defendant Fitbit.

15 **MR. STERN:** And William Stern, on behalf of Fitbit.
16 Good morning.

17 **MS. BOSMAN:** Good morning, Your Honor. Erin Bosman,
18 on behalf of Fitbit.

19 **THE COURT:** Okay. Well, let me start with the most
20 intriguing issue, and that is: What is going on with your
21 arbitration. Mr. Selbin?

22 **MR. SELBIN:** Yes Your Honor.

23 **THE COURT:** May it please the Court, Jonathan Selbin,
24 Lieff, Cabraser, Heimann and Bernstein, on behalf of
25 plaintiffs.

1 Well, I think we've entered what the Ninth Circuit called,
2 "the dark side of our nation's policy in favor of arbitration,"
3 which is to say that after two years of telling the Court and
4 Plaintiff McLellan that she had to go to arbitration even to
5 have arbitrability decided, Ms. McLellan went to arbitration,
6 and Fitbit refused to pay the fees.

7 And we think that, under a controlling Ninth Circuit case,
8 *Brown versus Dillard's*, which is the source of the "dark side"
9 quote, 430 F. 3d. 1004, they've voided their own Arbitration
10 Agreement. And we think it's grounds for --

11 **THE COURT:** Actually, I may have been -- I was
12 actually asking a simpler question, which is: What literally
13 is happening?

14 **MR. SELBIN:** Well, what literally --

15 **THE COURT:** Is it scheduled?

16 **MR. SELBIN:** No. It's -- they --

17 **THE COURT:** Do you have an arbitrator signed up?

18 **MR. SELBIN:** None of the above. Ms. McLellan
19 initiated arbitration. We address this in our surreply.

20 **THE COURT:** That's why I'm asking. It's intriguing.

21 **MR. SELBIN:** Yeah. She initiated the arbitration;
22 included in the list of things that were important to her in
23 that arbitration that the arbitrator be familiar with issues of
24 scope and enforceability, arbitrability issues; that that's the
25 issue Your Honor sent it there --

1 **THE COURT:** This is AAA?

2 **MR. SELBIN:** This is AAA.

3 She paid her fee. She's required to pay \$200, and she
4 paid that fee.

5 And Fitbit made an offer of -- what was, in effect, an
6 offer of judgment to her, which she declined. And they did not
7 pay their fee to the AAA. And they informed AAA that they
8 believed that the arbitration was terminated.

9 **THE COURT:** Well, that's what I was confused about.
10 The AAA letter is close to that, although it didn't quite say,
11 *We refuse to participate.*

12 So let me ask Mr. Stern what's happening with the
13 arbitration.

14 **MR. STERN:** Yes. Thank you, Your Honor.

15 First of all, what I want to say is that what happened in
16 AAA and Ms. McLellan has nothing to do, in our view, with the
17 motion that is -- the Motion to Strike regarding Mr. Dunn.

18 That said, I'm happy to discuss what happened at AAA. We
19 didn't have a chance to brief it. And what I'd like to request
20 is that, if in any way what happened in AAA is going to affect
21 Mr. Dunn's motion, I'd like either an opportunity to brief it,
22 or to fully discuss what happened in AAA.

23 **THE COURT:** We'll work all of that out.

24 **MR. STERN:** Okay.

25 **THE COURT:** What is happening with AAA?

1 **MR. STERN:** Yeah. Because we have -- Fitbit has a
2 great story to tell about AAA. What happened is this is an
3 individual arbitration. That's what she signed up for.

4 And if Your Honor would permit, I have a one-page handout.

5 **THE COURT:** Sure. Hand it to Ms. Clark.

6 (Whereupon a document was tendered to the Court.)

7 **THE COURT:** Do you have two copies?

8 **MR. STERN:** I do. Mr. Selbin has a copy. And,
9 barring an objection --

10 **MR. SELBIN:** No objection.

11 **MR. STERN:** Okay.

12 **THE COURT:** I'm just looking at it. Okay?

13 **MR. SELBIN:** Yeah. No objection.

14 **THE COURT:** We're not doing anything else with it.
15 Whether you object or not, I'm going to look at it.

16 So go ahead. What is this telling me?

17 **MR. STERN:** Yeah. And this is in the Record,
18 Document 133-2.

19 What this is telling us is that Ms. McLellan, following
20 the Court's ruling Your Honor made October 2017, six months
21 went by.

22 **THE COURT:** Yes.

23 **MR. STERN:** After we filed our Mr. Dunn motion to
24 strike, and one week before they filed their opposition, they
25 sought for the first time to tender their claim to AAA. And

1 this (indicating) is the cover sheet on the demand.

2 **THE COURT:** Okay.

3 **MR. STERN:** And what I wanted to call out was two
4 things.

5 The dollar amount of claim on the left side is just under
6 \$162.

7 And the portion I highlighted asks for who the claimant
8 is; type of business. It says "individual." That was typed in
9 by Ms. McLellan.

10 So it is consistent with the Court's ruling. It's an
11 individual claim that seeks \$162.

12 They also seek other relief, to the right of that:
13 Attorneys fees, et cetera.

14 **THE COURT:** Mm-hm.

15 **MR. STERN:** So we were presented with this demand.
16 And we looked at the Terms of Service. There's nothing in the
17 Terms of Service that says that Fitbit has to act irrationally,
18 or different than it would with any other claim for \$162. We
19 looked at it.

20 We also decided what -- this is a
21 customer-service-oriented company. We want customers to be
22 happy. She's obviously not happy.

23 So what did we do? We wrote a check -- and wrote a letter
24 which you have in front of you -- that was 17 times the \$162
25 demand. It offered her her money back -- all of it, not just

1 the price premium for the allegedly dysfunctional heart
2 monitoring. The whole thing. \$162 plus interest. Four times
3 that amount for punitive damages. We used the Ninth Circuit 4x
4 as guidance. We paid -- we offered a thousand dollars in
5 attorneys' fees for filling out the form and tendering the
6 form. By the way, most of the rest of this was just attaching
7 pleadings from this case. And she gets to keep the watch. Oh,
8 and we also offered \$750 reimbursement for the filing fee. So
9 we wrote a check -- I mean, we offered to write a check for
10 about \$2,800. And they declined.

11 Now, it's perfectly within their right to decline. We are
12 not saying, as Mr. Selbin is suggesting, that this is -- that
13 this extinguishes the claim. It doesn't. It's an offer. It's
14 good only upon acceptance, and she didn't accept.

15 But we did have a phone call with Mr. Selbin afterward.
16 And in the phone call we said --

17 They asked us, *Do you want to know why we turned it down?*

18 We said, *Yeah. Tell us.*

19 And he said because -- a couple of things. They said,
20 first, we're not offering full relief that she requests.

21 And so we asked, *What is the full relief?* And we asked
22 about money.

23 And all they said about money is they don't agree with our
24 4x measure on punitive damages.

25 And so we said to them, *Well, what would be enough? Tell*

1 *us. Make us a counteroffer.*

2 They declined on money. So at least where we stand
3 today -- and they never counteroffered.

4 So what full relief she didn't get -- let's go through
5 what that might be.

6 **THE COURT:** Well --

7 **MR. STERN:** It's not money.

8 **THE COURT:** Let me ask a question.

9 **MR. STERN:** Okay.

10 **THE COURT:** She said "No." Okay.

11 So what's happening now with the arbitration?

12 **MR. STERN:** So we wrote the letter which is in front
13 of you --

14 **THE COURT:** Yes.

15 **MR. STERN:** -- to AAA two weeks ago. And we said,
16 *Here's what we did.* We told AAA that no rational --

17 **THE COURT:** I should not hear too much about
18 settlement issues. Okay?

19 **MR. STERN:** Pardon? I'm sorry.

20 **THE COURT:** High level is better.

21 **MR. STERN:** High level.

22 **THE COURT:** I'm not really supposed to hear about
23 these --

24 **MR. STERN:** Understood. I think you've heard all you
25 need to.

1 **THE COURT:** I should not hear either side's
2 back-and-forth about why this is good or not.

3 **MR. STERN:** Understood.

4 **THE COURT:** But all I'm interested in is: What is
5 the next step? Are you now booking arbitration? You said
6 "No." You have another controversy. What's the next step?

7 **MR. STERN:** We told AAA that, in our view, a rational
8 litigant wouldn't litigate \$162 claim where the filing fee,
9 itself, is \$750.

10 This wouldn't be true in this court. If she had filed
11 this claim in this court, and we had tendered \$2,800, I have a
12 feeling the Court would look to the other side and say, *What is*
13 *it you would get if you went fully to trial, and got everything*
14 *you wanted, and then some? You would get less than 2,800.*

15 But in any event --

16 **THE COURT:** You know, the Supreme Court has said you
17 cannot unilaterally moot a claim. And you certainly can't moot
18 standing, simply by tendering what you consider to be full
19 relief. So although I might look askance --

20 **MR. STERN:** Understood.

21 **THE COURT:** -- I would have no power nor would I have
22 the inclination to put the case on hold, or otherwise dismiss
23 it. It would go forward.

24 **MR. STERN:** Yes.

25 **THE COURT:** Now, is the arbitration going forward?

1 **MR. STERN:** Let me answer that, but first let me go
2 to mooted the claim. We're not arguing that her claim has
3 been mooted. What we're saying is we made an offer: 17x.

4 We have heard no counteroffer.

5 And we've told AAA all of this; exactly what I'm telling
6 you. And we said, *We regard that matter as concluded.*

7 So we have had no further communications with them. We
8 haven't posted our fee with AAA.

9 What I understand from the surreply -- here's -- let me
10 say this. That decision is not irreversible, but what I
11 understand Ms. McLellan wants -- and I know this from the
12 surreply. And maybe Mr. Selbin will elaborate. What she wants
13 is a right to be heard. And my understanding of that right to
14 be heard is simply to have, pursuant to the Delegation
15 Clause -- is to have the arbitrator decide the remaining two
16 formation issues that Your Honor didn't decide, which would be
17 fraudulent inducement, and scope.

18 So when I'm hearing notions about she's been denied a
19 right of Due Process, an opportunity to be heard, let's be
20 clear on what that right is. What she is asking us to do is go
21 to arbitration on a claim of \$162; that we have to pay \$750
22 just to get the arbitrator, in order to have her two formation
23 defenses decided. At least, that's the first step.

24 As I said, we felt no rational litigant would require
25 that. The -- nothing in the Terms of Service says we have to

1 do what no rational litigant would do; but on the other hand,
2 it's not irreversible. We could -- after this hearing, we
3 could -- I will consult with my client, who's in the courtroom
4 today. And if we decide to change that, if it's important, we
5 can do that.

6 But I do want to emphasize what happens to her has nothing
7 to do with Mr. Dunn. And I'm happy to explain that. I'm also
8 happy to brief that, because this whole issue is a red herring,
9 as far as Mr. Dunn and --

10 **THE COURT:** I could not disagree more. I am
11 developing a very slow but distinct burn over what appears to
12 be an absolutely unacceptable level of gamesmanship by Fitbit
13 in this case.

14 Now, you all came to me and said this case could not be
15 heard in court -- no way, no how -- because it was subject to
16 arbitration.

17 And I litigated that, and I issued an Order, and I sent
18 you to arbitration.

19 For Fitbit now to say, unilaterally, *This case is not*
20 *arbitrable, because we think it's a cheap case, and we offered*
21 *her plenty money to get rid of it, and she said "No," and she's*
22 *crazy as a result of that, so our hands are not tied,* strikes
23 me as profoundly troubling; troubling to the point where I'm
24 beginning to consider whether this is a form of civil contempt.

25 Now I am going to set a schedule for this. And we're

1 going to do this in due course and in due order. And,
2 Mr. Selbin, how about two weeks from today, you take a look
3 at -- I want a full description of both sides' views of what
4 happened.

5 **MR. SELBIN:** Very good.

6 **THE COURT:** Now, you can call this, for the moment, a
7 statement on the status of the arbitration.

8 I do not know how this will be packaged; whether this is a
9 form of contempt. Whether I reverse my delegation order or
10 whether we do something else, I don't know yet; but the first
11 thing I want to do is get a handle on the facts. And if you'd
12 lay out for me, please, Mr. Selbin, the time line with specific
13 references and dates and letters and e-mails and so on, then I
14 can take a look at it. And tell your side of the story.

15 Mr. Stern, you do the same.

16 **MR. SELBIN:** Very good.

17 **THE COURT:** And is two weeks adequate for that?

18 **MR. SELBIN:** Plenty, Your Honor.

19 **THE COURT:** All right. And you can have two weeks to
20 respond.

21 **MR. STERN:** Yes, sir.

22 **THE COURT:** I will tell you that if I find that
23 Fitbit has forced this case out of court, and then has
24 unilaterally refused to arbitrate it, there will be an
25 accounting. And that accounting will have potentially grave

1 consequences, both professionally for the attorneys and
2 possibly for the client, as well. I am very disturbed that
3 this would be the tactic that Fitbit would use. You cannot
4 shut down people's claims through games. And I am gravely
5 concerned that that is what has happened here.

6 **MR. STERN:** Yes.

7 **THE COURT:** Now, I will look at these facts, and I
8 will be prepared to be educated. And it may be that there's
9 been a misunderstanding and I've gotten it wrong, or you've
10 gotten it wrong, or something else has gotten it wrong, and we
11 can go on our path and put this behind us; but if that is not
12 the case, we will be talking again. All right?

13 Two weeks. That will be the Order on that.

14 **MR. SELBIN:** Understood, Your Honor.

15 **MR. STERN:** Your Honor, one comment as far as the
16 briefing.

17 **THE COURT:** Yes.

18 **MR. STERN:** As I said --

19 Well, two things.

20 As I said, we never intended to moot this claim. It was
21 simply an offer, but we can brief that. I don't want to argue
22 that, but I just wanted to be clear that that was never our
23 intent; and I said so earlier today.

24 The other point is I also said, *This isn't irreversible.*

25 And I can visit and I will revisit with the client whether we

1 want to reopen the arbitration. And I'm pointing this out only
2 to say that when our due date comes, we may very well say,
3 *We've written a letter. We've posted our \$750. And we'll go*
4 *forward.* And we could very well do that.

5 But the Court ought to understand that a claim that is
6 \$162 -- an individual claim -- is not one that any rational
7 litigant would litigate.

8 **THE COURT:** All right. I'm going to stop you,
9 Mr. Stern, because I need to see the record.

10 **MR. STERN:** I understand.

11 **THE COURT:** I do want to advise you that is, in my
12 view, an incorrect perspective on the issue.

13 The correct perspective is: There is a dispute -- a live
14 one -- over whether Fitbit's Arbitration Agreement is binding,
15 and whether it covers the claims in this case.

16 **MR. STERN:** Correct.

17 **THE COURT:** That's what was sent to the arbitrator.
18 It was not to resolve a \$161 claim.

19 It was sent to the arbitrator to decide whether the case
20 was going to go forward in this forum or in arbitration,
21 because there were disputes over arbitrability. So to say that
22 this is limited strictly to a \$160-and-change claim is wrong.
23 That is just not correct.

24 **MR. STERN:** I'm only going by the box that they
25 checked. And if there's a misunderstanding, we can fix that.

1 **THE COURT:** I don't imagine that there could be a
2 misunderstanding, because I sent the case to AAA to decide
3 arbitrability; not to decide a \$161 claim. That is not even a
4 portion of my Order. It's not even mentioned in my Order.

5 The Order as to AAA was: Under the current state of the
6 law, you, Mr. Arbitrator or Ms. Arbitrator, need to decide this
7 question. The question goes to the heart of which forum will
8 hear this case.

9 It had nothing to do, even remotely, with the dollar value
10 of her watch; and I'm taken aback that you keep focusing on
11 that. You know that's not the case. Even the lawyer in this
12 case, from Day One, you signed all of those briefs. You argued
13 it to me. You know what was delegated to the AAA to decide.
14 It was not a \$161 claim.

15 Mr. Selbin.

16 **MR. SELBIN:** Your Honor, only one comment relating to
17 this reversibility issue. And we will brief this, as well.
18 Again, the *Brown versus Dillard's* case from the Ninth Circuit
19 expressly addresses this, where a defendant comes in and says,
20 *Never mind. We're sorry. We'll go back and arbitrate now.*

21 And the Ninth Circuit says, *You can't do that. You had*
22 *your chance.*

23 We'll brief it.

24 **THE COURT:** We're going to take this one step at a
25 time.

1 **MR. SELBIN:** Sure.

2 **THE COURT:** I'm going to get a handle on the facts
3 first. Then we'll set --

4 **MR. SELBIN:** Very good.

5 **THE COURT:** All right. Two weeks from today. And
6 then two weeks to reply.

7 **MR. STERN:** Good. Thank you.

8 **THE COURT:** Okay. Let's see.

9 **MR. SELBIN:** Your Honor, there's also the Motion to
10 Dismiss on calendar. I don't know. Mr. Budner, from our firm,
11 is prepared to argue that today. That can wait.

12 **THE COURT:** That's fine. Let's do the Motion to
13 Strike first.

14 **MR. SELBIN:** Okay.

15 **THE COURT:** Okay. Now, Mr. Selbin, I said these have
16 to go to arbitration. You can't -- if the arbitrator decides
17 that it's not for the arbitration panel to hear, then it's for
18 the Court to hear. That's fine.

19 You can amend, and put these people back in, and the class
20 allegations; but they were taken out. All right?

21 So saying, *Well, we're just going to hang fire until the*
22 *arbitrator decides and leave all of this in*, is not the right
23 step. You can amend later. It will be without prejudice.
24 It's perfectly fine. You're not going to be hamstrung. I
25 can't imagine. Maybe -- I just hate to say "No," because

1 1 percent -- less than 1 percent chance something dramatic
2 might happen; but you will seasonably almost certainly be
3 allowed to amend, and put all of those people back in. No
4 one's going to close the courthouse doors. Okay? So --

5 **MR. SELBIN:** I understand, Your Honor.

6 If I may, there's a couple of points I'd like to make, in
7 specific that relate to some arguments in their Reply, for no
8 other reason than the Record. I hear Your Honor.

9 The first point is that we think that this issue is now
10 even more premature than we thought before, because there is
11 the issue of what's going to happen with the arbitration, and
12 whether everybody's going to come back. Certainly
13 Ms. McLellan, we think, will. And we think there's an argument
14 that that's going to apply to everybody, given what they've
15 shown with respect to their own adherence to their own
16 Arbitration Clause, and whether it becomes void. So we think
17 that any ruling on class ought to at least delay the resolution
18 of that issue.

19 A couple other points.

20 They don't argue that he can't represent a class of
21 opt-outs.

22 **THE COURT:** I think they agree that he can.

23 **MR. STERN:** He can.

24 **MR. SELBIN:** He can. Okay. So I want to make sure
25 that that's clear. So we're fine on that.

1 Then we get to injunctive relief.

2 **THE COURT:** By the way, let me just jump in.

3 **MR. SELBIN:** Sure.

4 **THE COURT:** Now, somebody said somewhere that there
5 is actually -- you have an exact count, or roughly the exact
6 count.

7 **MR. SELBIN:** It's roughly 200.

8 **THE COURT:** You agree with that?

9 **MR. SELBIN:** We -- based on the discovery they
10 provided, that's what we're talking about.

11 **THE COURT:** All right. That's scattered throughout
12 the country?

13 **MR. SELBIN:** A couple hundred folks.

14 **THE COURT:** 200 basically?

15 **MR. SELBIN:** I'm sorry?

16 **THE COURT:** 200?

17 **MR. SELBIN:** 200. That's our understanding.

18 **THE COURT:** More than I would have thought, actually.

19 **MR. SELBIN:** No comment, Your Honor.

20 **THE COURT:** Well --

21 **MR. SELBIN:** I'm not sure. We had no idea how many
22 people would have opted out.

23 **THE COURT:** Rarely do I see opt-outs in triple
24 digits. Anyway --

25 **MR. SELBIN:** I want to turn to the public injunctive

1 relief piece, because they argue that he can't represent anyone
2 on the public injunctive relief claim. And, of course, that
3 claim isn't preëmpted.

4 **THE COURT:** That, we're not taking up today. Okay?

5 All we're doing -- all I'm doing is -- we are not going to
6 have the people who did not opt out be part of the class
7 definition. That's all we're doing. Okay?

8 So I said that last time. I'm a little bit surprised it
9 came back. You need to take that out. It's without prejudice
10 to changed circumstances. So if the arbitrator, for some
11 reason, sends the case back or there are other developments
12 that would affect the delegation of the issue to arbitration, I
13 will allow you to seasonably amend that; but we're not going to
14 pretend the delegation didn't happen. So you have to take that
15 out. All right?

16 This case is about Mr. Dunn and the 200-or-so opt-outs
17 only, and that's all that should be in the class definition.
18 It really is just editing. It makes no substantive difference
19 at this point. Okay?

20 We will defer any issues about public injunctive relief.
21 It's not even a theoretical issue. It's not even a practical
22 issue until a class gets certified anyway. So why don't we
23 just wait and see how it goes? If he has an individual right
24 to sue that's not going to be affected by the class
25 allegations, he may be able to get an injunction that will

1 effectively cover other people, just as an individual. That's
2 actually typically how these things happen. You don't even
3 need a class. You know, if you get conduct relief for one,
4 it's conduct relief for all. But who knows what will happen
5 with that? We don't have to do that today. Okay?

6 So it's granted to that limited extent. And I'll spell
7 that out in the Order.

8 Now, on the Motion to Dismiss, Mr. --

9 **MR. SELBIN:** Thank you, Your Honor.

10 **MR. STERN:** Your Honor, and Mr. Bartolomeo will be
11 arguing for us.

12 **THE COURT:** Mr. Bartolomeo. All right.

13 **MR. BUDNER:** Hello, Your Honor. Kevin Budner, for
14 the plaintiffs.

15 **MR. BARTOLOMEO:** Kai Bartolomeo, for Fitbit.

16 **THE COURT:** All right. Okay. Please.

17 **MR. BARTOLOMEO:** Thank you, Your Honor.

18 I think we can start with some low-hanging fruit, because
19 there actually is a couple places where the parties agree; and
20 that is on plaintiffs' claim for revocation of acceptance, and
21 their claim for Song-Beverly.

22 **THE COURT:** Yes.

23 **MR. BARTOLOMEO:** I think in the opposition,
24 plaintiffs agree that those are not viable; that they should be
25 dismissed. We would agree, of course. And if the Court orders

1 nothing else today, we respectfully request that those two
2 claims be dismissed from the Second Amended --

3 **THE COURT:** Mr. Budner, I think that's right. Is
4 that right?

5 **MR. BUDNER:** It is 99 percent right.

6 We have footnote that relates to the issue we discussed
7 with the other attorneys about the prematurity if Ms. McLellan
8 rejoins the action. She, of course, could bring a Song-Beverly
9 claim; but I think Your Honor already noted that whether she is
10 technically omitted now and reinserted later doesn't -- doesn't
11 really matter.

12 **THE COURT:** You can amend again.

13 **MR. BUDNER:** Yeah. And that's the point I'm trying
14 to make. So --

15 **THE COURT:** All right. So Song-Beverly and
16 revocation will be withdrawn.

17 Okay. Go ahead.

18 **MR. BARTOLOMEO:** Thank you, Your Honor.

19 There's another area of agreement among the parties, and
20 that relates to plaintiffs' misrepresentation of claims. And
21 those are the claims for fraud -- fraud in the inducement, and
22 then the consumer-protection claims of California law and
23 Arizona law.

24 We don't agree on everything; but one thing we do agree on
25 is that those claims need to be pled with particularity. And

1 that requires specifying the time and place, the medium, the
2 content of the misrepresentation, the reason why the
3 statement's false, the parties to the misrepresentation, and
4 plaintiffs' reliance, which is required under all of the
5 statutes under --

6 **THE COURT:** Now, we have a little bit of a head
7 start. We went through all of this in the other *Fitbit* case I
8 had on the sleep monitors. And I'm having trouble seeing why
9 the heartrate-monitor allegations here are any less competent
10 than the ones I sustained in the sleep case. What's your view
11 on that?

12 **MR. BARTOLOMEO:** Your Honor, I think the difference
13 is: In *Brickman* the claims at issue all appeared in one
14 specific place, and were all entirely uniform. They were all
15 on the product box. Each plaintiff specifically alleged that
16 he and she read the box before purchase, and saw those specific
17 statements. And Your Honor found in *Brickman* that those
18 allegations were sufficient to satisfy Rule 9(b).

19 The difference here is that we have upwards of 20
20 representations, and they appear in different media. Sometimes
21 it's not specified where they appeared. Sometimes they were
22 commercials. It appears from other sources that they may be on
23 websites.

24 Some are statements about product functionality. Some of
25 statements that are merely catchphrases. "Know Your Heart";

1 things of that nature.

2 And so the representations are different, and the sources
3 are different.

4 And we also have the plaintiff here, who doesn't tell us
5 what specific representations he saw, and where they appeared.

6 We know generally that he did some internet research. We
7 know that that Internet research included third-party sources.
8 It appears to have maybe included the Fitbit website.

9 But that's not the entire universe of the sources for the
10 potential -- for the misrepresentations -- alleged
11 misrepresentations.

12 **THE COURT:** Mr. Budner, show me the paragraph that
13 you think best lays out what the Mr. Dawn saw.

14 **MR. BUDNER:** Yeah. I would direct Your Honor -- and
15 thank you for that. I would direct Your Honor to paragraphs 6,
16 which is his plaintiff-specific paragraph. And he says -- I
17 believe the relevant quote is that --

18 **THE COURT:** Excuse me. Paragraph six?

19 **MR. BARTOLOMEO:** I believe it's 13, Your Honor.

20 **MR. BUDNER:** You're right. It's 13, Your Honor.
21 It's paragraph 13.

22 **THE COURT:** Six has nothing.

23 **MR. BUDNER:** It is paragraph 13. You're absolutely
24 right. I was going off memory, not my notes, which is probably
25 a bad idea.

1 **THE COURT:** All right. Okay. 13. That's what
2 you're going to hang your hat on?

3 **MR. BUDNER:** And, well, I was going to supplement
4 that with paragraphs 128 and 136 in 6 -- excuse me. In
5 paragraph 13 Mr. Dunn explains that he researched Devices
6 online; that he viewed, quote, "Fitbit's representations about
7 the PurePulse Tracker's ability to consistently record accurate
8 heartrates, even during exercise."

9 And then, to the extent that that is not sufficient
10 allegation of reliance, he repeats allegations specifically of
11 reliance in paragraphs 128 and 136. And, of course, all of the
12 claims incorporate all of the -- all of the other allegations.
13 The 128 and 136 are paragraphs, I believe, within the CLRA and
14 UCL claims.

15 **THE COURT:** Okay. All right.

16 Any quick responses to Mr. Bartolomeo?

17 **MR. BARTOLOMEO:** Yes, Your Honor.

18 What paragraphs 13 says -- and this is a quote -- is that
19 Mr. Dunn, quote, *viewed Fitbit's representations about the*
20 *PurePulse Tracker's ability to consistently record accurate*
21 *heartrates even during exercise.*

22 We have about 20 representations in the Complaint. If you
23 go through each one of those, not every one of them talks about
24 consistency or accuracy. In fact, not a single one of them
25 even mentions the word "accuracy." So we're still left to

1 guess which of the varied representations in the Complaint he
2 saw and made his purchasing decision based on.

3 **THE COURT:** All right.

4 **MR. BUDNER:** You're --

5 **THE COURT:** Okay. Yes. Final word. Go ahead.

6 **MR. BUDNER:** This is our final word on fraud or --

7 **THE COURT:** On 9(b). Yeah.

8 **MR. BUDNER:** Okay. Well, let me just restate the
9 pleading standard that Your Honor articulated in *Brickman*,
10 which we do think is pretty precisely on all squares, and which
11 Your Honor foresaw would be on all squares in August, when you
12 said it would be a guide for this case if we ever got to the
13 Motion to Dismiss. So we agreed. And Your Honor said all that
14 is required is sufficient specificity to fairly apprise the
15 defendant of the nature of the alleged fraud, and enough facts
16 to warrant discovery and further proceedings.

17 I'm going to do a run-on sentence, so I get two final
18 words. And that is I also would like to --

19 **THE COURT:** It's a run-on sentence? Not in my text.

20 **MR. BUDNER:** No, no, no. Absolutely not. I'm sorry.

21 **THE COURT:** Yeah. All right.

22 **MR. BUDNER:** Your quote was pristine and
23 grammatically correct.

24 **THE COURT:** You don't have to pander.

25 (Laughter in the courtroom.)

1 **MR. BUDNER:** Well, I, however, am going to put an
2 ellipsis in there, and direct you to paragraph 50 in the
3 Complaint.

4 **THE COURT:** Five zero?

5 **MR. BUDNER:** It's five zero.

6 And the reason I'm directing you there, Your Honor, is
7 because there, Mr. Dunn references the packaging that his
8 Device came in. And it does it by way of an article that
9 critiques some of the language on the packaging, and contrasts
10 it to the performance of the Devices.

11 Now, Mr. Bartolomeo pointed out that in *Brickman*, they
12 relied exclusively on the product packaging. Well, here,
13 Your Honor, we haven't included an image of the product
14 packaging, but I think it's fairly clear that he saw the
15 product packaging before he made his purchase. We are happy --
16 if the Court deems it necessary, although I think our
17 allegations are more than specific, we're happy to include the
18 images of the packaging.

19 **THE COURT:** Do you have one?

20 **MR. BUDNER:** I do. What I have is the product
21 packaging layout that was produced by Fitbit. And I did hand
22 them a copy before we got started.

23 (Whereupon a document was tendered to the Court.)

24 **MR. BUDNER:** And I hope Your Honor brought your
25 microscope, because it is quite small, and I apologize for

1 that.

2 **THE COURT:** Thank you. Ms. Clark, this is the box?

3 **MR. BUDNER:** This is the box for the Charge HR. And
4 again, Mr. Dunn bought two of these Devices at two separate
5 locations: One at Bed Bath & Beyond, and one at Best Buy.

6 So here we have, at the front, Charge HR. Quote,
7 Heartrate plus activity wristband then their tagline, "Every
8 Beat Counts."

9 Notably, below there you have the representation that it
10 provides, quote, "continuous heartrate," next to an image of a
11 heart with an EKG line running through it.

12 And then if you flip up to the top right, which is the
13 side of the package, it details more about the heartrate. And
14 it says, *PurePulse continuous heartrate. Automatic 24/7*
15 *wrist-based heartrate.*

16 (Reporter requests clarification.)

17 **MR. BUDNER:** Wrist-based.

18 *Continuous workout heartrate.* Again, we have the image of
19 the heart. Now, we have an image of a user, depicting a user
20 with -- wearing one of the watches.

21 So even on the box, itself, you have unambiguous
22 representations that the Device provides, quote, *Automatic 24/7*
23 *wrist-based heartrate; continuous workout heartrate.* And it
24 shows somebody working out.

25 Now, I anticipate that if we're following the path laid

1 forth in Fitbit's motion, that at some point we're going to
2 hear them say that although they marketed a heartrate device,
3 they didn't tell anybody it would be accurate; and it's
4 ridiculous to think that they would be.

5 And that, frankly, is a silly argument.

6 They say it's going to provide continuous workout
7 heartrate. I think our allegations are pretty clear, and
8 backed up by pretty comprehensive testing that these Devices do
9 not come even close to providing a continuous workout
10 heartrate. They're off by 20, 30, 40 beats per minute.

11 It's nothing close to being full. They do not work. They
12 do not record user's heartrate during exercise. So --

13 **THE COURT:** All right. Let's go to the other issue.
14 I think I'd like to --

15 **MR. BARTOLOMEO:** Your Honor, may I make two quick
16 points in response to that?

17 **THE COURT:** Yeah.

18 **MR. BARTOLOMEO:** One is, as to *Brickman*, we don't
19 dispute what the legal standard is.

20 What we dispute is whether plaintiffs' allegations were
21 sufficient to satisfy it. We don't think they are.

22 The second is: Plaintiff is providing now an image of the
23 box, but nowhere in the Complaint -- paragraph 13, paragraph
24 50, anywhere else -- does he claim that he read the box before
25 he bought it. The difference between this case and *Brickman* is

1 that *Brickman* did say that.

2 **THE COURT:** I was wondering about that, Mr. Budner.

3 **MR. BUDNER:** Your Honor, I -- our position is that
4 the allegations in the Complaint are more than sufficient. He
5 alleges that he did online research. He did visit Fitbit's
6 website. The --

7 **THE COURT:** You would think he would mention the box,
8 though.

9 **MR. BUDNER:** Your Honor, I concede that.

10 **THE COURT:** I'm not saying one way or the other
11 whether it's -- but it just struck me.

12 **MR. BUDNER:** It would have made the allegations even
13 more robust. And if Your Honor deems it necessary, we'll add
14 that one point.

15 **THE COURT:** This is representative of what he had
16 under the box when he brought the product. Is that right?

17 **MR. BUDNER:** It is. Well, this was -- this was
18 produced to us as the package for the Charge HR. We have no
19 indication that it varied over time. I'm happy to talk to the
20 client to find his precise box, if he has it; but yes, we have
21 no reason to doubt that this is identical to the box that
22 packaged his Device.

23 **THE COURT:** All right.

24 **MR. BUDNER:** So again, Your Honor, we think that
25 we've made pretty clear that Fitbit made consistent and

1 pervasive representations about these Devices; permeated all of
2 their consumer-facing communications.

3 Calling out which one of the specific representations he
4 saw online, we don't think is necessary in this context. And I
5 think the cases that we cited in our opposition show that; but
6 again, it's certainly possible for us to add this box if you
7 think that's -- that's the linchpin.

8 **THE COURT:** Well, I -- you know, it certainly
9 would -- you have a lot to work with. It certainly would dot
10 the i and cross the t if you just met what I found to be
11 adequate in *Brickman*, and said, *Here is the box. And this is*
12 *the box my client bought. And he looked at it. And before he*
13 *paid his money for the watch he said, "That looks good to me."*
14 And that was based on what he saw on the box. So --

15 **MR. BUDNER:** Second, Your Honor.

16 **THE COURT:** Would you like to do that? How about
17 that?

18 **MR. BUDNER:** I -- to be perfectly honest, Your Honor,
19 this case has been pending for two and a half years. I would
20 like not to do that. I would like you to find that the --

21 **THE COURT:** This is not going to stay discovery, but
22 I think it would be a good idea for you to do that. Okay? So
23 why don't we do that? And at the same time, you can adjust the
24 class allegations that we talked about earlier.

25 Last thing I want to hear about is breach of warranty.

1 Mr. Bartolomeo.

2 **MR. BARTOLOMEO:** Yes, Your Honor. Thank you.

3 There are two breach-of-warranty claims in the Complaint.
4 The first is a breach of express warranty, which is based on
5 the alleged representations that plaintiff lists. And again,
6 there are upwards of 20 of those.

7 The case law is very clear that in order to stay the
8 breach of warranty -- express-warranty claim based on a
9 representation, not a written warranty, you have to specify
10 exactly the terms of the warranty; exactly the representations
11 that make up the warranty. And if Your Honor likes, I can
12 provide a couple of case citations for that.

13 **THE COURT:** No. I don't need that.

14 Let's just talk about why you think that wasn't satisfied
15 here.

16 **MR. BARTOLOMEO:** Yes, Your Honor. For the same
17 reasons that we believe that plaintiff has not satisfied
18 Rule 9(b); and that is that although we have a generalized
19 allegation of the nature of representations that he claims he
20 saw, we still have 20 representations listed in the Complaint,
21 some of which are, you know, brief marketing statements;
22 catchphrases; some of which have nothing to do with Device
23 consistency or accuracy; some of which just speak to
24 functionality.

25 And so if plaintiff truly believes that he has a

1 breach-of-express-warranty claim, it's his burden to tell us
2 what the terms of that warranty are. Plaintiff has not done
3 that, nor has he said with specificity that he relied on those
4 terms in making his decision; that it was part of the bargain.
5 And he's required to allege both to satisfy the claim.

6 **THE COURT:** All right. Mr. Budner.

7 **MR. BUDNER:** Thank you, Your Honor.

8 Mr. Bartolomeo opened, saying that the arguments were
9 similar here to the fraud-based claims. And respectfully, I
10 agree. We've detailed the allegations -- I think in the
11 Complaint, we have detailed representations. I would point
12 Your Honor to paragraphs 18 through 30.

13 **THE COURT:** I mean, you all -- just to jump in, you
14 all allege these Devices are not fit for ordinary use as
15 heartrate trackers. Right?

16 **MR. BUDNER:** That's true, Your Honor. That takes us
17 into implied warranty, which I'm happy to address as well.
18 Mr. Bartolomeo addressed express warranty; but yes, we allege
19 not only that Fitbit made specific representations which --
20 Your Honor, if you look at them, I think you'll find that
21 they're not actually all that varied.

22 The point behind all of them is that they -- and I'll just
23 give you a few samplings -- that they allow users to, quote,
24 *accurately track workout intensity*, end quote; *measure*
25 *heartrate automatically, continuously; track your heartrate all*

1 *day and during exercise; provide real-time heartrate; check*
2 *real-time heartrate to gauge your effort, and adjust workouts*
3 *on the spot; deliver continuous risk-based heartrate activity*
4 *tracking during workouts and beyond. This is all from that*
5 *range of paragraphs 18 to 30.*

6 There's a very clear and consistent message that comes
7 through among all of these. And that is that the Devices
8 provide at least some modicum of accuracy in heartrate readings
9 during exercise. That is the thrust of both our fraud-based
10 and our express-warranty claims. And as we've alleged and, I
11 think, shown with pretty extensive testing, they don't do that;
12 they don't work; they don't provide that.

13 So, for similar reasons as the fraud claims, we think our
14 express-warranty claims are adequately pleaded.

15 If Your Honor would like, I can transition to the implied
16 warranty and merchantability --

17 **THE COURT:** No. I think that's fine.

18 All right. Mr. Bartolomeo.

19 **MR. BARTOLOMEO:** Yes, Your Honor. Thank you.

20 So the representations that Mr. Budner listed are in the
21 Complaint, but so are these: "Every Beat Counts," "Know Your
22 Heart," "The Difference Between Good and Great Is...Heart,"
23 "For Better Fitness, Start with Heart," "Know Your Heart."

24 Plaintiff has a burden to tell the Court and to tell the
25 defendant exactly the representations he relied on not just for

1 his fraud-based claims, but for the warranty claim, because
2 he's constructing a warranty claim based on representation, so
3 he has to tell us what that representation is.

4 And we've now heard a couple of times plaintiffs' counsel
5 use the phrase, "It's fairly clear from the Complaint," "You
6 can tell from the Complaint," but that's not the federal
7 pleading standard. Rule 8 and Rule 9(b) require more
8 specificity than gleaning from the allegations.

9 Plaintiffs' own cases say the purpose of the pleading is
10 to put the defendant on notice, and to prevent fishing
11 expeditions.

12 We're left to guess what exactly Mr. Dunn read/relied on,
13 that he's now claiming forms an express warranty. So he's
14 required to replead to at least tell us those details. That's
15 for the express-warranty claim. For --

16 **THE COURT:** All right. Thank you.

17 Okay. I'll have this out shortly.

18 What else is happening?

19 **MR. BUDNER:** I'm sorry. I didn't catch your last --

20 **THE COURT:** I'll have this out shortly, but what else
21 is happening? What else is going on?

22 **MR. BUDNER:** What else is going on? Ah. So you're
23 moving now beyond the scope of --

24 **THE COURT:** Things going forward?

25 **MR. BUDNER:** Ah. So you're moving, now, beyond the

1 scope of the Motion to Dismiss?

2 **THE COURT:** Yes. We're moving to case management.

3 **MR. BUDNER:** I take your point. So, Your Honor, we
4 submitted some discovery requests. We had a back-and-forth on
5 them. We felt that Fitbit's responses were not sufficiently
6 thorough. We got some test results, but not a whole lot of
7 context to understand them.

8 They raised, frankly, a lot more questions than they
9 answered, and led us to believe that all responsive documents
10 had not been produced. We had a series of meet-and-confers on
11 that. We got a letter saying that Fitbit would go back and
12 look for more documents, or at least talk about it. And that
13 was a couple months ago. And we haven't heard anything.

14 We haven't pressed it further, beyond that. We didn't get
15 a specific time frame for when they'd get back to us.

16 **THE COURT:** Wait. You're the plaintiff. You've got
17 the burden of proof, so you need to be pressing forward.

18 **MR. BUDNER:** Your Honor, we intend --

19 **THE COURT:** That's your role. So --

20 **MR. BUDNER:** We intend to be even more, although we
21 weren't quite aggressive on it before, we intend to ramp up the
22 pressure.

23 **THE COURT:** Aggressive or not aggressive, that's not
24 my concern. This is your case. You're going to have to drive
25 it forward. I'm not going to keep setting deadlines, you know,

1 and allowing things to lapse so if you want to get it done, but
2 you're not happy with where you are, you need to take the next
3 step. That goes for both of you. All right. Don't just hang
4 out.

5 **MR. BUDNER:** Well, so then --

6 **THE COURT:** I'm relying -- I've got 300-plus of these
7 things. I'm relying on you to be the shepherd of your case.

8 **MR. BUDNER:** Well, then, Your Honor, I think to
9 address your question --

10 **THE COURT:** Dispute. Not going to do it on the fly.
11 Send me a letter. Just do my -- follow my discovery procedure.
12 All right? And then we'll take it from there.

13 Now, most important thing is you need to meet and confer
14 in good faith. And the Court takes that quite seriously. And
15 any defaults from that, I take quite seriously as well.

16 You do what you need to do to get that done. Maybe you
17 can work it out. If you can't, send me a letter; but don't
18 wait. All right?

19 **MR. BUDNER:** Your Honor, your point on that is taken.
20 And again, to address your bigger-picture question of what else
21 is going on, I think it's quite reasonable to I assume, given
22 how long we've been waiting for a supplement to their
23 production, that we will have an issue to bring to Your Honor
24 quite soon.

25 **THE COURT:** All right. Well, just -- get your other

1 stuff done, too. You've got, probably, a lot to do. Make it
2 happen if you want it to happen.

3 **MR. BUDNER:** Understand, Your Honor.

4 **MR. BARTOLOMEO:** For Fitbit's part, following the
5 Court's ruling on the letter briefs on discovery, we did
6 produce additional documents. I believe it was over a thousand
7 documents. And we produced -- we did meet and confer in good
8 faith. And following the meet and confer, we've gone back.
9 We've collected additional documents. We're in the process of
10 reviewing them. So we're -- I can represent to the Court that
11 we're not resting on our laurels, and we are proceeding with
12 all due diligence.

13 **THE COURT:** All right. I wouldn't describe producing
14 documents as "laurels," but you know what to do. All right?
15 So just make it happen. Okay. All right. Thank you.

16 **MR. BARTOLOMEO:** Thank you, Your Honor.

17 **MR. SELBIN:** Thank you, Your Honor.

18 **MR. BUDNER:** Thank you, Your Honor.

19 **THE CLERK:** All rise. Court's in recess.

20 (At 11:07 a.m. the proceedings were adjourned.)

21 I certify that the foregoing is a correct transcript from the
22 record of proceedings in the above-entitled matter.

23 

24 _____ May 31, 2018
25 Signature of Court Reporter/Transcriber Date
Lydia Zinn