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16 UNITED STATES DISTRICT COURT  
17 NORTHERN DISTRICT OF CALIFORNIA

18 JAMES P. BRICKMAN, individually and as a  
19 representative of all others similarly situated,

20 Plaintiff,

21 v.

22 FITBIT, INC.,

23 Defendant.

Case No. 3:15-cv-2077-JD

**[PROPOSED] PRELIMINARY  
APPROVAL ORDER**

1 Named plaintiffs, Margaret Clingman, James P. Brickman, Carissa Ray, Michael Landis,  
2 Erica Wathey, Stephanie Curtis, Carolyn Ciavarella, Amanda Samy, and James E. Gau, II renew  
3 their request for preliminary approval of a proposed class action settlement pursuant to a written  
4 settlement agreement (the “Agreement”) with Defendant, Fitbit, Inc., dated October 29, 2018,  
5 individually and on behalf of the Settlement Sub-Classes (as defined in the Agreement). The  
6 Court denied the original preliminary approval motion over concerns about the use of a coupon as  
7 part of the compensation awarded to class members, an overly broad release, and other issues.  
8 Dkt. No. 257. The denial was without prejudice, and the parties’ revised settlement proposal has  
9 satisfactorily addressed the Court’s concerns. Overall, the proposed settlement is a good recovery  
10 for the class, and fair and reasonable in the circumstances of this litigation. Consequently, it is  
11 approved.

12 The parties submitted their amended preliminary approval motion at about the same time  
13 as our district adopted new procedural guidance for class action settlements. While the proposed  
14 settlement will not be required to formally conform to the new guidelines, it is well within the  
15 spirit of the guidance. The parties are ordered to file the post-distribution accounting as discussed  
16 in the guidelines.

17 **IT IS ORDERED:**

18 1. Unless otherwise specified, capitalized terms contained herein shall be as defined  
19 in the Agreement.

20 2. This Court previously certified the following classes pursuant to its Order  
21 re Class Certification (Dkt. No. 194):

- 22 a. **California Class:** All persons who purchased in the State of  
23 California, and registered online, a Fitbit Flex, One, or Ultra  
24 between 2009 and October 27, 2014;
- 25 b. **Florida Class:** All persons who purchased in the State of Florida,  
26 and registered online, a Fitbit Flex, One, or Ultra between 2009 and  
27 October 27, 2014;
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3. For settlement purposes only and contingent upon Final Approval by this Court of the Agreement at the Final Approval Hearing (“Final Approval”), the Court hereby certifies, under Fed. R. Civ. P. 23(b)(3), the following Settlement Sub-Classes, defined as follows:

- a. **California Sub-Class:** All persons who purchased in the State of California, and registered online, a Fitbit Flex, One, or Ultra between 2009 and October 27, 2014 (Represented by Margaret Clingman);
- b. **Florida Sub-Class:** All persons who purchased in the State of Florida, and registered online, a Fitbit Flex, One, or Ultra between 2009 and October 27, 2014 (Represented by James P. Brickman);
- c. **New York Sub-Class:** All persons who purchased in the State of New York and registered online a Fitbit Flex, One, or Ultra between March 26, 2012 and October 27, 2014 (Represented by Carissa Ray);
- d. **Pennsylvania Sub-Class:** All persons who purchased in the State of Pennsylvania, and registered online, a Fitbit Flex, One, or Ultra between March 26, 2012 and October 27, 2014 (Represented by Michael Landis);
- e. **Ohio Sub-Class:** All persons who purchased in the State of Ohio, and registered online, a Fitbit Flex, One, or Ultra between March 26, 2012 and October 27, 2014 (Represented by Erica Wathey);
- f. **Michigan Sub-Class:** All persons who purchased in the State of Michigan, and registered online, a Fitbit Flex, One, or Ultra between March 26, 2012 and October 27, 2014 (Represented by Stephanie Curtis);

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- g. **New Jersey Sub-Class:** All persons who purchased in the State of New Jersey, and registered online, a Fitbit Flex, One, or Ultra between March 26, 2012 and October 27, 2014 (Represented by Carolyn Ciavarella);
- h. **Missouri Sub-Class:** All persons who purchased in the State of Missouri, and registered online, a Fitbit Flex, One, or Ultra between March 26, 2013 and October 27, 2014 (Represented by James Gau);
- i. **Multi-State Sub-Class:** All persons who purchased in the State of Illinois, and registered online, a Fitbit Flex, One, or Ultra between March 26, 2013 and October 27, 2014, or purchased in the State of Washington, State of Texas, State of Georgia, or State of North Carolina, and registered online, a Fitbit Flex, One, or Ultra between March 26, 2014 and October 27, 2014 (Represented by Amanda Samy).

16 4. Subject to Final Approval of the Agreement and the entry of Judgment, and for  
17 settlement purposes only, the Court finds that the prerequisites of Rule 23 of the Federal Rules of  
18 Civil Procedure are met, including requirements that the Class Members are too numerous to be  
19 joined in a single action, that common issues of law and fact exist and predominate, that the  
20 claims of the settlement Class Representatives are typical of the claims of the Class Members,  
21 that the Class Representatives and Class Counsel can adequately protect the interests of the Class  
22 Members, and that the Settlement Sub-Classes are a superior method to resolve the claims at  
23 issue.

24 5. Therefore, the Court hereby certifies the above defined Settlement Sub-Classes  
25 (Nos. 3(a) – 3(i)) as damages classes pursuant to Rule 23(b)(3). If Final Approval of the  
26 Agreement is not granted, or if final judgment as contemplated in the Agreement is not entered,  
27 this Conditional Approval Order shall be vacated and the Parties shall be restored without  
28 prejudice to their respective litigation positions prior to entry of this Conditional Approval Order.

1           6.       The Court designates Patrick J. Perotti and Frank A. Bartela of Dworken &  
2 Bernstein Co., L.P.A., and Ronald A. Margolis of Bonezzi Switzer Polito & Hupp Co. L.P.A., as  
3 Class Counsel of the Settlement Sub-Classes.

4           7.       Based on review of the Agreement, terms of the proposed settlement, the claims,  
5 defenses, and allegations in this Action, and applicable law, the Court preliminarily finds that  
6 there is sufficient basis to conclude that the proposed Agreement is fair, adequate, and reasonable  
7 and in the best interests of the Class Members. The Court further finds that the Agreement is the  
8 product of thorough, informed, and non-collusive negotiations between the Parties as outlined in  
9 the unopposed Motion for Preliminary Approval and Agreement. Thus, the Court preliminarily  
10 and conditionally approves the proposed settlement of the Settlement Sub-Classes' claims as  
11 described in the Agreement, preliminarily finding the Agreement to be fair, reasonable, and  
12 adequate and in the best interests of Class Members.

13           8.       The Court approves the proposed Claim Form and Class Notice, substantially  
14 similar to the forms attached as Exhibit A, Exhibit B, and Exhibit C to the Agreement. (Dkt. No.  
15 263-1). The Claim Form and Class Notice are written in plain English, are easy to understand,  
16 and fully satisfy the requirements of Fed. R. Civ. P. 23 and due process requirements of the  
17 United States Constitution.

18           9.       The Court finds that the proposed Class Notice methodology, contained in Section  
19 IV of the Agreement and outlined in Plaintiffs' Unopposed Amended Motion for Preliminary  
20 Approval (Dkt. No. 263) will provide the best notice reasonably practicable to the Class  
21 Members, and will fairly advise them of their right to object, to opt out of the settlement, and of  
22 what they may receive if they remain in the Settlement Sub-Classes and to otherwise satisfy the  
23 requirements of Fed. R. Civ. P. 23 and due process requirements of the United States  
24 Constitution.

25           10.      The Court also preliminarily approves the administration of the proposed  
26 settlement as described in the Agreement and the disbursement of the Settlement Benefits to  
27 Settlement Class Members who timely submit signed and completed Claim Forms. Claim Forms  
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1 must be postmarked or delivered to the Settlement Administrator on or before May 28, 2019, in  
2 order to be considered, which deadline will be stated in the Class Notice and on the Settlement  
3 Website. Those Settlement Class Members who timely submit signed and completed Claim  
4 Forms by the deadline specified will be eligible for distribution of compensation only to the  
5 extent, in the amount, and in the manner described in the Agreement. If the Court grants Final  
6 Approval of the Agreement, the Settlement Benefits will be distributed to or for the benefit of  
7 Settlement Class Members in the manner and in the amounts described in the Agreement.

8 11. The Court shall schedule a Final Approval Hearing, the date and time of which to  
9 be included in the Class Notice, to consider and finally determine:

- 10 a. Whether the Agreement should be finally approved by the Court as fair,  
11 reasonable, and adequate;  
12 b. Whether and in what amount attorneys' fees should be awarded to Class  
13 Counsel, as provided in the Agreement; and  
14 c. Objections, if any, made to the Agreement, or any of its terms.

15 The Final Approval Hearing described in this paragraph may be postponed, adjourned, or  
16 continued by order of the Court without further notice to Class Members.

17 12. Any Class Member who has not requested exclusion from the Settlement Sub-  
18 Classes and who objects to approval of the proposed settlement may appear at the Final Approval  
19 Hearing in person or through counsel to show cause as to why the proposed settlement should not  
20 be approved as fair, reasonable, and adequate. However, no person (other than named parties)  
21 may be heard at the Final Approval Hearing, or file papers or briefs in connection therewith,  
22 unless on or before May 28, 2019, such person has filed with the Court and served on Class  
23 Counsel and Defendant's Counsel a timely written notice of intent to object, which must contain  
24 or include the following information:

- 25 a. the name, address, and signature of the objecting Class Member;  
26 b. the specific reasons for the Class Member's objections to the Agreement,  
27 including a detailed statement of all factual and legal basis for such objections  
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1 and copies of any and all documents or other materials allegedly supporting the  
2 objection;

- 3 c. the identity of all witnesses, by name, address, and a full summary of proposed  
4 testimony, who the objecting Class Member may call to testify at the Final  
5 Approval Hearing, and a description and copies of all evidence such objecting  
6 Class Member may offer at the Final Approval Hearing; and indication  
7 whether the objector will attend the Final Approval Hearing; and  
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9 d. if the objecting Class Member, their Counsel or any person with whom they  
10 are working on the objection has objected to a class action settlement on more  
11 than 3 occasions, the Class Member must, in the objection:

- 12 i. list all cases in which they filed objections and by whom the  
13 objections were filed,  
14 ii. state the outcome of those objections, and  
15 iii. state the amount of money, if any, paid in connection with the  
16 objections to the objector, to their counsel, or to anyone else,  
17 including by whom such payment was made and whether it was  
18 disclosed to the court overseeing the respective proposed  
19 settlement.

20 Any Class Member who does not file and serve a timely notice of intent to object with all  
21 required materials and information in accordance with this Conditional Approval Order shall  
22 waive the right to object to the Agreement or to be heard at the Final Approval Hearing, and shall  
23 be forever barred from making any objection to the Agreement.

24 13. Defendant's Counsel and Class Counsel shall promptly furnish to each other  
25 copies of any notice of intent to object and all accompanying materials that comes into such  
26 counsel's possession.

27 14. If the Agreement is finally approved, the Court will enter a Judgment approving  
28 the Agreement substantially in the form and content attached to the Agreement as Exhibit E, and

1 incorporating it as the judgment of the Court, which judgment shall be binding upon all members  
2 of the Settlement Sub-Classes who have not timely and properly requested exclusion in  
3 accordance with this Conditional Approval Order and the terms of the Agreement.

4           15. In the event that Final Approval of the proposed settlement reflected by the  
5 Agreement is not granted by the Court, or a settlement is approved with terms different than as  
6 reflected by the Agreement and that are not agreed to by Plaintiffs and Defendant in writing, or  
7 the Judgment is reversed or modified on appeal, or entry of a Judgment as provided in the  
8 Agreement does not occur for any reason, then the settlement, the Agreement, all drafts,  
9 negotiations, discussions, and documentation relating thereto, and all orders entered by the Court  
10 in connection therewith, shall become null and void, and shall not be used or referred to for any  
11 purpose in this Action or in any other proceeding. In such event, the Agreement and all  
12 negotiations and proceedings relating thereto shall be withdrawn without prejudice to the rights of  
13 any of the Parties thereto, who shall be restored to their respective positions as of the date of the  
14 execution of the Agreement.

15           16. All Class Members who have not timely and properly excluded themselves from  
16 the Settlement Sub-Classes are preliminarily enjoined, in either an individual or representative  
17 capacity, from filing, commencing, prosecuting, continuing, litigating, intervening in,  
18 participating in as class members or otherwise, or seeking to certify a class in, or organizing  
19 customers of Fitbit into a separate class of persons, as a purported class action (including by  
20 seeking to amend a pending complaint to include class allegations) in or receiving any benefits or  
21 other relief from, any other lawsuit, arbitration or administrative, regulatory or other proceeding  
22 or order in any jurisdiction, based on or relating to the claims and causes of action in, or the facts  
23 and circumstances relating to, this Action and/or the Released Claims as described in the  
24 Agreement.

25           17. The Parties are hereby authorized without further approval from the Court to agree  
26 upon such amendments or modifications of the Agreement and of all exhibits thereto as shall be  
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1 consistent in all respects with this Conditional Approval Order and do not limit the rights of Class  
 2 Members.

3 18. Pursuant to the Agreement and Plaintiffs' Unopposed Amended Motion for  
 4 Preliminary Approval (Dkt. No. 263), the Court issues the following schedule for the settlement  
 5 administration of the Agreement, based on the date of this Order granting the motion:  
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Event	Days	Date
Preliminary Approval Order	N/A	December 17, 2018
Class Notice Issue Date	75 days from Preliminary Approval Order	March 1, 2019
Claims Deadline	90 days from Class Notice Issue Date	May 30, 2019
Exclusion deadline	90 days from Class Notice Issue Date	May 30, 2019
Objection Deadline	25 days prior to the Final Approval Hearing	June 17, 2019
Attorneys' Fees Motion due	35 days prior to the Objection Deadline	May 10, 2019
Final Approval Hearing	Any date, as set by the Court, after Objections and the Motion for Attorneys' Fees and Costs are fully briefed	July 11, 2019
Attorneys' Fees and Costs Hearing	Any date, as set by the Court, after the Final Approval Hearing	August 1, 2019
Effective Date	30 days after the issuance of the Final Approval Order	TBD

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 20 Date: December 17, 2018

  
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 JAMES DONATO  
 United States District Judge