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11 UNITED STATES DISTRICT COURT

12 CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

13 SCOTT MILLER, an individual, on
 14 behalf of himself, the general public
 15 and those similarly situated,

16 Plaintiff,

17 v.

18 FUHU, INC. and FUHU HOLD-
 19 INGS, INC.,

20 Defendants.

Case No. 14-cv-6119 CAS (ASx)

SECOND AMENDED CLASS
 ACTION COMPLAINT FOR
 VIOLATION OF THE CALIFOR-
 NIA CONSUMERS LEGAL
 REMEDIES ACT; FALSE AD-
 VERTISING; UNFAIR BUSINESS
 PRACTICES BREACH OF EX-
 PRESS AND IMPLIED WAR-
 RANTY; and FRAUD, DECEIT,
 AND/OR MISREPRESENTATION

JURY TRIAL DEMANDED

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1 Scott Miller, by and through his counsel, brings this Second Amended Class
2 Action Complaint (the “Complaint”) against Defendants Fuhu, Inc. and Fuhu
3 Holdings, Inc. on behalf of himself and those similarly situated, for violations of the
4 Consumer Legal Remedies Act, false advertising, unfair trade practices, breach of
5 express and implied warranty, and fraud, deceit and/or misrepresentation. The
6 following allegations are based upon information and belief, including the
7 investigation of Plaintiff’s counsel, unless stated otherwise.

8 **INTRODUCTION**

9 1. Defendants manufacture, distribute, and sell “Nabi” brand electronic
10 tablets¹ for children. Defendants market, advertise and represent to consumers that
11 the Nabi tablets are “rechargeable” using an included AC adapter and charging
12 cables and/or cords (collectively referred to as “power adapters”), which attach to a
13 charging port on the tablets’ motherboards. (For purposes of this Complaint, the
14 power adapters and charging port will be collectively referred to as the “charging
15 system.”). Defendants also market, advertise and represent to consumers that the
16 Nabi tablets are “built just for kids,” “made especially for kids,” “designed for real
17 kids,” and “designed specifically for kids.” However, contrary to the marketing and
18 advertising, the power adapters included with the Nabi tablets do not reliably
19 recharge the tablets, and the tablets are not appropriate to be used by children nor
20 able to withstand use by children because of defects in the charging system.
21 Further, contrary to Nabi’s warranty that the product will operate as specified, the
22 included charging systems fail to charge the battery and/or fail to allow the tablet to
23 be operated during charging. These defects destroy (or significantly decrease) the
24 usefulness of the Nabi tablets because they cannot be reliably recharged or used.
25 Despite their representations, Defendants failed to test the usability of their tablets’
26 charging systems with children prior introducing the products into the market.

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28 ¹ An electronic “tablet” is a mobile computer with touchscreen display, circuitry and battery in a single unit.

1 2. Plaintiff purchased a Nabi tablet during the summer of 2012, and
2 shortly after his purchase, and well within the first year of ownership, he began
3 experiencing problems recharging the tablet. Plaintiff contacted Defendants three
4 times about the Nabi tablet's failure to recharge. Defendants ignored Plaintiff's first
5 two requests. The third time, Defendants finally sent Plaintiff a replacement power
6 adapter. However, the replacement power adapter was also defective in that it does
7 not comply with the product specifications and did not cure the defects in the
8 charging system, because the tablet cannot be used when it is attached to the power
9 adapter and plugged into a power source, and it must be unplugged and restarted to
10 be used, meaning that it cannot be charged and used simultaneously. The defects in
11 the charging system also create a serious risk of fire and have caused several
12 customers' Nabi tablets to melt, spark, and catch fire, all of which Defendants have
13 known. Exhibit A provides a more detailed explanation of the defects in the Nabi
14 tablet charging system, as well as the resulting harm suffered by consumers and the
15 unfitness of the Nabi tablet charging system for ordinary use by its intended users.

16 3. Defendants know that their representations that the Nabi tablets are
17 "rechargeable" and that the Nabi tablets are "built just for kids," "made especially
18 for kids," "designed specifically for kids," and similar phrases are false, because
19 they have received many complaints from consumers regarding the defective
20 charging systems and have investigated those complaints. Defendants have also
21 examined in detail the problems, and safety issues, associated with their Nabi tablet
22 charging system, and have discussed those problems with their contract
23 manufacturers, as further set forth in Exhibit A. Both Defendants and the contract
24 manufacturers tested the charging system and concluded that it failed the tests.
25 They also concluded that the charging system was not appropriately designed for
26 use by children. Nevertheless, when one of Defendants' contract manufacturers
27 suggested a change to the design of the charging system, which would have
28 permitted it to pass some of their tests, Defendants rejected these recommendations.

1 4. Originally, Defendants attempted to placate complaining consumers by
2 providing replacement power adapters to them. However, the replacement power
3 adapters did not remedy the recharging problems, as they suffered from the same
4 design and manufacturing defects, and, in any event, the replacement power
5 adapters did not cure the problems with the charging ports. Defendants then
6 stopped providing complaining consumers with replacement power adapters, even
7 if they reported the problem during the warranty period, primarily because
8 Defendants' manufacturing partners were refusing to pay for the free replacement
9 power adapters. Defendants again began providing replacement power adapters in
10 response to consumer complaints in late 2014. However, Defendants continued to
11 replace power adapters with power adapters that were similarly, if not identically,
12 defective, including used power adapters. Defendants also hide information about
13 their replacement program and misdirect consumers to purchase replacement
14 adapters so that Defendants will not need to comply with their warranty obligations
15 to provide free replacements. Indeed, the existence of the replacement program is
16 obscured by Defendants' confusing, contradictory, and incomplete information on
17 their website and Facebook page. Defendants also failed to address problems with
18 the charging ports, which completely prevents the charging system from operating
19 even if the power adapter is working.

20 5. Defendants obtained, and are obtaining, substantial profits from the
21 sale of the Nabi tablets. Defendants' practices materially deceive consumers into
22 believing that they are purchasing something more valuable than what they actually
23 receive. Plaintiff and others similarly situated justifiably rely to their detriment on
24 Defendants' misrepresentations that the Nabi tablets are rechargeable, contain an
25 included a functional power adapter, and are designed for use by children. Plaintiff
26 would not have purchased the Nabi tablet had Defendants adequately disclosed to
27 him that the Nabi tablets were sold with defective charging systems that failed to
28 reliably recharge the tablets, were not suitable for children, and created a risk of fire

1 and injury.

2 6. After Plaintiff filed this lawsuit, in September 2014, Defendants
3 amended their Terms of Use agreement, which is available on their website and
4 applicable to all Nabi tablets, to include arbitration and class action waiver clauses.
5 Defendants then attempted to force Plaintiff and others similarly situated to agree to
6 these amended terms by conditioning Nabi software updates and repairs on the
7 acceptance of Defendants' amended Terms of Use agreement. These clauses are
8 unconscionable and constitute a breach of Defendants' promise to provide all Nabi
9 tablet owners with free software updates, which include, *inter alia*, new features
10 and fixes to known bugs, and the full use and enjoyment of the tablets that they
11 previously purchased.

12 **PARTIES**

13 7. Scott Miller ("Plaintiff") is, and at all times alleged in this Complaint
14 was, an individual and a resident of Auburndale, Florida.

15 8. Defendant Fuhu, Inc. is a corporation incorporated under the laws of
16 the State of California, having its principal place of business in El Segundo,
17 California.

18 9. Defendant Fuhu Holdings, Inc. is a corporation incorporated under the
19 laws of the State of California, having its principal place of business in El Segundo,
20 California.

21 10. The Parties identified in paragraphs 8 - 9 of this Complaint are
22 collectively referred to hereafter as "Defendants."

23 11. At all times herein mentioned, each of the Defendants was the agent,
24 servant, representative, officer, director, partner or employee of the other
25 Defendants and, in doing the things herein alleged, was acting within the scope and
26 course of his/her/its authority as such agent, servant, representative, officer,
27 director, partner or employee, and with the permission and consent of each
28 Defendant.

1 19. Defendants' Terms of Service agreement, located on Defendants'
2 website at <http://www.fuhu.com/terms>, has, since at least July 3, 2010 and through
3 the present, provided the following regarding choice of law and venue: "By
4 visiting a Fuhu Property, you agree that all matters relating to your access to or use
5 of the Site, products or services sold or distributed by or through Fuhu, including all
6 disputes, will be governed by the laws of the United States and by the laws of the
7 State of California, without regard to principles of conflicts of laws. You agree to
8 the personal jurisdiction by and venue in the state and federal courts in Los Angeles
9 County, California, and waive any objection to such jurisdiction or venue."

10 20. Plaintiff accordingly alleges that jurisdiction and venue are proper in
11 this Court.

12 **SUBSTANTIVE ALLEGATIONS**

13 21. Defendants manufacture electronic tablets for children. Among these
14 products are the Nabi XD, Nabi 2, Nabi 2 S, Nabi Jr., Nabi Jr. S, and Nabi
15 DreamTab² (referred to collectively herein as the "Nabi tablets"). Defendants
16 manufactured and sold over one million Nabi tablets in 2012 alone. Defendants sell
17 the Nabi tablets through various retailers, including both brick-and-mortar retailers
18 and online retailers (e.g., Best Buy, Walmart, Target, and Amazon), as well as on
19 their website (available at <http://shop.nabitablet.com>).

20 **A. Defendants' False Advertisements and Misrepresentations.**

21 22. To promote the sale of the Nabi tablets, Defendants provide their retail
22 partners with marketing and advertising materials and information relating to the
23 Nabi tablets. Defendants market, advertise, and represent to all their retail partners,
24 who in turn provide this information to consumers, that the Nabi tablets are
25 rechargeable and designed for children. Further, Defendants provide information
26 on their websites (<http://www.nabitablet.com> and shop.nabitablet.com) relating to

27 _____
28 ² Some of Nabi tablet models came with specially branded editions or versions such Disney and Nickelodeon special edition tablets. Other than branding, these tablet versions are the same as the non-branded model tablets.

1 the Nabi tablets. On their website, Defendants represent to consumers, including
2 Plaintiff, that the Nabi tablets are rechargeable and designed for children. In
3 particular, Defendants market, advertise, and represent to retailers, and on their
4 website, that each of the Nabi tablets include a “power adapter,” are “rechargeable,”
5 and have “rechargeable batteries.” Defendants also market, advertise, and represent
6 to retailers, and on their website, that the Nabi tablets are “made for kids,” “built
7 just for kids,” “made especially for kids,” and “designed specifically for kids.”

8 23. Defendants’ representations are false because the Nabi tablets have
9 defective charging systems that fail to reliably recharge the tablets and that render
10 the tablets unfit for ordinary use. In particular, users attempting to recharge the
11 Nabi tablets using the provided power adapters experience recurring recharging
12 failures, well within the first year of operation, including without limitation the
13 following: (i) failure of the tablets to begin recharging (i.e., the charging light
14 indicator will not display an orange light and the battery will not recharge); (ii)
15 failure of the tablets to power on after recharging; (iii) failure of the tablets to
16 function while recharging, and (iv) excessive heat during charging, creating a risk
17 of fire. Typically, the charging cord will fail because, due to defects in design and
18 manufacturing (including the small diameter and large length of the charging pin
19 and the lack of adequate reinforcement), the pin easily becomes bent or broken,
20 which prevents an electrical connection with the charging port, or which creates a
21 partial connection that is prone to sparking and fire. The charging pin is also
22 defectively designed because it requires substantial manual dexterity and fine motor
23 skills to connect and disconnect without causing damage to the charging port, and
24 many children are not likely to have such dexterity or fine motor skills. Due to
25 defects in design and manufacturing, the charging port also easily detaches from the
26 motherboard as a result of normal insertion and removal of the charging cord,
27 which again prevents an electrical connection or creates a partial connection that is
28 prone to sparking and fire. Further details about these and other defects in the

1 charging system are set forth in Exhibit A. At no time have Defendants informed
2 potential consumers or instructed retailers to inform potential consumers that the
3 Nabi tablets are not rechargeable or that they cannot be used while charging or
4 plugged in or that their use creates a serious risk of overheating, sparks, smoking
5 and/or fire. Indeed, Defendants knowingly and intentionally failed to disclose to
6 consumers, including Plaintiff and those similarly situated, that the Nabi tablets
7 have defective charging systems that fail to reliably recharge the tablets and that are
8 dangerous.

9 24. Defendants expressly warn consumers in the Nabi tablets' user
10 manuals that no power adapters other than Nabi-supplied adapters should be used to
11 recharge the tablets, because using other power adapters could damage the tablets.

12 **B. Defendants' Product Specifications.**

13 25. The Nabi User Manuals, which provide the product specifications for
14 the Nabi tablets regarding recharging the tablets, are available for download from
15 Defendants' website at <http://www.nabitablet.com/support>. For example, the Nabi
16 2 User Manual states the following:

17 **Battery**

18 nabi uses a rechargeable Lithium-Polymer battery. The
19 battery will be partially charged when you open your
20 nabi. However, we recommend fully charging your nabi
21 for four hours after taking it out of the box.

22 **Charging the Battery**

23 There are two ways to charge nabi: You can connect nabi
24 to an electrical outlet or you can charge nabi by connect-
ing it to your computer.

25 Connect to an electrical outlet: Plug the tip of the USB
26 charging cable into the nabi power charger port and plug
27 the other end into the USB Power Adapter. Then plug the
28 USB Power Adapter into an electrical outlet.

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Connect to a computer: Plug the tip of the USB charging cable into the power charger port on nabi, and plug the other end into the USB port on your computer.

Please note: Only the USB charging cable will charge nabi when connected to a computer. A Micro USB cable will not charge nabi. Only use the Micro USB cable for transferring files onto nabi.

Important: When charging nabi via a computer, it may take longer to charge. The computer may not provide enough power to charge nabi. If this is the case, switch to the wall charger and connect nabi to an electrical outlet.

If the battery is completely depleted, nabi may display the battery-charging screen indicating that nabi needs to charge for 15 minutes before you can use it. Leave nabi plugged in so it can charge while you use it.

Charging Light Indicator

When the battery is charging, the charging indicator will display an orange light. Once it's fully charged, the light will turn green.

Extending Battery Life

To extend the battery life of your nabi, fully charge the battery for four hours prior to using nabi for the first time. Charge for up to four hours whenever the battery is depleted.

! Caution: Only use a nabi™ USB Power Adapter and USB charging cable to charge your device. Using a different charger may damage your nabi.

Please note: Only a Fuhu Authorized Service Provider should replace the battery. Any attempt to remove or replace your battery, other than through an Authorized Service Provider, may damage your nabi and will void your warranty.

(Section 2.2 of the Nabi 2 User Manual.)

26. Likewise, Section 16 of the Nabi 2 User Manual provides additional

1 product specifications and safety information related to recharging the tablets:

2 **Charging nabi**

3 To charge nabi, only use the nabi™ Power Adapter. The
4 nabi™ Power Adapter may become warm during normal
5 use. Always allow adequate ventilation around the nabi™
6 Power Adapter. Do not connect or disconnect the nabi™
7 Power Adapter with wet hands. Unplug the nabi™ Power
8 Adapter if any of the following conditions exist:

- 9 • The power cord or plug has become frayed or damaged.
- 10 • The adapter is exposed to rain, liquid, or excessive mois-
11 ture.
- 12 • The adapter case has become damaged.
- 13 • You suspect the adapter needs service or repair.
- 14 • You want to clean the adapter.

15 Read all safety instructions for any products and accesso-
16 ries before using with nabi. Fuhu is not responsible for the
17 operation of third-party accessories or their compliance
18 with safety and regulatory standards.

(Section 16 of the Nabi 2 User Manual.)

19 **C. Defendants' Breach of Warranty.**

20 27. Each Nabi tablet includes Defendants' written product warranty, which
21 states, in pertinent part, in similar or identical terms, as follows:

22 Fuhu warranties for one year from the date of sale to the consumer
23 that the nabi is of merchantable quality and that it conforms to appli-
24 cable specifications. Applicable specifications mean the specification
25 for the Processor, the CPU (Central Processing Unit). The applicable
26 specifications exclude and no warranty is provided for the specifica-
27 tions for any other components or for any performance that can de-
28 grade naturally with normal use for one year... If you discover that
your nabi is not of merchantable quality and fails to conform to its ap-
plicable specifications, as defined above, we will, at our option, re-
fund the purchase price, or repair or replace the product, using new or

1 refurbished components within a reasonable time during the warranty
2 period.

3 28. Defendants' written warranty policy is available on their website at
4 <http://www.nabitablet.com/legal/warranty>.

5 29. The Nabi tablets are not of merchantable quality at the time of sale
6 and/or for one year from the date of sale. As described above, the Nabi tablets are
7 not rechargeable because they are sold with defective charging systems that fail to
8 reliably recharge the tablets, create substantial safety issues due to the risk of fire,
9 and render the tablets unfit for their ordinary use by children. Additionally,
10 although Defendants state in the Nabi tablet product manuals that the tablets may be
11 used while connected to an external power source (i.e., while recharging), the
12 charging systems are defective such that they will intermittently—or in the case of
13 Plaintiff's replacement charger, perpetually—be unusable while they are plugged
14 in. As described in detail below, when consumers complain to Defendants during
15 the warranty period that the Nabi tablets do not recharge and/or cannot be used
16 while they are recharging, Defendants have failed to: (i) refund the purchase price
17 of the Nabi tablets, and/or (ii) adequately repair or replace the Nabi tablets or the
18 charging systems.

19 **C. Defendants' Knowledge of the Defective Nabi Tablets.**

20 30. At the time of Plaintiff's purchase of a Nabi tablet, Defendants were
21 well aware that the Nabi tablets have defective charging systems that failed to
22 reliably recharge the tablets because Defendants had received numerous complaints
23 from retailers and consumers, as well as requests from consumers for warranty
24 service and/or replacement power adapters. Only Defendants had access to the
25 retailer and consumer complaints and warranty data regarding the defective
26 charging systems. Additionally, Defendants were alerted to the defective charging
27 systems by complaints posted on the Internet, including Defendants' own Facebook
28 page. For example, on December 29, 2011, Defendants posted the following on

1 their Facebook page: “Many people are having trouble charging you [sic] nabi
2 either because of a faulty charger or a broken charger tip.” Again, on December 31,
3 2011, Defendants posted the following on their Facebook page: “here’s what we
4 have found with regard to the charger problems many of you are experiencing.” In
5 response to these consumer complaints, Defendants investigated the problem and
6 determined that the charging systems included with the tablets were defective. See
7 Exhibit A. Only Defendants and their contract manufacturers and agents had access
8 to these internal investigations.

9 31. Originally, Defendants sent replacement power adapters to consumers
10 who complained of defective power adapters and/or problems recharging the Nabi
11 tablets. However, the replacement power adapters did not remedy the problems
12 because they too were defectively designed and manufactured, and because they did
13 not remedy the problems with the charging ports. Defendants’ customers continued
14 to have problems recharging the Nabi tablets when using the replacement power
15 adapters. Additionally, Defendants continue to sell Nabi tablets with defective
16 power adapters that fail to reliably recharge the tablets. Further, for a period of
17 time, Defendants refused to send replacement power adapters to consumers
18 complaining of defective power adapters within the warranty period. Instead,
19 Defendants directed consumers who complained, during the warranty period, of
20 defective power adapters and/or problems recharging the tablets to purchase
21 another power adapter from Defendants or from a third party despite their warning
22 in the User Manual that a non-Nabi brand power adapter could damage the tablet.
23 At no time have Defendants refunded the purchase price of the Nabi tablets to
24 consumers who complain that the tablets cannot be recharged and/or cannot be used
25 while they are recharging.

26 32. On July 9, 2014, Defendants again enacted a policy of sending
27 replacement power adapters to consumers who complain of defective power
28 adapters and/or problems recharging the Nabi tablets. However, Defendants

1 continue to send the defective replacement power adapters to complaining
2 consumers, and do not even ensure that the replacement power adapters are new.
3 Defendants have never contacted or attempted to contact all Nabi tablet owners to
4 inform them that they would replace defective power adapters for free. Instead,
5 Defendants cryptically communicate this replacement program to Nabi tablet
6 owners on their website and Facebook page.

7 33. Defendants' website misleads Nabi owners about, and diverts Nabi
8 owners from participating in, Defendants' power adapter replacement program, in
9 at least the following ways:

- 10 a) None of the Support pages for any of the Nabi tablets state that
11 Defendants will replace defective power adapters for free.
- 12 b) On each of the Support pages for Nabi 2 and the Nabi XD tablets,
13 there is an icon and link for "Troubleshooting." On each of the
14 Troubleshooting pages, there are three topics associated with the
15 "Charging and Powering on" icon. However, none of these topics
16 tell customers how to determine if their powers adapters are
17 defective (instead, they state that you "may" have a defective wall
18 charger or that you "may need a new charger"). Further, none of
19 these topics tell customers how to request a replacement power
20 adapter or inform customers that Defendants will replace the power
21 adapter for free.
- 22 c) On each of the Support pages for the Nabi 2, Nabi Jr., Nabi XD,
23 Big Tab HB Nabi and Nabi DreamTab tablets, there is an icon and
24 link for "Get to Know Your Nabi." On each of the Get to Know
25 pages there are icons and links to topics about features and
26 functionalities of the Nabi tablets. For example, there are currently
27 14 such icons on the Nabi 2 Get to Know page. None of these
28 topics on any of the pages address recharging or powering on the

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- tablets.
- d) On the Support page for Nabi 2 tablets, there is an icon and link for “Get a Replacement.” The Get a Replacement link does not indicate that the replacement is free to customers experiencing problems. Likewise, on the Get a Replacement page, there is a big green button marked “request charger,” but that button does not indicate that customers can request a free charger. Only after customers that click through four pages from the Support page and provide their login credentials are they ever informed that the replacement will be free.
 - e) On the Support page for the Nabi Jr. tablets, there is an icon and link for “Troubleshooting.” On the Troubleshooting page, there is a topic, “My Nabi Jr. is not charging,” associated with the “Charging and Powering on” icon. However, this topic does not tell customers how to request a replacement power adapter or inform customers that Defendants will replace the power adapter for free.
 - f) On the Support page for the Nabi Jr. tablets, there is an icon and link for “Get a Replacement,” but it only provides customers with the option to request a replacement screen; it does not provide customers with an option to request a replacement power adapter.
 - g) There is no icon and link for “Get a Replacement” on the Nabi XD, Big Tab HD Nabi, and the Nabi DreamTab Support pages.
 - h) On each of the Support pages for the Big Tab HD Nabi and the Nabi DreamTab tablets, there is an icon and link for “Troubleshooting.” On the Troubleshooting pages, there are four topics associated with the “Charging and Powering on” icon. However, these topics do not tell customers how to request a replacement power adapter or inform customers that Defendants

1 will replace the power adapter for free. Instead, each of the topics
2 requires customers to contact Defendants via telephone for further
3 assistance.

4 34. Likewise, Defendants' Nabi Facebook page provides consumers with
5 incomplete and confusing information, at least as identified in the following:

6 a) Although Defendants' Facebook page contains a "Get a
7 Replacement" page, it only purports to provide information for the
8 Nabi 2 and the Nabi DreamTab tablets.

9 b) The Get a Replacement page for Nabi 2 tablets informs consumers
10 to "Choose your part" but provides only a blank page – i.e., it
11 contains no parts, and no information on how to request a
12 replacement power adapter. It also does not inform consumers that
13 free replacements are available.

14 c) The Get a Replacement page for the Nabi DreamTab tablets
15 incorrectly displays FAQs and does not provide any information
16 regarding free power adapter replacements.

17 d) Each of the "Troubleshooting" pages on Defendants' Facebook
18 page contains the same information as the Nabi website
19 Troubleshooting pages. Each of these pages is deficient for the
20 same reasons described above.

21 e) Question #3 on the Nabi 2 "Current Top Ten FAQs" page, "what
22 should I do if my Nabi 2 won't power on," states only that "you
23 may have a defective wall adapter" but does not inform consumers
24 that they can receive a free replacement power adapter and/or how
25 to do so.

26 f) Question #4 on the Nabi 2 FAQ page, "how do I get a replacement
27 charger," is blank and provides consumers with no information.
28 There is no information on the Nabi Facebook pages to indicate that

1 Defendants are offering free replacement power adapters for the
2 Nabi 2.

3 g) Question #7 on the Nabi DreamTab “Current Top Ten FAQs” page,
4 “what should I do if my Nabi DreamTab won’t power on,” states
5 only that “you should be sure it’s charged,” but does not inform
6 consumers that the power adapter might be defective or how to
7 receive a free replacement power adapter.

8 h) Question #9 on the Nabi DreamTab FAQs page, “how do I get a
9 replacement charger cable,” provides: “nabi Connector to USB
10 cables (DreamTab’s adapter and cable sets) are available for
11 purchase at nabishop.com!” This page does not address defective
12 power adapters or the free replacement program.

13 i) Question #3 on the Nabi Jr. “Current Top Ten FAQs” page, “what
14 should I do if my Nabi Jr. won’t power on,” states that “you may
15 have a defective wall adapter” but does not provide any information
16 on what to do if the adapter is defective or mention the replacement
17 program.

18 j) The Nabi XD Current Top Ten FAQs page does not provide any
19 questions or answers related to recharging the tablet or power
20 issues.

21 35. Additionally, Defendants’ free replacement program for power
22 adapters as described on their website and Facebook page extends only to Nabi 2
23 tablets, although consumers have had problems recharging and powering the other
24 Nabi tablets. Further, none of the pages adequately inform the customer that the
25 problem may be with the charging port, which cannot be fixed with a replacement
26 adapter but rather requires the tablet to be repaired; and there is no online method to
27 order such a repair.

28 36. Furthermore, even if Defendants’ program was effectively

1 communicated, it is insufficient to remedy the Nabi tablet recharging problems,
2 because Defendants replace defective power adapters with other defective power
3 adapters and do not fix the defective charging ports. Nabi owners report that, after
4 requesting a replacement power adapter from Defendants, they have received used,
5 outdated and/or defective power adapters. Defendants' practice of sending the
6 defective power adapters to complaining customers has resulted in many customers
7 experiencing repeat power adapter failures. Finally, it can take well over a month
8 for consumers to receive a replacement power adapter from Defendants. As several
9 consumers recently complained on Defendants' Facebook page, "I put in my
10 request a month ago...how long does it take," "I also requested a charger a little
11 over a month ago... Have been wondering how long it takes to receive" and "I
12 requested one several months ago never received anything." See
13 <https://www.facebook.com/nabitablet/posts/374438335915224> (last visited
14 February 4, 2015). The tablets cannot typically be used until the replacement power
15 adapter is received. Defendants do not extend the warranty period to cover the time
16 that it takes to provide replacement power adapters, so if, for example, a customer
17 requests a replacement power adapter in the eleventh month after purchase, receives
18 that power adapter more than one year after purchase, and then sees that the
19 replacement adapter does not fix the problem (meaning that the problem may be
20 with the charging port), Defendants will not provide service to the charging port.

21 37. In sum, rather than remedy the problems and send fully functional
22 replacement charging systems to consumers, Defendants make it difficult for
23 consumers to obtain information about the free replacement power adapters
24 program and give complaining consumers replacement power adapters with the
25 same defects. Some of the replacement adapters may be old or even used.
26 Defendants' replacement program is inadequate and insufficient to remedy
27 Defendants' violations of California law as described herein.
28

PLAINTIFF'S EXPERIENCES

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2 38. In the summer of 2012, Plaintiff was shopping for a tablet for his
3 grandson. Plaintiff wanted to purchase a tablet that was both rechargeable and could
4 be used while it was recharging (such as during a car ride or while plugged directly
5 into a wall outlet). Plaintiff researched his options extensively and compared
6 multiple brands of tablets. Plaintiff reviewed Defendants' website and the
7 representations that Defendants made to retailers regarding the Nabi tablets that the
8 tablet was "rechargeable" with an included "power adapter" and that it was
9 "powerful and entertaining enough for adults, but made for kids," "made especially
10 for kids," "designed specifically for kids," and "geared specifically towards kids."
11 At no time did Defendants inform Plaintiff that: (i) the tablets could not be
12 recharged; (ii) the tablets were sold with defective charging systems that fail to
13 reliably recharge the tablets; or (iii) that the tablets could not be used while
14 recharging. Plaintiff read and relied upon each of the affirmative
15 misrepresentations and omissions detailed above before purchasing a Nabi tablet.

16 39. Accordingly, on or about July 27, 2012, Plaintiff purchased a Nabi 2
17 tablet from Best Buy for \$199.99 (plus tax). If Plaintiff had known that
18 Defendants' representations regarding the Nabi tablet's rechargeability were false,
19 or that the tablet and charging system were not suitable for use by children, or were
20 not tested with children before the tablet was introduced, or that the charging
21 system created a risk of fire, Plaintiff would not have made his purchase.

22 40. Within the first few weeks following Plaintiff's Nabi tablet purchase,
23 Plaintiff's Nabi tablet began to suffer problems recharging; those problems grew
24 over the next several months until they caused the tablet to be unfit for ordinary
25 use. At first, when the Nabi tablet was connected via the charger cable to a power
26 outlet, the screen would cycle on and off, and the LED charging indicator would
27 change from red to green and back again. The tablet was chargeable only after a
28 reset was performed. Within a few months thereafter, while the tablet was

1 charging, the screen would flash and it would become very hot while charging,
2 making it dangerous to touch while connected to the charging cable. These
3 problems continued through the end of 2012. By the end of 2012, an additional
4 problem arose: even after the unit had been connected via the charging cable to a
5 power outlet, allowed to charge, and then disconnected, the unit would not turn on,
6 purportedly because it did not have a “full” charge, which due to the issues
7 described above was difficult to achieve. In addition, even if the unit received a
8 “full” charge, the tablet would abruptly turn off even when the battery still had a
9 significant remaining partial charge. Because of these issues, Plaintiff’s grandson
10 could not take the device from Plaintiff’s house, because of the risk that the
11 grandson could become injured—or start a fire—if the device was charged without
12 Plaintiff’s careful supervision. Although Plaintiff had intended for his grandson be
13 able to use, and recharge, the device at his home and in the car, these ordinary uses
14 could not occur. Thus, by the beginning of 2013—or less than six months after
15 purchase, the device could no longer be used on a daily basis or in any location
16 other than Plaintiff’s home but could only be used sporadically and for short
17 periods.

18 41. Within the first year of ownership of the Nabi tablet, Plaintiff
19 contacted Defendants, at least twice, and on at least one of these occasions
20 informed them of his problems recharging the Nabi tablet. Plaintiff did not get any
21 response from Defendants to these two communications. Finally, after Plaintiff
22 contacted Defendants for the third time regarding the problems recharging his Nabi
23 tablet, Defendants responded to Plaintiff. On or about September 16, 2013,
24 Defendants sent a replacement power adapter to Plaintiff.

25 42. The replacement power adapter, however, was also defective and did
26 not remedy the problems Plaintiff experienced recharging the Nabi tablet. In
27 particular, Plaintiff is unable to use his Nabi tablet while it is plugged into a power
28 source. When Plaintiff’s Nabi tablet is plugged into a power source using the

1 replacement power adapter, the screen goes blank, and the tablet turns off and can
2 only be restarted after it is unplugged from the power source. Plaintiff's Nabi tablet
3 cannot be turned on even after the charging indicator light on the tablet has turned
4 green (indicating a full charge) if it is still connected to an external power source
5 with the power adapter. Because the device continues to abruptly shut off even
6 when it purportedly still has a significant charge remaining on the battery, the
7 device can only be used for short periods—far shorter than would be reasonably
8 expected by a purchaser of a tablet computer. This makes the Nabi tablet unfit for
9 ordinary use because: (i) it can only be used when the battery is fully charged, and
10 then only for short periods; and (ii) cannot be used while utilizing power from a
11 wall outlet or car charger. Defendants contend that the second issue is a software
12 issue, which was addressed in an update, but in order to update his tablet,
13 Defendants demand that Plaintiff accept the amended Terms of Use and waive
14 certain rights as detailed below.

15 43. Plaintiff would like to purchase additional tablets for his grandchildren
16 and other children, but unless injunctive relief is issued as requested in this
17 Complaint, he will have no way of knowing prior to purchase whether statements
18 by Defendants that the tablets are “rechargeable” with an included “power adapter”
19 are true.

20 CLASS MEMBERS' EXPERIENCES

21 44. Plaintiff's experience was not an isolated incident. Rather, all
22 consumers who purchased a Nabi tablet received defective charging systems that
23 fail to reliably recharge the tablets. Many consumers have publicly complained –
24 on Internet forums, online reviews, and even Defendants' own Facebook page –
25 about the defective power adapters and/or problems recharging the Nabi tablets.
26 For example, the following comments are a *small sample* of hundreds of consumer
27 complaints that appear on Defendants' own Facebook page regarding problems
28

1 recharging Nabi tablets and/or with the defective power adapters.³

2 45. On December 31, 2011: “Our charger has been broken from the
3 beginning.”

4 46. On July 8, 2012:

5 I see that this is an old post but this is the problem that
6 we've had. We got our Nabi for Christmas (ordered from
7 TRU). We all loved it at first but the charger ports have
8 made it a nightmare! The charger it came with did not fit
9 flush and ***eventually we were not able to charge the Nabi
10 from that port anymore.*** We bought a different charger to
11 use in the remaining port and ***that port did not last long
12 either. Now our Nabi is collecting dust...***

13 47. On December 23, 2012:

14 The Nabi I purchased is certainly faulty. I had for less
15 than a month and had nothing but problems. ***Not charging
16 is the death blow*** and I will hopefully be able to get a re-
17 fund on this over priced paper weight.

18 48. On December 25, 2012:

19 Just gave my granddaughter one for Christmas 2012.
20 ***Can't seem to charge it!***

21 49. On January 5, 2013:

22 I too am having problems. The ***little char[g]er doesn't
23 work at all anymore.*** I am using my computer to charge it
24 now and it only works half way, the charger doesn't want
25 to stay in the port.

26 50. On January 16, 2013:

27 I have the same problem and i just bought a new charger
28 from you guys and ***its still the same...***

51. On March 1, 2013:

...I am very unhappy with the charger and my 6 year old
is heart broken! ***I have tried to purchase our 3rd charger***

³ The typographical errors in paragraphs 45-65 are reproduced from original posts.

1 but they are out of stock!!!...

2 52. On March 23, 2013:

3 My Nabi has 100 % charge....a red battery icon not on the
4 screen...turns green for a second...sometimes...just bought
5 it 3 days ago..**won't respond when I try to power it
on**..turns off if I unplug the charger... (ellipses in original)

6 53. On April 8, 2013:

7 Just got my daughters nabi tab today open it as it was for
8 her birthday its been on charge now for 4 hours **but still
wount turn on!...**

9 54. On May 16, 2013:

10 bought our nabi2 for my sons 5th birthday and it looks
11 like the port that the charger plugs into is loose **and won't
charge** what do I do?

12 55. On September 1, 2013:

13 This is crazy! **I received my second replacement charger
and it worked for about 2 months.** Now, it's doing the
14 same thing again...

15 56. On October 4, 2013:

16 We are having similar issues, sometimes it turns on,
17 sometimes it does not. I left it plugged in for about 6
18 hours Monday, nobody used it, then on Thursday the bat-
19 tery was very low. **Charged it Thursday night (again)
and then had trouble turning it on.** That is the worst part,
20 not being able to turn on at times.

21 57. On October 22, 2013:

22 seems like everyone is having the same problem I also am
23 having problem and I bought 3 of them one for each of
24 my kids and now it seems like I just wasted almost 400\$
25 on these and I just bought them in march

26 58. On November 5, 2013:

27 My sons nabi will not turn on whatsoever, when I plug it
28 in it goes from a green light to an orange light for about a

1 minute then changes back to green but then no matter how
 2 long I hold the power button down for it WILL NOT turn
 3 on! I have been to the nabi website time and time again
 4 but there is no number that I can all to try and resolve this
 5 problem, only an email address which I think is ridicu-
 6 lous, my son has barely played on this expensive tablet,
 first there were charger problems and ***now we have a
 brand new charger from the nabi company and we're
 still having problems***, I want to be done with this...

7 59. On December 9, 2013:

8 Same here I just got the new nabi2 for my daughter
 9 Christmas gift ...I been changing it since 6pm yesterday
 10 Is now 3:30am i wake up to get ready for work and the
 nabi still flashing green and orange.... A won't turn on...

11 60. On January 2, 2014:

12 my grandson has had his nabi tab for a year ***in which his
 13 parent has purchased new charge[r]s three times*** the 3rd
 14 being Christmas ...tablet worked for not even a week, ***now
 15 it won't take a charge or even turn on!!!***” help plz if
 you can, thanks.

16 61. On January 21, 2014:

17 ...But then this morning I had trouble getting it to connect
 18 to get a charge...but finally I was able to get it to charge
 19 after a little wiggling around. Now this evening when I
 20 went to plug it in again to charge and now it won't con-
 21 nect to get a charge at all. We are devastated. We had
 22 JUST loaded the books and we were going to read them
 23 as bedtime stories tonight. What can be done about this.
 And now I search and find that it seems more Nabis than
 not have the very same issue...

24 62. On January 28, 2015:

25 Its amazing how many people have the same problem. I
 26 bought mine christmas of 2012. I have bought about 25
 27 chargers since then. Not the usb kind. the one with the
 28 skinny tip. They only last a week if that. Im so tired of
 this and NABI wont even fix the issue. Now I am having
 such a hard time charging my sons tablet. The charger is

1 so loose and wont even stay in the port. Its very irritating.
2 I will never buy another NABI products again! And my
3 son is not rough with his tablet at all. He hasnt hardly
4 even messed with it this past year because its never
5 charged.

63. On February 17, 2015:

6 Ughhh! Why sell an otherwise nice tablet and continue to
7 release purchase options like apps etc if the company can't
8 figure out the charging issue. ***I have purchased 3 charg-***
9 ***ers....because nabi customer support emailed me that re-***
10 ***placement chargers are no longer given and I would***
11 ***have to purchase.*** After purchase and wait, I am finding
12 that it's not the charger, but possibly a defect in design.
13 Are there any recalls? I might message channel 4 as a dud
14 product. No charge...no play for my kid

64. On February 26, 2015:

13 ...Ok so I bought TWO Nabi2 for Christmas. There
14 clearly is STILL charging issues. ***O Just bought a brand***
15 ***new charger and it did not fix the problem with one of***
16 ***them.*** What are the solutions.

65. On February 27, 2015:

17 ...My charger broke need replacement ASAP as sad child....

66. On April 28, 2015:

19 I wish I would've seen all these co.ments before I bought my daughters each
20 one. But even if I can't grt them charged. I must say I'm grateful ill only be
21 out like 65\$. I just bought 2 nabi tablets for 50\$ but now I'm starting to
22 wonder if they intenteinally sold me broken ones.

67. On May 6, 2015:

24 ...I'm on replacement charger and doing it again

25 68. More than 230,000 purchasers of the Nabi tablets have contacted Nabi
26 customer support about problems with charging their Nabi tablets. An additional
27 number, also believed to be in the tens or hundreds of thousands, has contacted
28 their retailers (such as Best Buy) to report the same issues.

1 69. Plaintiff’s investigator purchased a Nabi 2 in June 2014 from Best
2 Buy. On June 23, 2014, Plaintiff’s investigator sent an email to Defendants’
3 customer service department requesting a replacement charger, stating that the
4 investigator had purchased a “Nabi at Best Buy recently and the charger doesn’t
5 work.”

6 70. Defendants responded to Plaintiff’s investigator’s email later that day
7 with the following message:

8 You can purchase a charger at nabishop.com.
9 best, efrain nabi cares

10 **DEFENDANTS’ REFUSAL TO PROVIDE SOFTWARE UPDATES**

11 71. Defendants promise to provide and do provide free software updates
12 for the Nabi tablets. When Defendants release a software update, a notification is
13 pushed to all Nabi tablets who are connected to the Internet, notifying users that a
14 software update is available to download. These “over-the-air” software updates
15 provide Nabi users with vital updates to the tablet’s functionality, including
16 updates to the operating system, and fixes to known errors or bugs in the
17 software. These software updates are released periodically and are announced to
18 Nabi owners on Defendants’ website and Facebook page.

19 72. For example, in or around February 2015, Defendants released a
20 software update for Nabi tablets, Over-the-Air Update v3.0, which included a new
21 operating system (OS 3.0 “Blue Morpho”) and added “over 400 kid-focused,
22 parent-approved features,” including the following described on Defendants’
23 Facebook page:
24
25
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28

SHOW THE WORLD WHAT YOU CAN DO.

Get 400 New Features.
Pay Zero.

Blue Morpho OS now available on nabi 2/2S*

nabi
February 13 · Edited ·

Update your nabi 2/2S to Blue Morpho OS*, which starts with Android KitKat 4.4 and adds over 400 kid-focused, parent-approved features including:

Dream Pro Studio: A powerful suite of creative tools that teach your children how to draw, animate, author their own books and edit movies like a pro!

nabi Utilities Suite: A suite of applications that teaches kids how to read time, understand weather, and manage a calendar.

navigator: Use your nabi and iPhone/Android phone to communicate with your kids through the navigator app. Send an instant message, email, and share photos with your kids with nabi Connect, and reward your kids' good behavior with nabi Coins.

nabi Play and nabi Web: Give your kids access to top kid-friendly websites and streaming videos. Create customized channels of your child's favorite content.

Visit <http://bit.ly/nabi2OTA> for step-by-step instructions and to learn more.

*nabi 2: Update to v3.0
nabi 2S: Update to v2.0

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73. Defendants claim that their Over-the-Air update(s) have remedied at least some of the problems users experience recharging the Nabi tablets.

74. Even though Defendants represent that the software updates are free to all owners of Nabi tablets and the updates remedy known bugs in the Nabi software, since September 2014, Defendants have refused to provide these updates to all Nabi owners as promised. Instead, Defendants require that all Nabi owners agree to the amended Terms of Use agreement to receive the promised software and firmware updates. Defendants display a pop-up box on the Nabi tablets prior to installation of the updates, which requires the user to agree to the amended Terms of Use agreement before installation.

75. In September 2014, after Plaintiff filed his original complaint, Defendants amended the Terms of Use agreement, which is available on their website and is applicable to all Nabi tablets, to include the following arbitration and class action waiver provisions:

In the event of a dispute, you or Fuhu, Inc. must send to the other party a notice of dispute, which is a written statement that sets forth the name, address and contact information of the party giving the

1 notice, the facts giving rise to the dispute and the relief requested. You
2 must send any notice of dispute to Fuhu, Inc., 909 N. Sepulveda Blvd,
3 Suite 540, El Segundo, CA 90245, USA, Attention: Legal/Arbitration
4 Notice. We will send any notice of dispute to you at the contact
5 information we have for you. You and Fuhu, Inc. will attempt to
6 resolve a dispute through informal negotiation within sixty (60) days
7 from the date the notice of dispute is sent. After sixty (60) days, you
8 or we may commence arbitration. You may also litigate a dispute in
9 small claims court if the dispute meets the requirements to be heard in
10 small claims court, whether or not you negotiated informally first.

11 All claims and disputes that (1) are between you and Fuhu, Inc. or
12 either's subsidiaries, parents, affiliates, officers, directors and/or
13 employees, and (2) arise out of or relate to these terms and conditions
14 or their subject matter, interpretation, performance or enforcement, or
15 any other agreement, transaction or occurrence between you and
16 Fuhu, Inc. (including without limitation any tort or statutory claim)
17 ("Dispute") shall be arbitrated under the Commercial Arbitration
18 Rules of the American Arbitration Association ("AAA"), in English at
19 Los Angeles, California, before one neutral arbitrator who may be a
20 national of any party and who shall be a member of the AAA's Large
21 Complex Case Panel. All documents and information relevant to the
22 claim or dispute in the possession of any party shall be made available
23 to the other party not later than sixty (60) days after the demand for
24 arbitration is served, and the arbitrator may permit such depositions or
25 other discovery deemed necessary for a fair hearing. The arbitrator
26 shall have the power to require discovery of third parties (including
27 testimony and documents) to the fullest extent allowed by the laws of
28 the State of California. The hearing may not exceed two days. The
award shall be rendered within 120 days of the demand. The arbitrator
may award interim and final injunctive relief and other remedies, but
may not award punitive, exemplary, treble, or other enhanced
damages. To the fullest extent permitted by law, no arbitration under
the Agreement Documents shall be joined to an arbitration involving
any other party, whether through class arbitration proceedings or
otherwise. No time limit herein is jurisdictional. Any award of the
arbitrator (including awards of interim or final remedies) may be
confirmed or enforced in any court having jurisdiction.
Notwithstanding the above, you or Fuhu, Inc. may bring court
proceedings or claims against each other (i) solely as part of separate
litigation commenced by an unrelated third party, or (ii) if not first
sought from the arbitrator, solely to obtain in the state or federal

1 courts in Los Angeles, California, temporary or preliminary injunctive
2 relief or other interim remedies pending conclusion of the arbitration.
3 In the case of contradiction between the provisions of this Section and
4 the Commercial Arbitration Rules of AAA, this Section shall prevail.
5 The limitations on remedies described above may be deemed
6 inoperative to the extent necessary to preserve the enforceability of
7 the agreement to arbitrate. If any provision of this agreement to
8 arbitrate is held invalid or unenforceable, it shall be so held to the
9 minimum extent required by law and all other provisions shall remain
10 valid and enforceable.

11 <http://www.fuhu.com/terms>.

12 76. All class members who purchased a Nabi tablet after Defendants
13 amended the Terms of Use agreement in September 2014 are also required to
14 accept these terms prior to registration of the Nabi tablet. If they do not agree to the
15 Terms of Use agreement, their Nabi tablet cannot be used as intended.

16 77. Defendants present consumers with a Hobson's Choice – i.e., to
17 receive the promised Nabi tablet software and firmware updates necessary to fix
18 bugs that existed at the time of purchase and upgrades, they must acquiesce to
19 Defendants' arbitration provision and agree to waive their rights to litigate their
20 dispute.

21 78. Adding to the deception, and in an apparent effort to conceal the
22 amendments to the Terms of Use agreement, Defendants intentionally failed to
23 update the "Last Updated" date on their Terms of Use agreement. The Terms of
24 Use indicate that they were last updated on "August 16, 2013," even though they
25 were revised in September 2014. (*See* <http://www.fuhu.com/terms>.) This is
26 particularly troubling because, in the Terms of Use agreement, Fuhu purportedly
27 "reserves the right, at its sole discretion, to change, modify, add or remove portions
28 of these Terms, at any time." Defendants then place the onus on their customers
"to check these Terms periodically for change" and further state that the
"continued use of the Site following the posting of changes will mean that you
accept and agree to the changes." Yet, they intentionally obfuscated the September

1 2014 changes. Accordingly, Nabi owners who previously reviewed and agreed to
2 the Terms of Use are not sufficiently notified that the Terms of Use have been
3 amended. Nor do Defendants do anything to direct Nabi owners to the added
4 provisions.

5 79. Defendants' insertion of the arbitration and class action waiver
6 provisions in the Terms of Use and their requirement that all Nabi owners agree to
7 the amended Terms of Use to receive the promised software updates is
8 unconscionable and illegal in that it:

- 9 • was imposed on Nabi owners on a "take it or leave it" basis
10 with no opportunity by the Nabi owner to negotiate any term
11 thereof;
- 12 • was contained in an adhesive form agreement prepared by De-
13 fendants and concerning which Defendants were in a much
14 stronger bargaining position than the Nabi owner;
- 15 • requires the Nabi owners to choose between full use of the
16 products they previously purchased and retaining valuable
17 rights to sue;
- 18 • is substantially one-sided and benefits only Defendants to the
19 detriment of Plaintiff and class members.
- 20 • provides that "[a]ll claims and disputes that (1) are between you
21 and Fuhu, Inc. or either's subsidiaries, parents, affiliates, offi-
22 cers, directors and/or employees, and (2) arise out of or relate to
23 these terms and conditions or their subject matter, interpreta-
24 tion, performance or enforcement, or any other agreement,
25 transaction or occurrence between you and Fuhu, Inc. (includ-
26 ing without limitation any tort or statutory claim) ("Dispute")
27 shall be arbitrated under the Commercial Arbitration Rules of
28 the American Arbitration Association ("AAA");" and

- provides that “no arbitration under the Agreement Documents shall be joined to an arbitration involving any other party, whether through class arbitration proceedings or otherwise.”

80. Rather than agree to the unconscionable amended Terms of Use, Plaintiff refused to do so and has not received any of the software updates Defendants provided after September 2014.

81. Plaintiff and the class members received something lower in value than that for which they paid and, accordingly, they have lost money as a result of the unconscionability, illegality, and unenforceability of the amended Terms of Use. In particular, Plaintiff and the class members were denied promised and valuable software updates as well as full use of their tablets.

82. Class members who do not accept the amended Terms of Use may be unable to return the Nabi tablet to the retailer for a return of the full purchase price, since the tablet will have been opened and operated. Likewise, Defendants do not refund the full purchase price of Nabi tablets to consumers who decline to agree to the Terms of Use.

CLASS ALLEGATIONS

83. Plaintiff brings this action against Defendants, on behalf of himself and all others similarly situated, as a class action pursuant to section 1781 of the California Civil Code. Plaintiff seeks to represent the following groups of similarly situated persons:

All persons who, between July 3, 2010 and the present, purchased, in the United States, a Nabi tablet (excluding purchases for purposes of resale and purchases that were returned to the seller for a full refund, and purchases of the Nabi BigTab) (the “Class”);

All members of the Class who purchased their Nabi tablets and registered their purchase with one or more Defendants prior to September 24, 2014 (the “Unconscionability Subclass”); and

1 All members of the Class who purchased their Nabi tablets from a
2 third-party retailer (the “Warranty Subclass”).

3 84. The Class, the Unconscionability Subclass, and the Warranty Subclass
4 are hereinafter referred to collectively as the “Classes.”

5 85. This action has been brought and may properly be maintained as a
6 class action against Defendants because there is a well-defined community of
7 interest in the litigation and each proposed class is easily ascertainable.

8 86. Numerosity: Plaintiff does not know the exact size of the Classes, but
9 it is estimated that they are each composed of more than 100 persons. The persons
10 in the Classes are so numerous that the joinder of all such persons is impracticable
11 and the disposition of their claims in a class action rather than in individual actions
12 will benefit the parties and the courts.

13 87. Common Questions Predominate: This action involves common
14 questions of law and fact to the potential Classes because each class member’s
15 claim derives from the same: (i) deceptive, unlawful, unfair and/or false statements
16 and omissions that led Defendants’ consumers to believe that their Nabi tablets
17 were rechargeable and/or (ii) policy of denying class members registration and/or
18 all software updates unless they accept the amended Terms of Use. The common
19 questions of law and fact predominate over individual questions, as proof of a
20 common or single set of facts will establish the right of each member of the Classes
21 to recover. Among the questions of law and fact common to the Classes are:

- 22 • Whether Defendants unlawfully and/or deceptively failed, and
23 continue to fail, to inform class members that the charging systems
24 included with the Nabi tablets were defective because they do not
25 reliably recharge the Nabi tablets;
- 26 • Whether the charging systems included with the Nabi tablets are
27 defective;
- 28 • Whether Defendants are aware of the defective charging systems;

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- Whether Defendants’ advertising and marketing of the Nabi tablets sold to class members was likely to deceive class members or was unfair;
- Whether Defendants engaged in the alleged conduct knowingly, recklessly, or negligently;
- Whether Defendants had a duty to disclose the defective charging systems to consumers;
- Whether Defendants’ failure to disclose the defective charging systems was material to consumers’ decisions to purchase the Nabi tablets;
- Whether the defects in the Nabi tablets’ charging systems are inherent and substantially certain to result in failure to reliably recharge the tablets within one year of purchase;
- Whether the Nabi tablets are of merchantable quality and/or unfit for their ordinary purpose at the time of sale;
- Whether Defendants breached the express warranty or implied warranty of merchantability by manufacturing and distributing defective Nabi tablets;
- Whether Defendants’ policy of requiring class members to accept the hidden, unconscionable arbitration and class waiver provisions Defendants inserted into the Terms of Use is unlawful;
- The amount of revenues and profits Defendants received and/or the amount of monies or other obligations lost by class members as a result of such wrongdoing;
- Whether class members are entitled to injunctive and other equitable relief and, if so, what is the nature of such relief; and
- Whether class members are entitled to payment of actual, incidental, consequential, exemplary and/or statutory damages plus

1 interest thereon, and if so, what is the nature of such relief?

2 88. Typicality: Plaintiff's claims are typical of the Classes because
3 Plaintiff purchased a Nabi tablet from a third party retailer. Thus, Plaintiff and
4 class members sustained the same injuries and damages arising out of Defendants'
5 conduct in violation of the law. The injuries and damages of each class member
6 were caused directly by Defendants' wrongful conduct in violation of law as
7 alleged.

8 89. Adequacy: Plaintiff will fairly and adequately protect the interests of
9 all class members because it is in his best interests to prosecute the claims alleged
10 herein to obtain full compensation due to him for the unfair and illegal conduct of
11 which he complains. Plaintiff also has no interests that are in conflict with or
12 antagonistic to the interests of class members. Plaintiff has retained highly
13 competent and experienced class action attorneys to represent his interests and that
14 of the Classes. By prevailing on his own claim, Plaintiff will establish Defendants'
15 liability to all class members. Plaintiff and his counsel have the necessary financial
16 resources to adequately and vigorously litigate this class action, and Plaintiff and
17 counsel are aware of their fiduciary responsibilities to the class members and are
18 determined to diligently discharge those duties by vigorously seeking the maximum
19 possible recovery for class members.

20 90. Superiority: There is no plain, speedy, or adequate remedy other than
21 by maintenance of this class action. The prosecution of individual remedies by
22 members of the Classes will tend to establish inconsistent standards of conduct for
23 Defendants and result in the impairment of class members' rights and the
24 disposition of their interests through actions to which they were not parties. Class
25 action treatment will permit a large number of similarly situated persons to
26 prosecute their common claims in a single forum simultaneously, efficiently, and
27 without the unnecessary duplication of effort and expense that numerous individual
28 actions would engender. Furthermore, as the damages suffered by each individual

1 member of the Classes may be relatively small, the expenses and burden of
2 individual litigation would make it difficult or impossible for individual members
3 of the Classes to redress the wrongs done to them, while an important public
4 interest will be served by addressing the matter as a class action.

5 91. Nexus to California. The State of California has a special interest in
6 regulating the affairs of corporations that do business here. Defendants have their
7 principal place of business in California, and the acts complained of herein
8 emanated from decisions made by Defendants in California. Accordingly, there is a
9 substantial nexus between Defendants' unlawful behavior and California such that
10 the California courts should take cognizance of this action on behalf of classes of
11 individuals who reside anywhere in the United States.

12 92. Plaintiff is unaware of any difficulties that are likely to be encountered
13 in the management of this action that would preclude its maintenance as a class
14 action.

15 CAUSES OF ACTION

16 PLAINTIFF'S FIRST CAUSE OF ACTION

17 **(Violation of the Consumers Legal Remedies Act, California Civil Code §
18 1750, *et seq.*)**

18 **On Behalf of Himself and the Class**

19 93. Plaintiff realleges and incorporates the paragraphs of this Complaint as
20 if set forth herein.

21 94. This cause of action is brought pursuant to the California Consumers
22 Legal Remedies Act, California Civil Code § 1750, *et seq.* ("CLRA").

23 95. Defendants' actions, misrepresentations, omissions and conduct have
24 violated, and continue to violate the CLRA, because they extend to transactions that
25 are intended to result, or which have resulted, in the sale or lease of goods or
26 services to consumers.

27 96. Plaintiff and other class members are "consumers" as that term is
28 defined by the CLRA in California Civil Code § 1761(d).

1 97. The Nabi tablets that Plaintiff (and others similarly situated class
2 members) purchased were “goods” within the meaning of California Civil Code
3 § 1761(a).

4 98. By engaging in the actions, misrepresentations, omissions, and conduct
5 set forth in this Complaint, Defendants have violated, and continue to violate
6 §§ 1770(a)(5), 1770(a)(7), 1770(a)(9), and 1770(a)(19) of the CLRA.

7 99. In violation of California Civil Code §1770(a)(5), Defendants’ acts,
8 omissions, and practices constitute improper representations that the goods they sell
9 have sponsorship, approval, characteristics, ingredients, uses, benefits, or
10 quantities, which they do not have. In violation of California Civil Code
11 §1770(a)(7), Defendants’ acts, omissions, and practices constitute improper
12 representations that the goods they sell are of a particular standard, quality, or
13 grade, when they are of another. In violation of California Civil Code §1770(a)(9),
14 Defendants advertised goods or services with intent not to sell them as advertised.

15 100. With respect to the Unconsciability Subclass, in violation of California
16 Civil Code 1770(a)(19), Defendants included an unfair and unconscionable
17 arbitration provision in their Terms of Use agreement and purported to condition
18 class members’ pre-existing rights (such as the right to obtain software updates and
19 bug fixes) on their agreement to the amended Terms of Use. Defendants knew that
20 their amendment of the Terms of Use to include the arbitration provision was
21 unconscionable and illegal under California law but added it with oppression, fraud
22 or malice and/or in wilful and conscious disregard of the laws of California and the
23 legal rights of Plaintiff and class members.

24 101. Defendants’ acts, omissions, and practices misled consumers into
25 believing that they would be provided with Nabi tablets that were rechargeable and
26 could be recharged with the provided power adapter. In particular, Defendants
27 marketed, advertised, and represented to consumers that the Nabi tablets included a
28 “power adapter,” were “rechargeable,” and had “rechargeable batteries.”

1 Defendants also marketed, advertised, and represented to consumers that the Nabi
2 tablets are “made for kids,” “built just for kids,” “made especially for kids,” and
3 “designed specifically for kids.” Further, Defendants failed to disclose to
4 consumers that the Nabi tablets had defective charging systems that failed to
5 reliably recharge the tablets, that were not suitable for use by children, and that
6 created a risk of fire. Defendants thereby misrepresented by commission and
7 omission that the Nabi tablets were rechargeable and that they were suitable for use
8 by children.

9 102. Defendants had a duty to Plaintiff and class members to disclose to
10 them that the Nabi tablets were not rechargeable or suitable for use by children, and
11 that they presented a safety risk, because: (a) Defendants had exclusive knowledge
12 of material facts (i.e., the defective charging systems) not known to Plaintiff and
13 class members; (b) Defendants actively and intentionally concealed a material fact
14 (i.e., the defective charging systems) from Plaintiff and class members; and
15 (c) Defendants made partial representations regarding the Nabi tablets but also
16 suppressed material facts regarding the defective charging systems. Further,
17 Defendants had a duty to disclose the defective charging systems because
18 Defendants advertised and marketed the Nabi tablets as “rechargeable” and as
19 “designed specifically for kids.”

20 103. Defendants’ misrepresentations and omissions regarding the Nabi
21 tablets were material because the defective charging systems were likely to
22 manifest in failures to reliably recharge the tablets during the warranty period.
23 Further, the ability to recharge the Nabi tablet is essential to the product’s
24 usefulness. The defects in the charging system also presented significant safety
25 risks. If Plaintiff had known of the defective charging systems prior to purchasing
26 Defendants’ Nabi tablet, Plaintiff would not have made his purchase.

27 104. Plaintiff requests that this Court enjoin Defendants from continuing to
28 employ the unlawful methods, acts and practices alleged herein pursuant to

1 California Civil Code § 1780(a)(2). If Defendants are not restrained from engaging
2 in these types of practices in the future, Plaintiff and the other members of the Class
3 will continue to suffer harm.

4 105. More than thirty days prior to the filing of this Complaint, Plaintiff
5 gave notice and demand that Defendants correct, repair, replace or otherwise rectify
6 the unlawful, unfair, false and/or deceptive practices complained of herein.
7 Defendants failed to do so. Among other things, Defendants failed to: (i) identify
8 similarly situated customers; (ii) notify them of their right to correction, repair,
9 replacement or other remedy; (iii) provide that remedy; (iv) correct the deficiencies
10 identified in their replacement program; and (v) rescind the arbitration provision in
11 the amended Terms of Use. Accordingly, Plaintiff seeks, pursuant to California
12 Civil Code § 1780(a)(3), on behalf of himself and persons similarly situated,
13 compensatory damages, punitive damages and restitution of any ill-gotten gains due
14 to Defendants' acts and practices.

15 106. Plaintiff also requests that this Court award him his costs and
16 reasonable attorneys' fees pursuant to California Civil Code § 1780(d).

17 **PLAINTIFF'S SECOND CAUSE OF ACTION**
18 **(False Advertising, Business and Professions Code § 17500, *et seq.* ("FAL"))**
19 **On Behalf Of Himself and the Class**

20 107. Plaintiff realleges and incorporates by reference the previous
21 paragraphs of this Complaint as if set forth herein.

22 108. Beginning at an exact date unknown to Plaintiff, but within three (3)
23 years preceding the filing of this lawsuit, Defendants made untrue, false, deceptive
24 and/or misleading statements and omissions in connection with the advertising and
25 marketing of the Nabi tablets.

26 109. Defendants intentionally made the misrepresentations and statements
27 (by omission and commission) described above, that led reasonable consumers,
28 including Plaintiff, to believe that they were purchasing a rechargeable tablet and a
tablet that was designed specifically for children.

1 110. Plaintiff, and those similarly situated, relied to their detriment on
2 Defendants' false, misleading and deceptive advertising and marketing practices.
3 Had Plaintiff and those similarly situated been adequately informed and not
4 intentionally deceived by Defendants, they would have acted differently by, without
5 limitation, refraining from purchasing the Nabi tablets.

6 111. Defendants' acts and omissions are likely to deceive the general
7 public.

8 112. Defendants engaged in these false, misleading and deceptive
9 advertising and marketing practices to increase their profits. Accordingly,
10 Defendants engaged in false advertising, as defined and prohibited by section
11 17500, *et seq.* of the California Business and Professions Code.

12 113. The aforementioned practices, which Defendants have used, and
13 continue to use, to their significant financial gain, also constitute unlawful
14 competition and provide an unlawful advantage over Defendants' competitors as
15 well as injury to the general public.

16 114. As a direct and proximate result of such actions, Plaintiff and the other
17 members of the Class have suffered, and continue to suffer, injury in fact and have
18 lost money and/or property as a result of such false, deceptive and misleading
19 advertising in an amount which will be proven at trial, but which is in excess of the
20 jurisdictional minimum of this Court.

21 115. Plaintiff seeks, on behalf of those similarly situated, full restitution of
22 monies, as necessary and according to proof, to restore any and all monies acquired
23 by Defendants from Plaintiff, the general public, or those similarly situated by
24 means of the false, misleading and deceptive advertising and marketing practices
25 complained of herein, plus interest thereon.

26 116. Plaintiff seeks, on behalf of those similarly situated, a declaration that
27 the above-described practices constitute false, misleading and deceptive
28 advertising.

1 117. Plaintiff seeks, on behalf of those similarly situated, an injunction to
2 prohibit Defendants from continuing to engage in the false, misleading and
3 deceptive advertising and marketing practices complained of herein. Such
4 misconduct by Defendants, unless and until enjoined and restrained by order of this
5 Court, will continue to cause injury in fact to the general public and the loss of
6 money and property in that the Defendants will continue to violate the laws of
7 California, unless specifically ordered to comply with the same. This expectation
8 of future violations will require current and future consumers to repeatedly and
9 continuously seek legal redress in order to recover monies paid to Defendants to
10 which Defendants are not entitled. Plaintiff, those similarly situated and/or other
11 consumers nationwide have no other adequate remedy at law to ensure future
12 compliance with the California Business and Professions Code alleged to have been
13 violated herein.

14 **PLAINTIFF'S THIRD CAUSE OF ACTION**
15 **(Fraud, Deceit and/or Misrepresentation)**
16 **On Behalf of Himself and the Class**

17 118. Plaintiff realleges and incorporates by reference the paragraphs of this
18 Complaint as if set forth herein.

19 119. On or about July 27, 2012, Defendants fraudulently and deceptively
20 informed Plaintiff that the Nabi tablet he was purchasing included a “power
21 adapter,” was “rechargeable,” had “rechargeable batteries,” was “made for kids,”
22 “built just for kids,” “made especially for kids,” and “designed specifically for
23 kids.” Further, on or about July 27, 2012, Defendants failed to inform Plaintiff that
24 the Nabi tablet he was purchasing included a defective charging system that failed
25 to reliably recharge the tablet, rendered the tablet unfit for its ordinary use, was not
26 suitable for use by children, and created a significant safety risk.

27 120. These misrepresentations and omissions were known exclusively to,
28 and actively concealed by, Defendants, not reasonably known to Plaintiff, and
material at the time they were made. They concerned material facts that were

1 essential to the analysis undertaken by Plaintiff as to whether to purchase the Nabi
2 tablet. In misleading Plaintiff and not so informing Plaintiff, Defendants breached
3 their duty to him. Defendants also gained financially from, and as a result of, their
4 breach.

5 121. Plaintiff and those similarly situated relied to their detriment on
6 Defendants' fraudulent omissions. Had Plaintiff and those similarly situated been
7 adequately informed and not intentionally deceived by Defendants, they would
8 have acted differently by, without limitation, purchasing a different tablet.

9 122. Defendants had a duty to inform class members at the time of the
10 tablet purchases of the defective charging system in the Nabi tablets that they were
11 purchasing. Defendants omitted to provide this information to class members.
12 Class members relied to their detriment on Defendants' omissions. These
13 omissions were material to the decisions of the class members to purchase the Nabi
14 tablets. In making these omissions, Defendants breached their duty to class
15 members. Defendants also gained financially from, and as a result of, their breach.

16 123. By and through such fraud, deceit, misrepresentations and/or
17 omissions, Defendants intended to induce Plaintiff and those similarly situated to
18 alter their position to their detriment. Specifically, Defendants fraudulently and
19 deceptively induced Plaintiff and those similarly situated to, without limitation, to
20 purchase Nabi tablets.

21 124. Plaintiff and those similarly situated justifiably and reasonably relied
22 on Defendants' omissions, and, accordingly, were damaged by Defendants.

23 125. As a direct and proximate result of Defendants' misrepresentations
24 and/or omissions, Plaintiff and those similarly situated have suffered damages,
25 including, without limitation, the amount they paid for the Nabi tablets,
26 replacement power adapters, and/or repairs of the Nabi tablets.

27 126. Defendants' conduct as described herein was wilful and malicious and
28 was designed to maximize Defendants' profits even though Defendants knew that

1 they would cause loss and harm to Plaintiff and those similarly situated.

2 **PLAINTIFF’S FOURTH CAUSE OF ACTION**

3 **(Breach of Express Warranty)**

4 **On Behalf of Himself and the Warranty Subclass**

5 127. Plaintiff realleges and incorporates by reference the paragraphs of this
6 Complaint as if set forth herein.

7 128. This cause of action is brought pursuant to California Commercial
8 Code § 2100, *et seq.* as well as the common law.

9 129. Plaintiff, and those similarly situated, were “buyers” of goods as
10 defined in California Commercial Code § 2103.

11 130. Defendants were “sellers” and “merchants” as those terms are defined
12 in California Commercial Code §§ 2103 and 2104.

13 131. Plaintiff, and those similarly situated, who purchased Nabi tablets
14 received materially similar, if not identical, written warranties from Defendants.
15 Defendants’ written product warranties state, in pertinent part, in similar or
16 identical terms, as follows:

17 Fuhu warranties for one year from the date of sale to the consumer
18 that the nabi is of merchantable quality and that it conforms to applic-
19 able specifications. Applicable specifications mean the specification
20 for the Processor, the CPU (Central Processing Unit). The applicable
21 specifications exclude and no warranty is provided for the specifica-
22 tions for any other components or for any performance that can de-
23 grade naturally with normal use for one year... If you discover that
24 your nabi is not of merchantable quality and fails to conform to its ap-
25 plicable specifications, as defined above, we will, at our option, re-
26 fund the purchase price, or repair or replace the product, using new or
27 refurbished components within a reasonable time during the warranty
28 period.

132. These representations became part of the basis of the bargain in the
purchases by Plaintiff, and those similarly situated, of Defendants’ products, and
thus qualify as “express warranties” as defined by section 2313 of the California
Commercial Code in connection with the sale of goods to Plaintiff and those

1 similarly situated.

2 133. Defendants breached the written warranty because Defendants
3 manufactured and sold tablets that were not of merchantable quality during the
4 warranty period. In particular, during the first year of use after purchase, the Nabi
5 tablets: (i) were not rechargeable; (ii) had defective charging systems that failed to
6 reliably recharge the tablets; and/or (iii) could not be used while connected to a
7 power source. Failures to reliably recharge are not a symptom of a normally
8 functioning tablet. Rather, it is a symptom of the inherently defective charging
9 system included with the Nabi tablets. It was substantially certain that consumers
10 would experience problems recharging the Nabi tablets under normal use because
11 the normal use of tablets includes using them until the batteries are drained.
12 Further, Plaintiff, and others similarly situated, had no reasonable alternative means
13 to recharge the tablets because Defendants warned users that third party power
14 adapters could damage the tablets and because the charging port was also defective.
15 Instead of remedying the problems experienced by consumers, Defendants
16 responded to consumer complaints about recharging the Nabi tablets and/or the
17 defective charging systems by giving those consumers replacement power adapters
18 that were also defective and that failed to remedy the defects in the charging
19 systems. Defendants also refused to do anything in response to consumer
20 complaints and instead tell those consumers to purchase replacement power
21 adapters from Defendants.

22 134. The defects in the Nabi tablets were not apparent at the time of
23 purchase, because Defendants failed to disclose that: (i) the charging systems
24 included with the Nabi tablets were defective and (ii) the Nabi tablets could not be
25 used while they were plugged into a power source and/or recharging. On the
26 contrary, Defendants stated in the product manual for the Nabi tablets that the
27 tablets were both rechargeable and could be used while recharging.

28 135. As a result of Defendants' sale of Nabi tablets that do not perform as

1 warranted and are unfit for normal use, Plaintiff, and those similarly situated, have
2 suffered damages.

3 **PLAINTIFF'S FIFTH CAUSE OF ACTION**
4 **(Violation of the Song-Beverly Consumer Warranty Act, Civil Code §§ 1790, *et***
5 ***seq.*)**

6 **On Behalf of Himself and the Warranty Subclass**

7 136. Plaintiff realleges and incorporates by reference the paragraphs of this
8 Complaint as if set forth herein.

9 137. This cause of action is brought pursuant to the Song-Beverly
10 Consumer Warranty Act, California Civil Code §§ 1790, *et seq.* (the "Act").

11 138. Plaintiff and those similarly situated were "buyers" of "consumer
12 goods" as those terms are defined under California Civil Code section 1791. The
13 Nabi tablets sold to Plaintiff, and those similarly situated, are "consumer goods" as
14 defined in the Act.

15 139. Defendants were "manufacturers" as that term is defined in section
16 1791 of the Act.

17 140. An implied warranty of merchantability arose out of and was related to
18 Defendants' sales of the Nabi tablets.

19 141. Defendants breached the implied warranty of merchantability by
20 selling defective tablets—i.e., tablets that were not rechargeable and/or could not be
21 used while they were connected to a power source and/or recharging. These tablets
22 were unfit for their ordinary purpose at the time of sale because, regular use for
23 their ordinary purpose would drain the rechargeable batteries power which would
24 need to be recharged.

25 142. Defendants also made "express warranties" (set forth above) as
26 defined by § 1791.2 of the Act in connection with the sales of consumer goods to
27 Plaintiff and those similarly situated. By manufacturing tablets with defective
28 charging systems that failed to reliably recharge the tablets, Defendants breached
this written warranty because the Nabi tablets were not free from defects in

1 materials or workmanship under normal use.

2 143. As a result of Defendants' sale of defective products that do not
3 perform as warranted and are unfit for normal use, Plaintiff, and those similarly
4 situated, have suffered damages.

5 144. Plaintiff contacted Defendants for assistance and Defendants sent a
6 replacement power adapter to Plaintiff. However, the replacement power adapter
7 was also defective and did not remedy the problems recharging the tablet.
8 Accordingly, Plaintiff and those similarly situated have been unable to obtain
9 appropriate relief in the form of replacement, repair or restitution.

10 145. Plaintiff, and those similarly situated, have suffered and will continue
11 to suffer damages as a result of Defendants' failure to comply with their warranty
12 obligations. Accordingly, Plaintiff, and those similarly situated, are entitled to
13 recover such damages under the Song-Beverly Act, including damages pursuant to
14 Civ. Code §§ 1791.1(d) and 1974.

15 146. Defendants' breaches of warranty, as set forth above, were wilful.
16 Accordingly, a civil penalty should be imposed upon Defendants in an amount not
17 to exceed twice the amount of actual damages.

18 **PLAINTIFF'S SIXTH CAUSE OF ACTION**
19 **(Deceptive and Unlawful Trade Practices,**
20 **Business and Professions Code § 17200, et seq.)**
21 **On Behalf of Himself and the Class**

22 147. Plaintiff realleges and incorporates by reference the paragraphs of this
23 Complaint as if set forth herein.

24 148. Within four (4) years preceding the filing of this lawsuit, and at all
25 times mentioned herein, Defendants have engaged, and continue to engage, in
26 deceptive and unlawful trade practices in California by engaging in the deceptive
27 and unlawful business practices outlined in this Complaint. In particular,
28 Defendants have engaged, and continue to engage, in deceptive and unlawful trade
practices by, without limitation, the following:

- 1 a. misrepresenting that the Nabi tablets were
- 2 “rechargeable;”
- 3 b. failing to inform Plaintiff, and those similarly
- 4 situated, that the Nabi tablets they purchased had defective power
- 5 adapters that failed to reliably recharge the tablets during the first year
- 6 of operation;
- 7 c. engaging in fraud, deceit, misrepresentation, and
- 8 omissions as described herein;
- 9 d. violating the Song Beverly Consumer Warranty
- 10 Act as described herein;
- 11 e. violating the CLRA as described herein; and
- 12 f. violating the FAL as described herein.
- 13 g. purporting to impose unconscionable terms on Nabi
- 14 owners and to force owners to waive their rights to previously
- 15 promised benefits, as described herein.

16 149. Plaintiff and those similarly situated relied to their detriment on
17 Defendants’ deceptive and unlawful business practices. Had Plaintiff and those
18 similarly situated been adequately informed and not deceived by Defendants, they
19 would have acted differently by, without limitation, purchasing different tablets.

20 150. Defendants’ acts and omissions are likely to deceive the general
21 public.

22 151. Defendants engaged in these deceptive and unlawful practices to
23 increase their profits. Accordingly, Defendants have engaged in unlawful trade
24 practices, as defined and prohibited by section 17200, *et seq.* of the California
25 Business and Professions Code.

26 152. The aforementioned practices, which Defendants have used to their
27 significant financial gain, also constitute unlawful competition and provide an
28 unlawful advantage over Defendants’ competitors as well as injury to the general

1 public.

2 153. As a direct and proximate result of such actions, Plaintiff and the other
3 members of the Class have suffered and continue to suffer injury in fact and have
4 lost money and/or property as a result of such deceptive and/or unlawful trade
5 practices and unfair competition in an amount which will be proven at trial, but
6 which is in excess of the jurisdictional minimum of this Court. Among other
7 things, Plaintiff, and those similarly situated, lost the amount they paid for the
8 tablets, the amount they paid for replacement power adapters, and repairs
9 necessitated by the defective charging systems.

10 154. As a direct and proximate result of such actions, Defendants have
11 enjoyed, and continue to enjoy, significant financial gain in an amount which will
12 be proven at trial, but which is in excess of the jurisdictional minimum of this
13 Court.

14 155. Plaintiff seeks, on behalf of those similarly situated, full restitution of
15 monies, as necessary and according to proof, to restore any and all monies acquired
16 by Defendants from Plaintiff, the general public, or those similarly situated by
17 means of the deceptive and/or unlawful trade practices complained of herein, plus
18 interest thereon.

19 156. Plaintiff seeks, on behalf of those similarly situated, a declaration that
20 the above-described trade practices are fraudulent and/or unlawful.

21 157. Plaintiff seeks, on behalf of those similarly situated, an injunction to
22 prohibit Defendants from continuing to engage in the deceptive and/or unlawful
23 trade practices complained of herein. Such misconduct by Defendants, unless and
24 until enjoined and restrained by order of this Court, will continue to cause injury in
25 fact to the general public and the loss of money and property in that Defendants
26 will continue to violate the laws of California, unless specifically ordered to comply
27 with the same. This expectation of future violations will require current and future
28 consumers to repeatedly and continuously seek legal redress in order to recover

1 monies paid to Defendants to which Defendants were not entitled. Plaintiff, those
2 similarly situated and/or other consumers nationwide have no other adequate
3 remedy at law to ensure future compliance with the California Business and
4 Professions Code alleged to have been violated herein.

5 **PLAINTIFF'S SEVENTH CAUSE OF ACTION**
6 **(Declaratory Judgment)**

7 **On Behalf of Himself and the Unconscionability Subclass**

8 158. Plaintiff realleges and incorporates by reference the paragraphs of this
9 Complaint as if set forth herein.

10 159. An actual controversy has arisen and now exists between Plaintiff and
11 Defendants concerning the unconscionability and illegality of Defendants Terms of
12 Use agreement and the arbitration provision contained in the Terms of Use that is
13 common to all purchasers of Nabi tablets. Plaintiff alleges the Terms of Use
14 agreement and its arbitration provision are unconscionable and illegal under
15 controlling California and Ninth Circuit law and precedents. Defendants take the
16 obverse position claiming that their Terms of Use agreement and its arbitration
17 provision contained therein are conscionable and legal.

18 160. Plaintiff desires a judicial determination of his rights and duties, and a
19 declaration that the arbitration provision and/or the Terms of Use agreement and/or
20 specified terms of the Terms of Use agreement are unconscionable, illegal and
21 unenforceable.

22 161. A judicial determination is necessary and appropriate at this time
23 under the circumstances in order that Plaintiff may ascertain his rights and duties.

24 **PRAYER FOR RELIEF**

25 WHEREFORE, Plaintiff prays for judgment as follows:

26 A. On Cause of Action Number 1 against Defendants and in favor
27 of Plaintiff and the other members of the Class for:

- 28 1. Injunctive relief pursuant to California Civil Code section
1780;

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- 2. Actual damages, the amount of which is to be determined at trial;
- 3. Punitive Damages, the amount of which is to be determined at trial; and
- 4. Statutory Damages as provided by Civil Code section 1780(b), the amount of which is to be determined at trial.

B. On Causes of Action Numbers 2 and 6 against Defendants and in favor of Plaintiff and the other members of the Class:

- 1. For restitution pursuant to, without limitation, the California Business & Professions Code §§ 17200, *et seq.* and 17500, *et seq.*;
- 2. For injunctive relief pursuant to, without limitation, the California Business & Professions Code §§ 17200, *et seq.* and 17500, *et seq.*; and
- 3. For a declaration that Defendants’ above-described trade practices are fraudulent and/or unlawful.

C. On Cause of Action Number 3 against Defendants and in favor of Plaintiff and the other members of the Class:

- 1. An award of compensatory damages, the amount of which is to be determined at trial; and
- 2. An award of punitive damages, the amount of which is to be determined at trial.

D. On Causes of Action Numbers 4 and 5 against Defendants and in favor of Plaintiff and the other members of the Warranty Subclass:

- 1. An award of compensatory damages, the amount of which is to be determined at trial;
- 2. An award of punitive damages, the amount of which is to

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be determined at trial; and

3. An award of statutory damages according to proof.

E. On Cause of Action Number 7 against Defendants and in favor of Plaintiff and the other members of the Unconscionability Subclass for a declaration that the arbitration provision and/or the Terms of Use agreement and/or specified terms of the Terms of Use agreement are unconscionable, illegal and unenforceable.

F. On all Causes of Action against Defendants and in favor of Plaintiff, class members and the general public:

- 1. For reasonable attorneys' fees according to proof pursuant to, without limitation, the California Legal Remedies Act and California Code of Civil Procedure § 1021.5;
- 2. For costs of suit incurred; and
- 3. For such further relief as this Court may deem just and proper.

JURY TRIAL DEMANDED

Plaintiff hereby demands a trial by jury.

Dated: May 25, 2015

GUTRIDE SAFIER LLP



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EXHIBIT A

REDACTED