

119. At the time the Treadmills were sold, Defendant knew that the written affirmation of facts or written promises regarding the level of horsepower over a useful amount of time were false.

120. Defendant's breach of promises and warranties by failing to provide goods conforming to the promised product specifications directly and proximately injured Plaintiff and the Virginia Class, by providing them with non-conforming Treadmills and creating an artificially inflated price for those Treadmills.

121. Plaintiff provided Defendant notice before the filing of this lawsuit.

122. Defendant's breach of the promises and warranties entitle Plaintiff and the Virginia Class to: (a) damages, in an amount to be determined at trial, and (b) an order requiring future representations to conform with the Treadmills' actual performance in the type of use for which they are intended.

COUNT 4
Breach of Implied Warranty (Va. Code Ann. § 8.2-314) (on behalf of the Virginia Class)

123. Plaintiff restates and incorporates all other allegations in this Complaint.

124. Plaintiff brings this count as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

125. The laws governing the sale of goods imply a warranty that the goods conform to the representations and specifications suppliers/merchants supply for the goods and are fit for the purposes underlying the goods sold.

126. The laws governing the sale of goods also imply a warranty that the goods conform to the promises or affirmations of fact made on the container or label underlying the goods sold.

127. The purpose of these warranties is to protect consumers and consumers as the intended beneficiaries of those warranties. as the representations made to facilitate Defendant's Treadmill sales by creating consumer demand and consumer purchases.

128. Plaintiff and Virginia Class members are the intended beneficiaries of the implied warranty contract.

129. Defendant is a merchant that sells Treadmills.

130. The Treadmills are consumer goods.

131. Defendant breached these implied contractual provisions because the Treadmills cannot perform as Defendant promised.

132. Defendant breached these implied contractual provisions because the Treadmills do not conform to the promises and/or affirmations of fact made on the container or label as Defendant promised and/or affirmed.

133. Defendant cannot provide a remedy or provide conforming goods because the motors used in the Treadmills inherently cannot provide the represented power in ordinary, sustained operation.

134. Defendant's breach of the implied warranty of merchantability injured the Plaintiff and the Class by providing Treadmills that could not do the work as warranted and caused Plaintiff and the Class to pay a premium price for the Treadmills.

135. Defendant's actions breach implied warranties due consumers under Virginia law.

136. Defendant's breach entitles Plaintiff and the Class to: (a) damages, in an amount to be determined at trial, and (b) an order requiring future representations to conform to the Treadmills' actual performance in the type of use for which they are intended.

COUNT 5
Breach of Warranty -Magnuson-Moss Warranty Act

(on behalf of the Virginia Class)

137. Plaintiff restates and incorporates all other allegations in this Complaint.

138. Plaintiff bring this claim on behalf of the Virginia Class pursuant to Rule 23 of the Federal Rules of Civil Procedure.

139. The Treadmills are consumer products within the meaning of 15 U.S.C. § 2301(I).

140. Plaintiff and the Virginia Class are consumers within the meaning of 15 U.S.C. § 2301(3) because they are persons entitled under applicable state laws to enforce against the warrantor the obligations of its express and implied warranties.

141. Defendant are and was a supplier of consumer products and a warrantor within the meaning of 15 U.S.C. §§ 2301(4) and (5).

142. 15 U.S.C. § 2310(d) is satisfied because Plaintiff properly invokes the jurisdiction of this Court under CAFA.

143. This same section-15 U.S.C. § 2310(d)-provides a cause of action to any consumer who is damaged by the failure of a warrantor to comply with an implied warranty.

144. Defendant made implied warranties regarding the Treadmills to Plaintiff and the Virginia Class within the meaning of 15 U.S.C. § 2301(7). Horizon provided Plaintiff and other Virginia Class members an implied warranty of merchantability within the meaning of 15 U.S.C. § 2301(7).

145. Defendant breached the implied warranty of merchantability because the Treadmills do not-and cannot-perform as promised or affirmed at the 2.6 CHP to 4.0 CHP representations of the Treadmills during household operation. Specifically, the Treadmills do not-and cannot-produce the power expected of a 2.6 CHP to 4.0 CHP during ordinary household use.

146. As a direct and proximate result of Horizon's breach of the warranties regarding the CHP representations, Plaintiff, individually and on behalf of the Virginia Class, has been damaged. In addition, under 15 U.S.C. § 2310(d)(2), Plaintiff and the Virginia Class are entitled to recover a sum equal to the aggregate amount of costs and expenses (including attorneys' fees based on actual time expended) determined by the Court to have reasonably been incurred by Plaintiff and the Virginia Class in connection with the commencement and prosecution of this action.

147. Furthermore, Plaintiff and the Virginia Class are also entitled to equitable relief under 15 U.S.C. § 2310(d) and damages as a result of Horizon's violation of its implied warranties.

COUNT 6
Negligent Misrepresentation
(on behalf of a Virginia Class)

148. Plaintiff restates and incorporates all other allegations in this Complaint.

149. Plaintiff and the Virginia Class bring this count as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

150. In the course of business, Defendant misrepresented that the Treadmills maintain a CHP output that they cannot accomplish while in household use. Defendant had a duty of care to disclose the truthful CHP capabilities rather than the misrepresented information.

151. Defendant supplied the Plaintiff and Class members false and misleading information that a reasonable consumer would have used as guidance in evaluating the Treadmills' horsepower capabilities.

152. At the time Defendant made these misrepresentations, Defendant knew or should have known that these CHP representations were false, misleading or made them without

knowledge of their truth or falsity. Defendant has failed to exercise reasonable care or competence in communicating the CHP representations.

153. Defendant negligently misrepresented and/or, at a minimum, negligently omitted material facts concerning the Treadmill power representations, namely its true CHP capabilities while in operating use.

154. The misrepresentations and omissions made by Defendant, upon which Plaintiff and Class members reasonably and justifiably relied, were intended to induce and actually induced Plaintiff and Class members to purchase or pay a premium price for the Treadmills.

155. Plaintiff and Class members maintained an asymmetrical bargaining power which weighed heavily in favor of Defendant, who is a large corporate entity and maintained exclusive control over the actual horsepower capabilities of the Treadmills.

156. Plaintiff and Class members would not have purchased the Treadmills or would have paid considerably less, if the true facts concerning the CHP claims had been known.

157. Defendant's deceitful actions have caused damage to Plaintiff and Class members, who are entitled to damages and other legal and equitable relief as a result of Defendant's misrepresentations.

**COUNT 7
Fraud**

(on behalf of the Nationwide Class, or alternatively, on behalf of the Virginia Class)

158. Plaintiff restates and incorporates all other allegations in this Complaint.

159. As alleged herein, Defendant provided false and misleading information concerning the continuous horsepower capability of the Treadmills during household use. These misrepresentations were intended to, and did, induce Plaintiff and Class Members to purchase and/or pay a premium price for their treadmills.

160. Defendant knew that its CHP representations were false and misleading, or it made such representations without knowledge of their truth or falsity.

161. Plaintiff and Class Members reasonably and justifiably relied on Defendant's misrepresentations. But for these representations, Plaintiff and Class Members would not have purchased and/or paid a premium price for their treadmills.

COUNT 5
Virginia's Consumer Protection Act; Va. Code Ann. §§ 59.1-198, -200
(on behalf of the Virginia Class)

162. Plaintiff, individually and on behalf of the Virginia Class, restates and incorporates all other allegations in this Complaint.

163. Plaintiff and members of the Virginia Class bring this count as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

164. Plaintiff and members of the Virginia Class are consumers within the meaning of the Virginia's Consumer Protection Act; Va. Code Ann. §§ 59.01-198, -200 (the "Virginia Act").

165. The Virginia Act expressly prohibits "Misrepresenting that goods or services are of a particular quality standard, quality, grade, style or model" and/or "Using any other deception, fraud, false pretense, false promise or misrepresentation in connection with a consumer transaction." Virginia Act, at § 59.1-200(5) and (14):

166. Defendant engages in "trade" and "commerce" generally and as it pertains to the Treadmills' distribution for sale to consumers within all the states listed herein.

167. Defendant places continuous horsepower ratings on the Treadmills' boxes and in point of sale materials supplied to retailers.

168. The continuous horsepower promises and representations are misleading and deceptive for the reasons discussed herein.

169. Defendant's representations regarding the Treadmills "continuous" horsepower are material to a reasonable consumer and were designed to affect consumer decisions and conduct.

170. Defendant understood and intended that the representations about the Treadmills' horsepower would influence consumer behavior.

171. Defendant understands it has an obligation to ensure the honesty of all promotions and avoid misleading the public regarding its products.

172. Defendant's misleading horsepower statements in point-of-sale materials, on boxes and on its website constitute unfair methods of competition and unfair and/or deceptive acts or practices in the conduct of trade or commerce for treadmill sales to consumers.

173. Defendant's acts and practices offend public policy as established by statute.

174. Defendant's acts and practices are immoral, unethical, oppressive and unscrupulous.

175. Defendant's conduct substantially injured actual and potential consumers, the public and competition in each of the states in which the Treadmills were sold. As Defendant knows, Plaintiff, Virginia Class members, and consumers would not pay the prices they paid absent Defendant's false and misleading horsepower representations.

176. Defendant's conduct materially affected available information regarding its products to consumers nationwide and in each state in which the Treadmills were sold.

Defendant's conduct thus improperly distorted the information available to the public regarding the Treadmills.

177. Defendant's actions caused consumers to overpay for the Treadmills. These injuries are not outweighed by any countervailing benefits to consumers or competition. No legally cognizable benefit to consumers or competition results from Defendant's misconduct.

178. Defendant's actions involved information material to Treadmill purchases. The misleading nature of the promise or affirmations on the box, at the point of sale, online, and other similar representations, and the failure to include necessary explanatory information regarding such representations, were material to the price at which consumers purchased the Treadmills.

179. Because the representations about Treadmill CHP involve technical information that an ordinary consumer could not readily test, consumers could not have reasonably avoided the losses caused by misrepresentations forming the basis for the Treadmills' prices.

180. Plaintiff and the Virginia Class purchased the Treadmills for personal, family or household use. Thus, the practices discussed above constitute unfair competition or unfair, unconscionable, deceptive, or unlawful acts or business practices in violation of the Virginia Act.

181. The foregoing unfair and deceptive practices directly, foreseeably and proximately caused Plaintiff and the Virginia Class to suffer ascertainable losses when they paid a premium for the Treadmills above and beyond what they should have paid and provided Defendant more in revenues for the Treadmills than it could have received absent its false and misleading representations.

182. Plaintiff and the Virginia Class are entitled to recover damages and other appropriate relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of themselves and all others similarly situated, respectfully request that this Court:

1. Certify the proposed Class and Subclasses and appoint Plaintiff and their legal counsel to represent the Class and Subclasses;
2. Find in favor of Plaintiff, the Class, and the Subclasses on all counts asserted herein;
3. Declare that Defendant's conduct violated the statutes referenced herein;
4. Award Damages, including compensatory, exemplary, and statutory to Plaintiff, the Class, and the Subclasses in an amount to be determined at trial;
5. Grant restitution to Plaintiff, the Class, and the Subclasses and require Defendant to disgorge its ill-gotten gains;
6. Award Plaintiff, the Class, and the Subclasses punitive damages in an amount to be determined at trial;
7. Award Plaintiff, the Class, and the Subclasses reasonable attorneys' fees and the costs and disbursements of this suit incurred herein;
8. Enjoin Defendant from future misrepresentations regarding the horsepower of its Treadmills ;
9. Award Plaintiff, the Class, and the Subclasses pre-judgment and post-judgment interest at the highest legal rate to the extent provided by law; and
10. Order any such other and further relief the Court deems just and equitable.

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff demands a trial by jury on all counts herein and of all issues so triable.

Respectfully submitted,

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Counselfor Plaintiff, the Class, and the Subclasses