

Court File No. CV19-80810

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

ANDREA KOZLOVIC

Plaintiff

- and -

SUUNTO OY

Defendant



Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

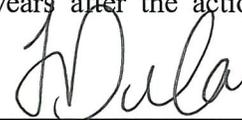
Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date: July 17, 2019

Issued by



Local Registrar

Address of
court office:

161 Elgin Street
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TO:

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DEFINED TERMS

1. In addition to the terms that are defined elsewhere herein, the following terms have the following meanings:

- (a) **“Class”** or **“Class Members”** means all persons resident in Canada who purchased a **Suunto Dive Computer**;
- (b) **“Defendant”** means Suunto Oy (hereinafter **“Suunto”**), a Finnish corporation headquartered in Vantaa, Finland;
- (c) **“Design Defect”** means the software and/or hardware in the **Dive Computers** that malfunctions, causing the **Dive Computers** to provide inaccurate information about a dive, including information about the depth of the dive, dive time, water temperature, safety stops, stop depths and time for required decompression, air tank pressure, and estimated remaining air time;
- (d) **“Plaintiff”** means Andrea Kozlovic;
- (e) **“Suunto Dive Computer(s)”** or **“Dive Computer(s)”** means the Suunto-branded dive computers, including the Suunto Cobra, Suunto Cobra 2, Suunto Cobra 3, Suunto Cobra 3 Black, Suunto Vyper, Suunto Vyper Novo, Suunto Vyper 2, Suunto Vyper Air, Suunto HelO2, Suunto Gekko, Suunto Vytec, Suunto Vytec DS, Suunto Zoop, Suunto Zoop Novo, Suunto Mosquito, Suunto D4, Suunto D6, Suunto D9, Suunto D4i, Suunto D6i, Suunto D4i Novo, Suunto D6i Novo, Suunto D9tx, and Suunto DX;

THE CLAIM

2. Plaintiff claims on her own behalf and on behalf of the members of the Class as against

Defendant:

- (a) An order pursuant to the *Class Proceedings Act* certifying this action as a class proceeding and appointing Plaintiff as Representative Plaintiff for Class Members;
- (b) A declaration that in designing, manufacturing, testing, marketing, packaging, distributing, supplying and/or selling the Suunto Dive Computers with a dangerous Design Defect, Defendant committed the following:
 - (i) Breach of express and/or implied warranties;
 - (ii) Negligence;
 - (iii) Fraudulent concealment;
 - (iv) Breach of the *Sale of Goods Act*;
 - (v) Breach of the *Consumer Protection Act* and the parallel provisions of similar provincial consumer protection legislation as well as the *Competition Act*;
 - (vi) Breach of the *Canada Consumer Product Safety Act*;
 - (vii) Breach of the *Consumer Packaging and Labelling Act*;
- (c) A declaration that this Statement of Claim is considered as notice given by Plaintiff on her own behalf and on behalf of “person similarly situated” and is sufficient to give notice to Defendant on behalf of Class Members;

- (d) In the alternative, a declaration that it is in the interests of justice to waive the notice requirement under Part III and s. 101 of the *Consumer Protection Act*;
- (e) General damages in an amount to be determined in the aggregate for Class Members for, *inter alia*, stress/distress, anxiety/anguish, trouble and inconvenience;
- (f) Special damages in an amount that this Honourable Court deems appropriate to compensate Class Members for, *inter alia*, the purchase price of the Dive Computers;
- (g) Punitive and aggravated damages in the aggregate in an amount that this Honourable Court deems appropriate;
- (h) An order that Class Members are entitled to a refund of the purchase price of their Dive Computers, including, but not limited to sales taxes, based *inter alia* on revocation of acceptance and rescission;
- (i) In the alternative, an order for an accounting of revenues received by Defendant from the sale of the Dive Computers;
- (j) A declaration that any funds received by Defendant through the sale of its Dive Computers are held in trust for the benefit of Plaintiff and Class Members;
- (k) Restitution and/or a refund of all monies paid to or received by Defendant from the sale of its Dive Computers to Class Members on the basis of unjust enrichment;

- (l) In addition, or in the alternative, restitution and/or a refund of all monies paid to or received by Defendant from the sale of its Dive Computers to Class Members on the basis of *quantum valebant*;
- (m) An order requiring Defendant to engage in a corrective marketing campaign and to engage in any further necessary affirmative injunctive relief, such as recalling existing products;
- (n) An order directing a reference or such other directions as may be necessary to determine issues not determined at the trial;
- (o) An order compelling the creation of a plan of distribution pursuant to ss. 23, 24, 25 and 26 of the *Class Proceedings Act*;
- (p) Pre-judgment and post-judgment interest on the foregoing sums in the amount of 2% per month, compounded monthly, or alternatively, pursuant to ss. 128, 129, and 130 of the *Courts of Justice Act*;
- (q) Costs of notice and administration of the plan of distribution of recovery in this action plus applicable taxes pursuant to s. 26 (9) of the *Class Proceedings Act*;
- (r) Costs of this action on a substantial indemnity basis including any and all applicable taxes payable thereon; and
- (s) Such further and other relief as counsel may advise and/or this Honourable Court may deem just and appropriate in the circumstances.

THE PARTIES

3. Plaintiff is an individual residing in Guelph, Ontario.
4. Plaintiff owns 3 Dive Computers (Cobra, Zoop, Vytec DS), which have all failed.
5. Plaintiff seeks to represent the following class of which she is a member:

All persons resident in Canada who have purchased a Suunto Dive Computer.

6. Defendant is and has been at all times, engaged in the business of designing, manufacturing, testing, marketing, packaging, distributing, supplying and/or selling Suunto Dive Computers throughout Canada.

NATURE OF THE CLAIM

7. Dive computers are devices used by scuba divers to measure and to provide information on various aspects of the dive critical to the diver's safety, including information about the depth of the dive, the dive time, water temperature, safety stops, stop depths and time for required decompression, air tank pressure, and estimated remaining air time. An inaccurate display of this information can result in serious injury or death to the diver. Plaintiff and other consumers purchased the Dive Computers expecting them to function properly and display accurate information.



8. During the descent in an underwater dive, as the water pressure outside the body increases, nitrogen gas from breathing air is absorbed into the body. The deeper the dive, the faster nitrogen dissolves into the body. Although this usually is not harmful, the problem arises when a diver ascends or surfaces and the nitrogen releases. In order to properly release the nitrogen slowly from the body, a diver must ascend slowly and carry out necessary decompression stops to allow the body to adjust.

9. If a diver ascends or surfaces too quickly to allow diffusion of the nitrogen, nitrogen gas bubbles will form in the body tissue, resulting in decompression sickness otherwise known as the “bends”. Decompression sickness can lead to headaches, joint pain, numbness, paralysis, nitrogen narcosis, and even death.

10. The Dive Computers are a critical instrument to assist divers in avoiding decompression sickness. The Dive Computers are used to track the depth and time of the dive and calculate theoretical and actual time and depth limits the diver should stay within to avoid decompression

sickness. Inaccurate information regarding depth and dive time can lead to serious injury or death to the diver.

11. In addition to dive depth and time for purposes of avoiding decompression sickness, the Dive Computers also display other critical information such as, water temperature (which can affect the likelihood of decompression sickness), air tank pressure, and estimated remaining air time. A misreading of any of this information can also lead to serious injury or death.

12. The only reason to purchase a Dive Computer is to have knowledge of the critical information regarding a dive. If the Dive Computer cannot reliably provide that information, it is worthless.

13. Each of the Dive Computers contains materially the same software and hardware that operates its critical functions. The software and/or hardware is defective because it can malfunction, causing the Dive Computers to provide inaccurate information regarding dive depth, dive time, air pressure, and remaining air time.

14. When a malfunction occurs, the Dive Computers report incorrect depths, “self-dive” or indicate that a dive is occurring when no dive is in fact occurring, report incorrect air time remaining, and/or report incorrect air tank pressure. All of these malfunctions are the result of defective software and/or hardware in the Dive Computers.

15. Online message boards related to scuba diving catalogue the manifestations of the common defect. On one such message board, www.scubaboard.com, a consumer complains that his Dive Computer has an error code and he inquires about how to get rid of the error. A person referring to himself as “Chris from Suunto” replies as follows:

“The ‘permanent’ error mode that was spoke of in the post...is due to a computer malfunction within the pressure sensor circuit. The computer thinks it is continuously diving and [displays] erroneous depths for hours on end. If this error occurs there is no way to clear it from the computer. The fault will stay within the memory in the computer even after the battery is removed. This is an unrepairable fault and the unit would need to be replaced.”

Numerous similar complaints have been made by consumers regarding the Dive Computers.

16. There has been at least one reported death as a result of a Dive Computer malfunctioning. On December 10, 2010, off the island of Lanai in Hawaii, Pamela Seigman was diving with a brand new Suunto Cobra 2 Dive Computer. During her second dive of the day, unbeknownst to Ms. Seigman or anyone else on the dive, her Dive Computer malfunctioned and failed to display the correct pressure remaining in her air tank and failed to sound alarms that the manual states the computer will provide. The Dive Computer reported substantial air remaining in Ms. Seigman’s air tank when, in reality, she was out of air. Ms. Seigman died from asphyxia due to salt water drowning. The Coast Guard investigation of Ms. Seigman’s death concluded that she died as a result of “equipment failure.” During subsequent testing of Ms. Seigman’s Dive Computer, the Dive Computer malfunctioned and displayed an “ER 1” code, indicating that the Dive Computer was defective and unrepairable.

17. Defendant is aware of the defective software and/or hardware in the Dive Computers. Despite this knowledge, when a Dive Computer comes in for repair due to malfunction, Defendant’s only attempt at repair is to replace the battery (as the malfunction is permanent). If the Dive Computer continues to malfunction with a new battery, and it is still under warranty, the

Dive Computer is replaced with a new Dive Computer because Defendant knows that the defective software/hardware cannot be repaired. However, the replacement Dive Computers also contain the defective software and/or hardware. This leaves consumers feeling as if they have fully repaired and functioning Dive Computers, when in reality the new Dive Computers suffer from the same defect and can similarly malfunction during a dive.

18. In fact, the computer defect is so prevalent that the ordinary two-year warranty for the Dive Computers was extended to five years for problems related to self-diving, incorrect depth readings, tank pressure, and temperature, and other improper operations. However, Defendant did not inform its customers that it extended the warranty to deal with the defective Dive Computers.

19. If the Dive Computer is outside of warranty, Defendant simply tells the customer that there is no repair.

20. Despite knowing about these dangers, Defendant does not warn consumers, regulators, or the public, of the defects existing in the Dive Computers. Instead, Defendant continues to expressly and impliedly represent that the Dive Computers are well-designed, properly manufactured, and safe for their intended use.

21. None of the warnings on the product packaging or in other marketing informed Plaintiff or other consumers that because of the Dive Computers' inherent defect in the software and/or hardware, ordinary use of the Dive Computers carries a substantial risk of serious malfunction whereby the Dive Computer may quit working and/or provide incorrect information about a dive. Instead of properly warning consumers of the hazards posed by using the Dive Computers as

intended, Defendant continues to misrepresent that the Dive Computers will provide certain accurate information during a dive and impliedly that the Dive Computers are safe for use.

22. As a result of Defendant's omissions and representations regarding the safety of the Dive Computers and their defective software and/or hardware, Plaintiff and the Class have been deceived into purchasing and using a product, which is inherently defective, unreliable and unsafe.

23. Defendant's omissions and misrepresentations were a material factor in influencing Plaintiff and Class Members' decision to purchase the Dive Computer and Defendant reaped, and continues to reap, large profits from its deceptive marketing, distribution, and repair of the Dive Computers.

24. Plaintiff and the Class Members suffered economic damages by purchasing the Dive Computers; they did not receive the benefit of the bargain, suffered out-of-pocket loss, stress/distress, anxiety/anguish, trouble and inconvenience.

25. Defendant knew or ought to have known that purchasers of their Dive Computers would not be reasonably able to protect their interests, that such purchasers would be unable to receive a substantial benefit from the Dive Computers and that customers would be relying on Defendant's representations to their detriment.

26. Plaintiff and members of the Class would not have purchased the Dive Computers had they known that the Dive Computers were not safe. When Plaintiff and Class Members purchased the Dive Computers, they relied on their reasonable expectation that the representation was accurate.

REPRESENTATIVE PLAINTIFF

27. Plaintiff owns 3 Dive Computers: (a) Cobra air-integrated console purchased in London, Ontario; (b) Zoop Yellow purchased in Calgary, Alberta; and (c) Vytec DS W/Transmitter purchased in Kitchener, Ontario.

28. Plaintiff was unaware at the time that the Dive Computers suffer from the Design Defect.

29. The Cobra failed in April 2018, while Plaintiff was in Africa. Plaintiff was at around 65 feet deep with 1626 PSI, with approximately half a tank. Suddenly, the PSI jumped to 200, 950, and started flashing 0 PSI, 0 air. An emergency ascent was performed. The depth gauge was also sporadically reading incorrect depth.

30. The Zoop also failed in April 2018 while in Africa. This Dive Computer was Plaintiff's secondary computer, a wrist mount. The Zoop had the same problems as described above. It wouldn't record proper depth or air levels. The Zoop also doesn't "kick in" when hitting the water.

31. The Vytec DS failed in November / December 2018. The Vytec has a transmitter and for no apparent reason it doesn't sync often (about 40-50% of dives) and the depth gauge sensor is off. It doesn't accurately read depth or air.

32. Plaintiff brought her Dive Computers to her dive shop, so as to change the batteries; it was noted that there was no corrosion or damage. The batteries have been replaced, yet the problems persist.

33. Plaintiff reported these issues to Suunto in December 2018. Defendant told her to contact HUIISH Outdoors at sales@huishoutdoors.com. When Plaintiff emailed them, she was told that Suunto told them to send anyone who contacts them directly to Suunto, which is contradictory.

34. While researching her problems online, Plaintiff discovered that a class action had been instituted in the United States due to this issue and that the U.S. class action was subsequently settled. Plaintiff contacted Defendant again multiple times and was told that the class action only covered U.S. Dive Computers.

35. In consequence, Plaintiff did not receive the benefit of her bargain and more importantly her life was put into serious danger; had she known the true facts, Plaintiff would never had purchased the Dive Computers.

36. Plaintiff has suffered damages as a result of purchasing the Dive Computers. In addition to the purchase price, she has also endured stress/distress, anxiety/anguish, and trouble and inconvenience.

CAUSES OF ACTION

A. Breach of Express and/or Implied Warranties

37. By designing, manufacturing, testing, marketing, packaging, distributing, supplying and/or selling the Dive Computers, in addition to misrepresenting the dangers associated with the Design Defect, Defendant created and breached express and/or implied warranties that the Dive Computers would measure and provide accurate information on various aspects of the dive critical to a underwater/ scuba diver's safety when, in fact, they did not.

38. At all times relevant hereto, applicable law imposed a duty that requires that the Dive Computers be of merchantable quality and fit for the ordinary purposes for which they are used.

39. Defendant knew of the specific use, i.e. safe underwater/ scuba diving, for which the Dive Computers were purchased, and they impliedly warranted that the products were fit for such use, especially so as Defendant marketed them for this particular purpose. This dangerous defect wholly impairs the use, value, and safety of the Dive Computers.

40. The Dive Computers were defective at the time they left Defendant's possession. At all times relevant hereto, Defendant knew of the Design Defect at the time that these transactions occurred.

41. Defendant has been put on notice of the defects inherent in the Dive Computers for many years now, but has failed to correct them. Defendant has received many complaints and warranty repairs and other notices from customers advising of the Design Defect associated with the Dive Computers, including the present Statement of Claim and the U.S. legal proceedings referred to earlier, which were originally filed on May 21, 2015.

B. Negligence

42. Defendant had a positive legal duty to use reasonable care to perform its legal obligations to Class Members, including, but not limited to designing, manufacturing, testing, marketing, packaging, distributing, supplying and/or selling the Dive Computers which are reasonably fit for their intended uses and to provide true and accurate information to the public to prevent undue risks arising from the foreseeable use of its products.

43. Defendant also owed Class Members a duty to carefully monitor the safety and post-market performance of the Dive Computers, to warn Plaintiff and Class Members of any and all dangers associated with their use, and to recall the Dive Computers from the Canadian market upon discovering the dangerous Design Defect.

44. Defendant was aware that its customers relied on it to provide truthful and accurate information about its Dive Computers.

45. Defendant breached its duty of care to Class Members by negligently designing, manufacturing, testing, marketing, packaging, distributing, supplying and/or selling the Dive Computers with a dangerous Design Defect, with false representations regarding their safety, by failing to ensure that they were of merchantable quality and fit for their intended purpose, and by failing to warn the public. The aforesaid loss suffered by Plaintiff and Class Members was caused by this negligence.

46. Defendant failed to meet the standard of care required in all the circumstances and was negligent in *inter alia* the following ways:

(a) In the research, design, manufacture, testing (pre and post-market), marketing, distribution, supply and/or sale of the Dive Computers;

(b) It knew or should have known that the design features of the Dive Computers, would make them more vulnerable to malfunction and provide incorrect information about a dive;

- (c) It failed to adequately design, manufacture, and/or test the Dive Computers to ensure that they were safe and free from defects prior to marketing, distributing, supplying, and/or selling them;
- (d) It knew or should have known that if the Dive Computers malfunctioned under conditions of ordinary use, that the underwater swimmers/ divers were at risk of serious injury or death;
- (e) It failed to conduct sufficient or any pre-market testing to establish that the Dive Computers provided acceptable accurate readings;
- (f) It failed to disclose the defects in the design of the Dive Computers in a timely manner or at all in certain circumstances;
- (g) Defendant continued to sell the Dive Computers notwithstanding increasing reports of malfunction;
- (h) It knew or should have known that the Dive Computers were inherently defective and that they could not properly perform in the manner for which they were intended;
- (i) It failed to take any sufficient steps to cure the fundamental manufacturing and design defects in the Dive Computers after it knew of the defects and the injuries and risks associated with their use;
- (j) It failed to warn Class Members that the Dive Computers were defective when knowledge of the defects became known to them;

(k) It placed its commercial interests over consumer safety; and

(l) It failed to investigate, adequately or at all or in a timely fashion, the increasing reports of malfunction arising from the ordinary use of the Dive Computers.

47. By virtue of the acts and omissions described above, Defendant was negligent and proximately caused the loss, damage, injury to Plaintiff and to the Class Members, as well as, posed a real and substantial risk to their health and safety.

48. The loss, damages and injuries were foreseeable.

C. Fraudulent Concealment

49. Defendant made material omissions as well as affirmative misrepresentations regarding the Dive Computers in claiming them to be safe for their intended use and in failing to disclose that they were actually plagued by a dangerous Design Defect.

50. Defendant knew that the representations were false at the time that they were made.

51. Defendant was under a duty to disclose that the Dive Computers were defective, unsafe, and unreliable because it was known and/or accessible only to Defendant, who had superior knowledge and access to the facts, and Defendant knew it was not known to or reasonably discoverable by the Class until it was too late and would malfunction during a dive. The Class Members could not, in the exercise of reasonable diligence, have discovered independently that the Dive Computers suffered from the Design Defect prior to purchase.

52. Whether or not the Dive Computers will malfunction is certainly a material safety concern. The facts concealed and/or not disclosed by Defendant to Plaintiff and Class Members are material facts in that a reasonable person would have considered them important in deciding whether to purchase the Dive Computers.

53. In addition, Defendant intentionally made the false statements and omissions in order to sell its Dive Computer and to avoid the expense and public relations consequences of a recall.

54. Defendant actively concealed and/or suppressed these material facts, in whole or in part, with the intent to induce Class Members to purchase the Dive Computers, and to protect its profits and it did so at the expense of the Class.

55. Class Members relied on Defendant's representations in relation to the Dive Computers that they were purchasing and they purchased such Dive Computers. Said reliance was reasonable. Class Members were without the ability to determine the truth on their own and could only rely on Defendant's statements and representations.

56. As a result of the concealment and/or suppression of facts, Class Members have sustained and will continue to sustain damages.

STATUTORY REMEDIES

57. Defendant is in breach of the *Sale of Goods Act*, the *Consumer Protection Act*, the *Competition Act*, the *Canada Consumer Product Safety Act*, *Consumer Packaging and Labelling Act*, and/or other similar/equivalent legislation.

58. Plaintiff pleads and relies upon trade legislation and common law, as it exists in this jurisdiction and equivalent/similar legislation and common law in the other Canadian provinces and territories. Class Members have suffered injury, economic loss and damages caused by or materially-contributed to by Defendant's inappropriate and unfair business practices, which includes Defendant being in breach of applicable consumer protection laws.

A. Breach of the *Sale of Goods Act*

59. At all times relevant to this Claim, Class Members were "buyer[s]", Defendant was a "seller", the Dive Computers were "goods", and the transactions by which Class Members purchased the Dive Computers from Defendants were "sale[s]" within the meaning of those terms as defined in s.1 of the *Sale of Goods Act*.

60. Defendant committed a fault or wrongful act by breaching the implied conditions as to fitness for a particular purpose and to merchantability. By placing into the stream of commerce a product that was unfit for the purpose for which it was marketed, Defendant is liable for damages relating thereto. The Class is entitled to maintain an action for breach of warranty under ss. 52 & 53 of the *Sale of Goods Act*.

B. Breach of the *Consumer Protection Act*

61. At all times relevant to this action, Class Members were "consumer[s]", Defendant was a "supplier", the Dive Computers were "goods", and the transactions by which the Class Members purchased the Dive Computers were "consumer transaction[s]" within the meaning of that term as defined in s. 1 of the *Consumer Protection Act*.

62. By failing to disclose and actively concealing the dangerous Design Defect inherent in the Dive Computers, Defendant has engaged in an unfair practice, which was and is “false, misleading or deceptive” and/or “unconscionable” within the meaning of ss. 14, 15 and 17 of the *Consumer Protection Act* as follows.

63. Plaintiff and the Class Members relied on Defendant’s representation. Said reliance is established by the purchase of the Dive Computers. Had Class Members known that the representation was false and misleading they would either not have purchased the Dive Computers.

C. Breach of the *Competition Act*

64. At all times relevant to this action, Defendant’s sale of the Dive Computers was a “business” and the Dive Computers were “product[s]” within the meaning of those terms as defined in s.2 of the *Competition Act*.

65. Defendant’s acts are in breach of s. 52 of Part VI of the *Competition Act*, were and are unlawful and render Defendant liable to pay damages and costs of investigation pursuant to s. 36 of the *Competition Act*.

66. Class Members relied upon the representation by purchasing the Dive Computers and suffered damages and loss.

67. Pursuant to s. 36 of the *Competition Act*, Defendant is liable to pay the damages which resulted from the breach of s. 52 and Plaintiff and Class Members are entitled to recover their full costs of investigation and substantial indemnity costs.

68. Plaintiff and Class Members are also entitled to recover as damages or costs, in accordance with the *Competition Act*, the costs of administering the plan to distribute the recovery in this action and the costs to determine the damages of each Class Member.

D. Breach of the *Canada Consumer Product Safety Act*

69. At all times relevant to this action, Defendant “sell[s]” the Dive Computers, which are “article[s]” and “consumer product[s]” within the meaning of those terms as defined in s. 2 of the *Canada Consumer Product Safety Act*.

70. Defendant knowingly designed, manufactured, marketed, packaged, distributed, supplied advertised and/or sold the Dive Computers, which are a danger to human health or safety and in so doing, breached ss. 7 (a) and s. 8 (a) of the *Canada Consumer Product Safety Act*.

71. Defendant also packaged and/or labelled the Dive Computers in a false, misleading or deceptive manner that can reasonably be expected to create an erroneous impression regarding the existence of the Design Defect and its danger to human health or safety under ss. 9 and 10 of the *Canada Consumer Product Safety Act*.

72. As such, Defendant breached ss. 7, 8, 9 and 10 of the *Canada Consumer Product Safety Act* and are liable to pay damages as a result under s. 41.

E. Breach of the *Consumer Packaging and Labelling Act*

73. At all times relevant to this action, Defendant was a “dealer”, the Dive Computers were “prepackaged product[s]”, the Dive Computer packaging were “labels”, and Defendant’s

representations thereon were “advertise[ments]” within the meaning of those terms as defined in s. 2 of the *Consumer Packaging and Labelling Act*.

74. Defendant labelled, marketed, packaged, promoted, advertised, and sold the Dive Computers with “false or misleading representations” under s. 7 of the *Consumer Packaging and Labelling Act* in that they used descriptions and/or illustrations of the type, quality, performance, and/or function that may reasonably be regarded as likely to deceive Plaintiff and Class Members.

75. As such, Defendant breached ss. 7 and 9 of the *Consumer Packaging and Labelling Act* and are liable to pay damages as a result under s. 20.

CAUSATION

76. The acts, omissions, wrongdoings, and breaches of legal duties and obligations of Defendant are the direct and proximate cause of Class Members’ injuries.

DAMAGES

77. By reason of the acts, omissions and breaches of legal obligations of Defendant, Class Members have suffered injury, economic loss and damages, the particulars of which include, but are not limited to:

A. General Damages (Non-Pecuniary Damages)

78. The general damages being claimed herein include:

- a) Stress/distress;

- b) Anxiety/anguish;
- c) Trouble and Inconvenience.

B. Special Damages

79. The special damages being claimed herein include the purchase price of the Dive Computers.

C. Punitive (Exemplary) and Aggravated Damages

80. At all material times, the conduct of Defendant as set forth was malicious, deliberate, and oppressive towards their customers and Defendant conducted itself in a willful, wanton and reckless manner.

81. In addition, it should be noted that it is imperative to avoid any perception of evading the law without impunity. Should Defendant only be required to disgorge monies which should not have been retained and/or withheld, such a finding would be tantamount to an encouragement to other businesses to deceive their customers as well. Punitive and aggravated damages are necessary in the case at hand to be material in order to have a deterrent effect on other corporations in Canada.

WAIVER OF TORT, UNJUST ENRICHMENT AND CONSTRUCTIVE TRUST

82. Plaintiff pleads and relies on the doctrine of waiver of tort and states that Defendant's conduct including tortious, statutory and otherwise, constitutes wrongful conduct which can be waived in favour of an election to receive restitutionary or other equitable remedies.

83. Plaintiff reserves the right to elect at the Trial of the Common Issues to waive the legal wrong and to have damages assessed in an amount equal to the gross revenues earned by Defendant or the net income received by Defendant or a percent of the sale of the Dive Computers as a result of Defendant's unfair practices and false representations which resulted in revenues and profit for Defendant.

84. Further, Defendant has been unjustly enriched as a result of the revenues generated from the sale of the Dive Computers.

85. Further, or in the alternative, Defendant is constituted as constructive trustees in favour of Class Members for all of the monies received because, among other reasons:

(a) Defendant was unjustly enriched by receipt of the monies paid for the Dive Computers;

(b) Class Members suffered a corresponding deprivation by purchasing the Dive Computers;

(c) The monies were acquired in such circumstances that Defendant may not in good conscience retain them;

(d) Equity, justice and good conscience require the imposition of a constructive trust;

(e) The integrity of the market would be undermined if the court did not impose a constructive trust; and

(f) There are no factors that would render the imposition of a constructive trust unjust.

86. Further, or in the alternative, Plaintiff claims an accounting and disgorgement of the benefits which accrued to Defendant.

EFFICACY OF CLASS PROCEEDINGS

87. The members of the proposed Class potentially number in the thousands and are geographically dispersed. Because of this, joinder into one action is impractical and unmanageable. Conversely, continuing with the Class Members' claim by way of a class proceeding is both practical and manageable and will therefore provide substantial benefits to both the parties and to the Court.

88. Members of the proposed Class have no material interest in commencing separate actions. In addition, given the costs and risks inherent in an action before the courts, many people will hesitate to institute an individual action against Defendant. Even if the Class Members themselves could afford such individual litigation, the court system could not as it would be overloaded and, at the very least, it is not in the interests of judicial economy. Further, individual litigation of the factual and legal issues raised by the conduct of Defendant would increase delay and expense to all parties and to the court system.

89. This class action overcomes the dilemma inherent in an individual action whereby the legal fees alone would deter recovery and thereby in empowering the consumer, it realizes both individual and social justice as well as rectifies the imbalance and restore the parties to parity.

90. Also, a multitude of actions instituted in different jurisdictions, both territorial (different provinces) and judicial districts (same province), risks having contradictory and inconsistent judgments on questions of fact and law that are similar or related to all members of the class.

91. Plaintiff has the capacity and interest to fairly and fully protect and represent the interests of the proposed Class and has given the mandate to her counsel to obtain all relevant information with respect to the present action and intends to keep informed of all developments. In addition, class counsel is qualified to prosecute complex class actions.

JURISDICTION AND FORUM

Real and Substantial Connection with Ontario

92. There is a real and substantial connection between the subject matter of this action and Ontario because:

- (a) Defendant engages in business with residents of Ontario;
- (b) Defendant derives substantial revenue from carrying on business in Ontario; and
- (c) The damages of many Class Members were sustained in Ontario.

93. Plaintiff proposes that this action be tried in the City of Ottawa, in the Province of Ontario as a class proceeding under the *Class Proceedings Act*.

Date: July 17, 2019

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ANDREA KOZLOVIC
Plaintiff

Court File No. *2019-80816*

SUUNTO OY
Defendant

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED IN OTTAWA
Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

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