

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

JON B. FELICE, Individually and on behalf
of all others similarly situated,

Plaintiff,

v.

INVICTA WATCH COMPANY OF
AMERICA, INC.,

Defendant.

CASE NO.: 0:16-cv-62772 (UA)

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

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Plaintiff Jon B. Felice (“Plaintiff”), by his undersigned attorneys, brings this class action complaint against Defendant Invicta Watch Company of America, Inc. (“Invicta,” or “Defendant”). Plaintiff’s allegations are based upon personal knowledge as to his own acts and upon information and belief as to all other matters. Plaintiff’s information and belief is based upon, among other things, investigation undertaken by his counsel.

NATURE OF THE ACTION

1. This is a class action against Invicta for violations of the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”), Fla. Stats. § 501.201, *et seq.*, violations of the Florida False Advertising Statute, Fla. Stat. § 817.41, violations of the Magnuson-Moss Act, 15 U.S.C. § 2301, *et seq.*, and breach of express warranty. Plaintiff and members of the class (the “Class”) he seeks to represent are all current or past owners of Invicta Pro Diver Series Watches (“Pro Diver Watches”).

2. As alleged herein, Invicta has taken, and continues to take, advantage of its unwitting consumers, including Plaintiff and members of the Class, to a grossly unfair degree by, *inter alia*, falsely representing that the Pro Diver Watches are: (a) suitable for scuba diving, marine activity, and surface water sports; and (b) water resistant from 50 meters to 300 meters (*i.e.*, 165 to 984 feet), when, in fact, the Pro Diver Watches are prone to leakage at any depth and in non-marine situations (*e.g.*, swimming, hand washing, bathing, rain, etc.).

3. As a result of the allegations herein, Plaintiff and members of the Class seek actual damages, plus attorney’s fees and costs.

JURISDICTION AND VENUE

4. This Court has diversity subject-matter jurisdiction over this class action pursuant to the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (“CAFA”), which, *inter*

alia, amends 28 U.S.C. § 1332, at subsection (d), conferring federal jurisdiction over class actions where, as here:

- (a) there are 100 or more members in the proposed Class;
- (b) there is minimal diversity, in that at least some members of the proposed Class have a different citizenship from Invicta; and
- (c) the claims of the proposed Class members exceed the sum or value of five million dollars (\$5,000,000) in the aggregate. *See* 28 U.S.C. §1332(d)(2) and (6).

5. Plaintiff's action satisfies CAFA's jurisdictional requirements, in that:

- (a) the proposed Class will vastly exceed 100 members, given the international national scope of Invicta's sales;
- (b) at least some members of the proposed Class are citizens of states different than Invicta, a Florida corporation with its principle place of business in Hollywood, Florida;
- (c) at a minimum, the named Plaintiff, a citizen of New York, has a different citizenship from Invicta;
- (d) the claims of the proposed Class members exceed five million dollars in the aggregate.

6. This Court has personal jurisdiction over the parties because Plaintiff submits to the jurisdiction of the Court, and Invicta is incorporated and headquartered in the State of Florida and transacts business within the State of Florida.

7. Venue is proper in the Southern District of Florida because Invicta is headquartered in this District, conducts substantial business in this District, maintains offices in

this District, and because certain of the acts or omissions instituting policies and procedures affecting Class members occurred in this District.

PARTIES

8. Plaintiff Jon B. Felice is a resident of New York. Mr. Felice purchased an Invicta Men's 8928OB Pro Diver 23k Gold-Plated and Stainless Steel Two-Tone Automatic Watch from Amazon.com on July 11, 2015 for \$82.45.

9. Defendant Invicta is a privately-held corporation organized and existing under the laws of the State of Florida, with its principal place of business located at 3069 Taft Street, Hollywood, Florida, 33021. Invicta promotes and markets its watches throughout the United States and internationally. Invicta is a globally-recognized watch brand with annual revenues estimated at more than \$50 million.

CLASS ACTION ALLEGATIONS

10. Plaintiff brings this lawsuit on behalf of himself and the proposed Class members under Rule 23(b)(2) and (3) of the Federal Rules of Civil Procedure. The proposed Class consists of: All persons who purchased, other than for resale, an Invicta Pro Diver Series watch model rated for depths of 50-300 meters, between the dates of November 17, 2012, and the present date.

11. *Numerosity.* The members of the Class are so numerous that their individual joinder is impracticable. Although the precise number of Class members is currently unknown, with Invicta's annual watch sales reported to exceed \$50 million, it is reasonable to assume there are thousands of Class members. The true number of Class members is known by Defendant. Class members may be notified of the pendency of this action by first class mail, electronic mail and/or by published notice.

12. ***Existence and Predominance of Common Questions of Law and Fact.*** Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting only individual Class members. These common legal and factual questions include, but are not limited to, the following:

- (a) whether Defendant had an adequate basis for its representations regarding the water resistant nature of the Pro Diver Watches prior to making them;
- (b) whether Defendant violated the provisions of the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. §§ 501.201, *et seq.*;
- (c) whether Defendant violated the provisions of the Florida Misleading Advertising statute, § 817.41, Fla. Stat.;
- (d) whether Defendant violated the provisions of the Magnuson-Moss Act, 15 U.S.C. §§ 2301, *et seq.*;
- (e) whether Defendant committed a breach of express warranty; and,
- (f) whether, and to what extent, Plaintiff and members of the Class have been damaged by the Defendant's conduct and the proper measure of damages.

13. ***Typicality.*** Plaintiff's claims are typical of the claims of the Class in that Plaintiff and the Class purchased Pro-Diver Watches falsely represented to be water resistant from 50 to 300 meters (*i.e.*, 165-984 feet). Moreover, Plaintiff, like the Class, has been damaged by Defendant's unlawful misconduct.

14. ***Adequacy of Representation.*** Plaintiff is a member of the Class and is committed to prosecuting this action. Plaintiff has retained competent counsel experienced in litigation of this nature. Plaintiff's claims are typical of the claims of other members of the Class in that he is seeking compensatory damages for Defendant's conduct as alleged herein, the same claims being

asserted on behalf of each individual member of the respective class. Plaintiff is, therefore, an adequate representative of the Class as described herein.

15. *Superiority and Manageability.* The likelihood of individual Class members prosecuting separate individual actions is remote due to the relatively small loss suffered by each Class member as compared to the burden and expense of prosecuting litigation of this nature and magnitude. Absent a class action, the Defendant is likely to avoid liability for their wrongdoing, and the members of the Class are unlikely to obtain redress for the wrongs alleged herein. This case presents no unusual management difficulties for this Court.

FACTUAL ALLEGATIONS

16. Invicta is the maker and seller of the Pro Diver Watches.

17. Invicta markets and advertises its products over many forms of media including television, magazines, and the internet.

18. Invicta sells its products through a variety of retail outlets including Amazon.com, Jet.com, Overstock.com, Evine.com (ShopNBC), Jomashop.com, and its own website, Invictastores.com.

19. Defendant claims on all of its product descriptions for the Pro Diver Watches that the watches are water resistant to varying depths (depending on model).

20. For example, on Amazon.com, the Pro Diver Watch product descriptions provide that the watches are “Water resistant to 200 m (660 ft)” and are “suitable for professional marine activity and serious surface water sports.”

21. Similarly, on Evine.com, the Pro Diver Watch product specifications state “Water Resistance 20 ATM - 200 meters - 660 feet.”

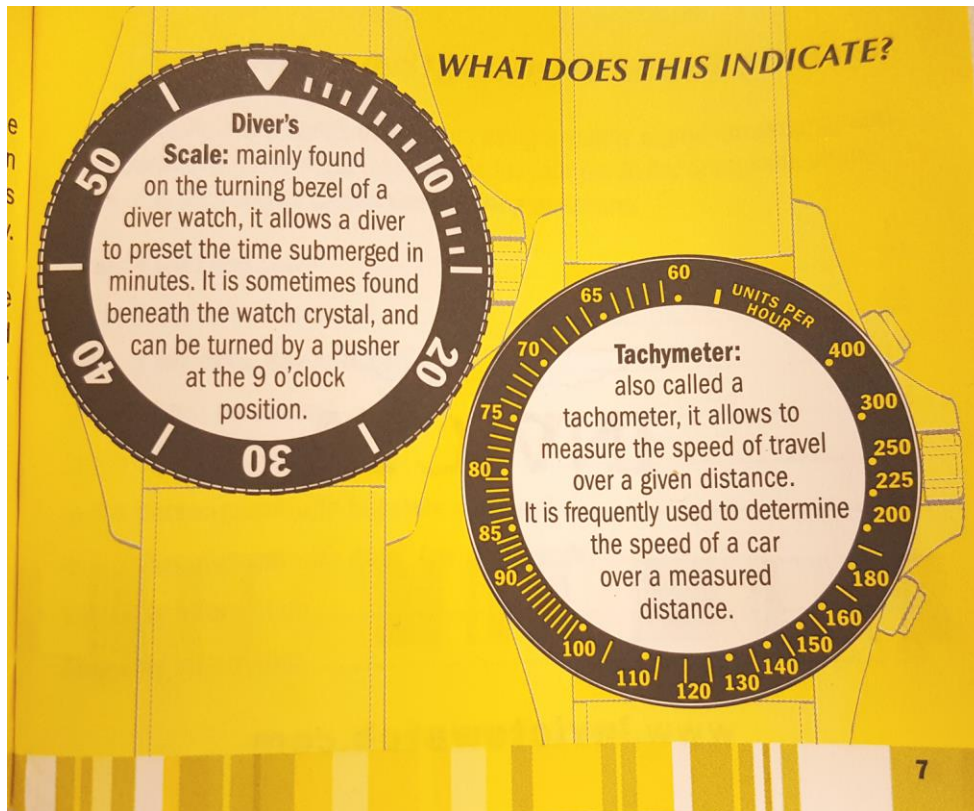
22. Even on its own website (under the link “Diving Watches”), Invicta represents that the Pro Diver Watches are water resistant up to depths of 300 meters and more. *See* https://invictastores.com/men?dir=asc&limit=25&order=water_resistance_meters&product_collection=1312.

23. The Pro Diver Watches themselves are engraved in numerous locations certifying their water resistant capability. For instance, the underside of the Plaintiff’s Pro Diver Watch (Model No. 8928) is engraved with the marking “WATER RESISTANT 200M” and the lower center of the face of his watch reads “660ft – 200M WATER RESISTANT.”



24. Moreover, both the Instruction Manual and Warranty that accompany the Pro Diver Watches describe them as “Diver models,” and certify that the watches are water resistant.

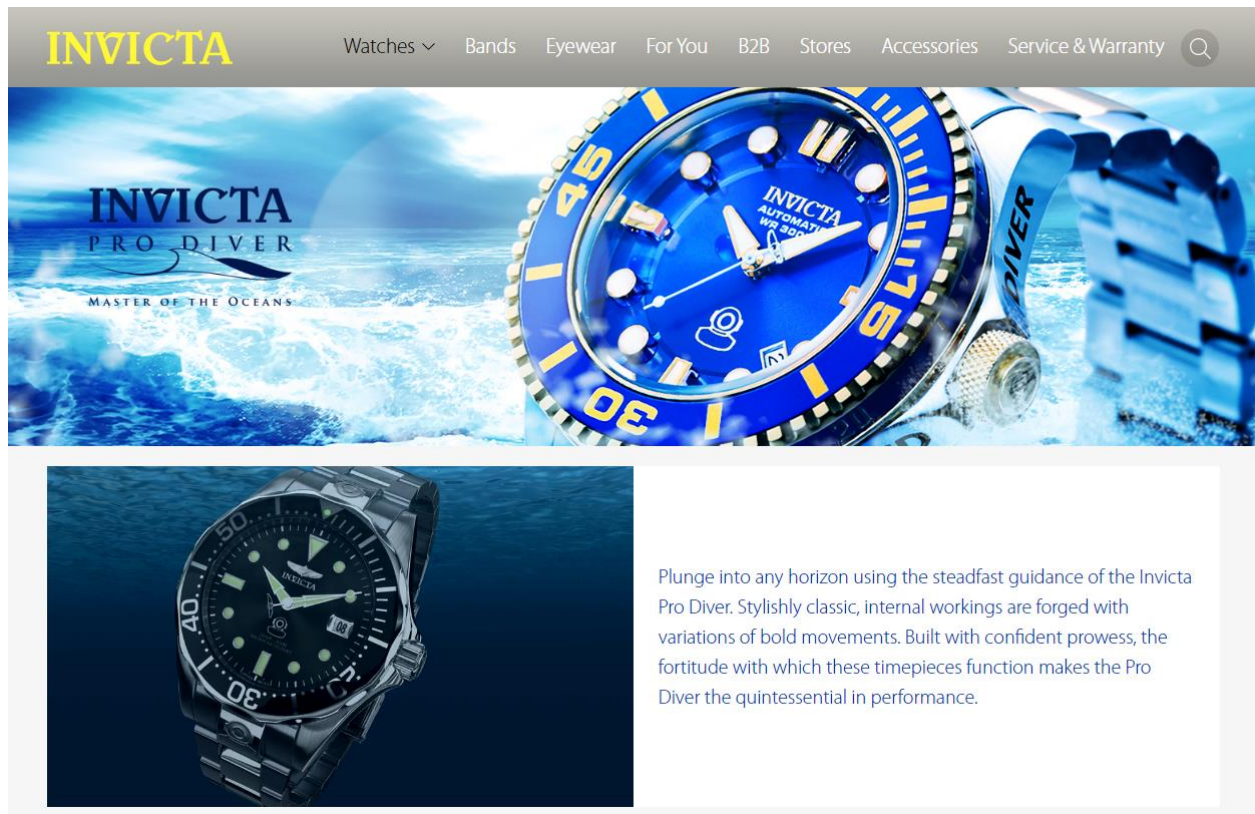
25. The instructions further provide tips for divers using the Pro Diver Watch functions:



26. In addition to the uniform descriptions, Invicta markets the Pro Diver Watches as diving watches. As noted above, on the invictastores.com website, the Pro Diver Watches are located under the “Diving Watches” link for both the Men’s and Women’s collections.

27. Even the style name of the Pro Diver Watches represents that they are diving watches.

28. On Invicta’s website (www.invictawatch.com/watches/pro-diver), the Pro Diver Watches are shown fully submerged in water:

The image shows a screenshot of the Invicta website. At the top, the Invicta logo is in yellow, followed by navigation links: Watches, Bands, Eyewear, For You, B2B, Stores, Accessories, and Service & Warranty. Below the navigation is a large banner featuring a blue and yellow Invicta Pro Diver watch with a metal link bracelet, set against a background of ocean waves. The text on the banner reads "INVICTA PRO DIVER MASTER OF THE OCEANS". Below the banner, there is a smaller image of a black and silver Invicta Pro Diver watch. To the right of this smaller image is a text block that reads: "Plunge into any horizon using the steadfast guidance of the Invicta Pro Diver. Stylishly classic, internal workings are forged with variations of bold movements. Built with confident prowess, the fortitude with which these timepieces function makes the Pro Diver the quintessential in performance."

29. The catch phrase associated with the Pro Diver Series, “Master of the Oceans,” heavily implies that the Pro Diver Watches are capable of being worn underwater in the ocean.

Plaintiff’s Experiences with the Pro Diver Watch

30. The first time Mr. Felice exposed his watch to water was when he wore it while at a pool. Mr. Felice entered the water while wearing the watch, but only engaged in mild surface water activity.

31. Immediately upon exiting the water, Mr. Felice discovered that condensation and water droplets had begun to form under the crystal of the watch.

32. Approximately two weeks later, after having time to dry, the watch again had condensation form underneath the crystal when Mr. Felice wore it while swimming in a pool.

33. Upon exiting the water, Mr. Felice noticed that in addition to condensation forming within the watch, the second-hand of the watch no longer functioned.

34. After drying out, the watch functioned for the next month until Mr. Felice wore it while on a boat. While wearing the watch, Mr. Felice entered the water and again noticed condensation form underneath the crystal.


35. Furthermore, rust had begun appearing on the inside of the watch due to its exposure to water.


36. The lack of water resistance, malfunctioning parts, and presence of rust had devalued the watch so much as to make it longer useable by Mr. Felice.



Widespread Reports of Leakage

37. Mr. Felice is hardly alone in his complaints regarding the lack of water resistance of the Pro Diver Watches. Indeed, complaints about the same defect are legion. Below is a representative sampling of recent (within last 4 years) of comments and reviews for the Pro Diver Watches in which customers note the penetration of water into their watch at shallow depths.

Complaint	URL reference
“I got this thing wet in the shower. Now I constantly get condensation inside of it.”	Amazon.com See https://goo.gl/31JGdE
“while it's a divers watch, after a dive depth of only 6 feet, water got into the watch. It still works but there are little droplets on the crystal.”	Amazon.com See https://goo.gl/a6ph73
<p>“First time I swam with this watch. Pool depth is 9 feet and moisture inside crystal. Piece of junk. Save your money.”</p> 	Amazon.com See https://www.amazon.com/gp/customer-reviews/R2MYBL8CS2R15K/ref=cm_cr_arpd_rvw_ttl?ie=UTF8&ASIN=B000JQJS6M
“Stem does not tighten, moisture under the crystal. Sending it back.”	Evine.com See http://www.evine.com/Product/630-766
“Used it while in the pool which was only 5 feet deep it was quite disappointing to see the condensation on the interior of the watch. The dial was highly obscured making difficult to make out the time. Water resistant to 200 M... not in this lifetime.”	Overstock.com See https://goo.gl/jynR8B

<p>“within the first week of wearing it, water beaded up and fogged under the crystal (having only washed my hands while wearing the watch).”</p> 	<p>Consumer Affairs <i>See</i> https://www.consumeraffairs.com/retail/invicta-watches.html?page=2</p>
<p>“While the Invicta watch I purchased was in the \$100.00 USD price range, and said to be waterproof; you would expect after 2 months use it would resist water penetration under a Florida rain storm. Well, just a few hours later it fogged inside.”</p>	<p>Consumer Affairs <i>See</i> https://www.consumeraffairs.com/retail/invicta-watches.html?page=4</p>
<p>“My Invicta Dive Watch rated 200 meters failed in 17 feet of water. Last Invicta watch I’ll ever buy.</p>	<p>Consumer Affairs <i>See</i> https://www.consumeraffairs.com/retail/invicta-watches.html?page=5</p>

<p>“I purchased an Invicta Watch (Model XXXXX) and within the first 45 day written warranty period I noticed that I had water damage under the crystal. The watch case states it is rated water resistant to 100MT. Washing your hands with the watch on should not result in this problem”</p>	<p>Better Business Bureau <i>See</i> http://www.bbb.org/south-east-florida/business-reviews/watches-dealers/invicta-watch-company-of-america-in-hollywood-fl-27002445/complaints#breakdown</p>
<p>“I bought an Invicta watch on groupon and on the back of the watch it states that it is waterproof. My husband took a shower with the watch on. Water got into it and ruined the watch.”</p>	<p>Better Business Bureau <i>See</i> http://www.bbb.org/south-east-florida/business-reviews/watches-dealers/invicta-watch-company-of-america-in-hollywood-fl-27002445/complaints#breakdown</p>
<p>“The item is clearly defective – the watch that supposed to be ‘water-water resistant’ for up to 50 meters, had water in it after a simple shower.”</p>	<p>Better Business Bureau <i>See</i> http://www.bbb.org/south-east-florida/business-reviews/watches-dealers/invicta-watch-company-of-america-in-hollywood-fl-27002445/complaints#breakdown</p>
<p>“If I didn’t know better, I would think that this is an Invicta knock off. My first started fogging under the crystal in two weeks. An indication of leaking even though it was never underwater, just normal wear. I exchanged it for another rand it began fogging after 5 days.”</p>	<p>Walmart.com https://www.walmart.com/ip/Invicta-8926-Mens-Stainless-Steel-Pro-Diver-Black-Dial-Automatic/30355767</p>
<p>“I am not replacing my watch, after purchase a year ago. The watch never holds time, the face allows condensation to collect, and it’s an unconformable watch to wear. Yes, this watch is very stylish and cool looking, but will fall apart after a couple of months!”</p>	<p>Walmart.com https://www.walmart.com/ip/Invicta-8926-Mens-Stainless-Steel-Pro-Diver-Black-Dial-Automatic/30355767</p>

38. Invicta is well aware of these complaints as illustrated in many of the reviews and comments online which recount consumers’ fruitless experiences with Invicta’s customer service.

39. Because the Pro Diver Watches sell in a lower-end price point (approximately \$75 to \$250), Invicta appears uniquely positioned to profit significantly off misrepresentations and

defects without significant risk of consumer action. Accordingly, class-based relief is the only mechanism by which purchasers of the Pro Diver Watches can obtain relief.

COUNT I

Florida Deceptive and Unfair Trade Practices Act

40. Plaintiff incorporates by reference and re-alleges each and every allegation set forth above as though fully set forth herein.

41. Plaintiff and Class members are “consumers” as defined by Fla. Stat. §501.203(7), and the subject transactions are “trade or commerce” as defined by Fla. Stat. §501.203(8).

42. FDUTPA was enacted to protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.

43. Invicta falsely represents that the Pro Diver Watches are water resistant at depths of 50 to 300 meters (or 165 to 984 feet) and appropriate for various types of water activity.

44. Invicta’s representations are likely to mislead a reasonable consumer as to the capabilities of the Pro Diver Watches, including Plaintiff and members of the Class.

45. Further, the Defendant’s representations of material facts regarding the water resistant capabilities of the Pro Diver Watches directly harmed Plaintiff and members of the Class.

46. Said misrepresentations were made through written advertising materials presented to Plaintiff and members of the Class when purchasing Pro Diver Watches.

47. Said misrepresentations were also made directly on the Pro Diver Watches marketed and sold to Plaintiff and members of the Class.

48. Defendant's misrepresentations constitute violations of FDUTPA, § 501.204 (1), Fla. Stat., which prohibits "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce...."

49. Due to the failure of the Pro Diver Watches to meet Invicta's representations regarding water resistance, Defendant's representations constitute unfair or deceptive actions resulting in a violation of FDUTPA.

50. Plaintiff and the Class have been damaged as a result of Invicta's violations of FDUTPA in that they incurred the costs of insufficient product value.

51. As a direct and proximate result of the unconscionable, unfair, and deceptive acts or practices alleged herein, Plaintiff and members of the Class have been damaged and are entitled to recover actual damages to the extent permitted by law, in an amount to be proven at trial. In addition, Plaintiff and members of the Class seek equitable relief to enjoin Defendant on the terms that the Court considers reasonable and appropriate.

COUNT II

Florida Misleading Advertising Statute

52. Plaintiff incorporates by reference and re-alleges each and every allegation set forth above as though fully set forth herein.

53. Defendant's misrepresentations regarding the water resistant capabilities of the Pro Diver Watches constitute violations of Florida's prohibition on misleading advertising, Fla. Stat. § 817.41 (1).

54. Florida's prohibition on misleading advertising, Fla. Stat. § 817.41 (1), provides that it is "unlawful for any person to make or disseminate or cause to be made or disseminated before the general public of the state, or any portion thereof, any misleading advertisement. Such

making or dissemination of misleading advertising shall constitute and is hereby declared to be fraudulent and unlawful, designed and intended for obtaining money or property under false pretenses.”

55. Defendant knew, or should have known, about the defects in the Pro Diver Watches. Complaints about the water resistant qualities of the Pro Diver Watches can be seen in product comments featured on Amazon.com as far back as August, 2008. Comments regarding the lack of water resistance continued to appear every year, with some comments being posted as recent as September of 2016.

56. Defendant intended for the representations about the water resistant capabilities of the Pro Diver Watches to induce consumers to rely and act upon it. The water resistant nature of the Pro Diver Watches is the main advertising feature of the Pro Diver Series.

57. Every advertisement and product description for the Pro Diver Watches consistently states that they are capable of preventing water penetration at depths of 50 to 300 meters. This representation is so crucial to the marketability of the Pro Diver Watches, that these representations are permanently engraved onto the Pro Diver Watches themselves.

58. Plaintiff and members of the Class suffered injury in justifiable reliance upon Defendant’s representations. The water penetration, resulting from activities Invicta represented as suitable for the Pro Diver Watches, produced condensation within the Pro Diver Watches, damaged the designs featured on the face of the Pro Diver Watches, significantly lowered the value of the Pro Diver Watches, and rendered them unusable for the purposes in which they were purchased.

59. As a direct and proximate result of the Invicta's misleading advertising concerning the water resistant nature of the Pro Diver Watches, Plaintiff and members of the Class have and will continue to suffer damages.

COUNT III

Magnuson-Moss Act

60. Plaintiff incorporates by reference and re-alleges each and every allegation set forth above as though fully set forth herein.

61. Pursuant to 15 U.S.C. § 2310(e), this action shall serve as notice that Plaintiff is acting on behalf of the Class and that Invicta shall have a reasonable opportunity to cure the breaches alleged herein.

62. The Pro Diver Watches are "consumer products" within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(1).

63. Plaintiff and Class members are "consumers" within the meaning of the Magnuson-Moss Act, 15 U.S.C. § 2301(3).

64. Defendant is a "supplier" and "warrantor" within the meaning of the Magnuson-Moss Act, 15 U.S.C. § 2301(4) and (5).

65. Defendant's representations regarding the Pro Diver Watches alleged herein all fall within the definition of "written warranty" provided in the Magnuson-Moss Act, 15 U.S.C. § 2301(6).

66. Defendant made promises and representations in an express warranty provided to all consumers, which became the basis of the bargain between Plaintiff, Class members and the Defendant.

67. Defendant breached all applicable warranties because the Pro Diver Watches suffer from a latent and/or inherent defect that causes it to leak when exposed to water, rendering it unfit for its intended use and purpose. This defect substantially impairs the use and value of the Pro Diver Watches.

68. Additionally, Defendant knew or should have known of the problems with the Pro Diver Watches based on the numerous public complaints posted on the internet. Defendant, having been given reasonable notice of the defect in the Pro Diver Watches and breach of warranties, had an opportunity for years to cure the defects for Plaintiff and all Class members, but has failed to do so.

69. Pursuant to 15 U.S.C. § 2310(d)(1), Plaintiff and the Class are entitled to recover the damages caused to them by Defendants' breaches of written warranties, which damages constitute the full purchase price of the Pro Diver Watches. In addition, pursuant to 15 U.S.C. § 2310(d)(2), Plaintiff and the Class may 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 been reasonably incurred by Plaintiff and the Class for and in connection with the commencement and prosecution of this action.

70. As a direct and proximate result of the Invicta's breach of written warranties concerning the water resistant nature of the Pro Diver Watches, Plaintiff and members of the Class have and will continue to suffer damages.

COUNT IV

Breach of Express Warranty

71. Plaintiff incorporates by reference and re-alleges each and every allegation set forth above as though fully set forth herein.

72. Defendant expressly warranted through written product descriptions on its website and the Pro Diver Watches themselves that the watches were water resistant.

73. Defendant made these representations to all consumers, which became the basis of the bargain between Plaintiff, Class members and the Defendant.

74. Defendants breached their express warranties because the Pro diver watches are not in fact water resistant at depths between 50 to 300 meters. In short, the Pro Diver Watches do not perform as expressly warranted.

75. Defendant knew, or should have known, about the defects in the Pro Diver Watches based on Plaintiff's notice and the plethora of public complaints posted on the internet.

76. As a direct and proximate result of the Defendant's breach of express warranties concerning the water resistant nature of the Pro Diver Watches, Plaintiff and members of the Class have and will continue to suffer damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment and relief as follows:

- A. Declaring that this lawsuit is properly maintainable as a class action, certifying Plaintiff as representative of the Class, and appointing undersigned counsel as Class Counsel;
- B. Declaring that Invicta violated the FDUTPA;
- C. Declaring that Invicta violated Florida's prohibition on misleading advertising;
- D. Declaring the Invicta violated the Magnuson-Moss Act;
- E. Declaring that Invicta breached its express warranties;
- F. Awarding actual damages against Invicta in an amount to be determined at trial, together with prejudgment interest at the maximum rate allowable by law;

- G. Ordering injunctive relief, including permanently enjoining and restraining the Defendant from engaging in the unfair and deceptive practices complained of herein and ordering full disclosure of Defendant's actual practices, and the entry of such other orders as may be necessary or appropriate to restore to Plaintiff and members of the Class, including restitution and disgorgement of money acquired by Defendant in violation of the FDUTPA.
- H. Awarding Plaintiff and members of the Class an award of attorneys' fees and expenses; and
- I. Granting such other and further relief as may be just and proper.

DEMAND FOR TRIAL BY JURY

Plaintiff demands a trial by jury of all issues so triable.

Dated: November 22, 2016

Respectfully submitted,

THE POLASZEK LAW FIRM, PLLC

s/ Christopher S. Polaszek

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