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PROTEMPO LIMITED

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF SAN FRANCISCO

12 PROTEMPO LIMITED,
13 Plaintiff,
14 vs.
15 ALIPHCOM, INC. d/b/a JAWBONE, a
California corporation, HOSAIN RAHMAN, an
16 individual, JASON CHILD, an individual, and
DOES 1 through 10, inclusive
17 Defendants.

Case No. CGC-17-559617

SECOND AMENDED COMPLAINT FOR:
(1) Promissory Fraud;
(2) Fraud and Intentional Deceit;
(3) Negligent Misrepresentation;
(4) Breach of Contract (Direct Claims);
(5) Unjust Enrichment;
(6) Breach of Warranty;
(7) Conversion;
(8) Account Stated;
(9) Open Book Account;
(10) Breach of Contract (Assigned Claims);
(11) Account Stated (Assigned Claims);
(12) Open Book Account (Assigned Claims);
(13) Violation of Penal Code section 496(a).

ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco
12/22/2017
Clerk of the Court
BY: DAVID YUEN
Deputy Clerk

1 Plaintiff Protempo Limited (“Protempo”) alleges the following on information and belief:

2 **INTRODUCTION**

3 1. This action concerns the fraudulent and otherwise wrongful conduct of defendants
4 AliphCom, Inc. d/b/a Jawbone (“Jawbone”), its Chief Executive Officer Hosain Rahman
5 (“Rahman”), and its Chief Financial Officer, Jason Child (“Child”), in making or directing the
6 making of materially false statements and promises to Protempo before Protempo contracted with
7 Jawbone, to induce Protempo to pay Jawbone at least \$1.9 million, making or directing the
8 making of false statements and promises of performance in the parties’ contract itself, and
9 thereafter breaching that contract. Rahman and Child knew the statements were false when they
10 were made, and knew Jawbone would not and could not perform when the false promises were
11 made, but nevertheless participated in, directed, and authorized the making of the false statements
12 and promises. Then, when Protempo and Jawbone entered into their agreement, Jawbone
13 breached the agreement in numerous respects. As a result of Jawbone, Rahman and Child’s
14 fraudulent and wrongful conduct, Protempo has incurred millions of dollars in damages for which
15 Protempo now seeks to hold the Defendants accountable.

16 **PARTIES**

17 2. Protempo is, and at all material times mentioned herein was, a New Zealand
18 corporation authorized to do business and doing business in California.

19 3. Jawbone is, and at all relevant times herein mentioned was, a California
20 corporation organized and existing under and by virtue of the laws of the State of California, and
21 which has its principal place of business in the State of California, County of San Francisco.

22 4. Rahman is, and at all relevant times mentioned herein was, an individual residing in
23 the State of California, County of San Francisco. Rahman, at all relevant times mentioned herein,
24 was serving as the Chief Executive Officer of Jawbone.

25 5. Child is, and at all relevant times mentioned herein was, an individual residing in
26 the State of California, County of San Francisco. Child, at all relevant times mentioned herein,
27 was serving as the Chief Financial Officer of Jawbone.

28 6. Protempo is presently unaware of the true names and capacities of defendants Does

1 1 through 10, inclusive, and therefore sues these defendants by such fictitious names. Protempo
2 will amend this Complaint to show the true names and capacities of such fictitiously-named
3 defendants when the same have been ascertained or upon proof at trial. Protempo is informed and
4 believes and based thereon alleges that each of the fictitiously-named defendants is in some
5 capacity legally responsible for the events and damages alleged herein.

6 7. At all relevant times mentioned herein, certain of the defendants, including the Doe
7 defendants, were acting as the partners, agents, servants, employees, alter egos, successors or
8 predecessors in interest, or conspirators, of others of the defendants, and were acting within the
9 course and scope of such relationship, with the knowledge, express or implied, of each such other
10 named defendant. Protempo sometimes refers to Jawbone, Rahman, Child and Does 1 through 10
11 herein collectively as "Defendants."

12 OPERATIVE FACTS

13 8. Protempo contracts with electronics manufacturers to remarket excess or trailing-
14 edge but still functional and salable products.

15 9. Jawbone was at one time considered a richly-valued maker of wearable gadgets and
16 wireless speakers. By mid-2016, however, unbeknownst to Protempo, Jawbone was on
17 increasingly shaky financial footing, as it struggled to pay key vendors and keep inventory in
18 stock.

19 10. On or about April 29, 2016, Protempo entered into an agreement (the "Original
20 Agreement") with Jawbone whereby Jawbone promised to provide brand-new products free and
21 clear of all encumbrances in exchange for payment by Protempo. Child signed the Original
22 Agreement on behalf of Jawbone. A true and correct copy of the Original Agreement is attached
23 hereto and incorporated herein as Exhibit A.

24 11. On June 2, 2016 and June 9, 2016, the parties amended the Original Agreement to
25 add additional products which Jawbone would sell to Protempo. True and correct copies of these
26 amendments are attached hereto and incorporated herein as Exhibits B and C.

27 12. In August and September 2016, both Rahman and Child engaged in and directed
28 negotiations with Protempo for entry into a third amendment to the Original Agreement to sell

1 Protempo what Jawbone represented was an additional \$2.1 million of purportedly brand-new,
2 unencumbered products, ready for distribution. However, during the course of those negotiations,
3 Rahman and Child made and directed, approved, ratified and encouraged the making of several
4 misrepresentations and false promises, with the knowledge – shared by Rahman and Child and
5 others at Jawbone – that the statements were false and that Jawbone would not and could not
6 perform as promised.

7 13. On or about September 11, 2016, Rahman and Child directed Steve Jordan of
8 Jawbone in writing and otherwise to encourage Protempo to immediately purchase a remaining
9 Jawbone inventory of products – which Jawbone had set aside to meet customer warranty claims –
10 in Tijuana, Mexico, so that Jawbone could quickly receive from Protempo a cash infusion to
11 continue Jawbone’s flagging operations and meet overdue payment obligations to Jawbone’s
12 vendors.

13 14. In a September 12, 2016 e-mail, Mr. Jordan wrote to Adam Brown of Protempo
14 that Rahman and Child “are looking to sell all remaining customer care units” to Protempo,
15 attaching an inventory of new, customer care units supposedly available for sale to Protempo.

16 15. On September 14, 2016, following the parties’ negotiations and Defendants’
17 making of the false statements and promises alleged herein, Jawbone and Protempo entered into
18 their third amended agreement (“Amended Agreement”) whereby Jawbone promised to sell an
19 additional \$2,121,161 worth of products to Protempo. A true and correct copy of the Amended
20 Agreement is attached hereto and incorporated herein as Exhibit D.

21 16. More specifically, between August 27, 2016 and September 14, 2016 (among other
22 times), at both Rahman’s and Child’s direction, and with their approval, ratification and
23 encouragement, Jawbone made numerous false statements and promises to Protempo, including,
24 but not limited to, the following:

- 25 • During a face-to-face meeting in San Francisco on or about August 27, 2016, Mr.
26 Jordan of Jawbone informed Adam Brown, Adam Burge and Mark Priscott of
27 Protempo that Jawbone had an inventory of brand-new products available for sale
28 to Protempo. On or about September 10, 2016, and again on or about September

1 11, 2016, via e-mail and video conference calls, Mr. Jordan of Jawbone represented
2 to Adam Brown and Mark Priscott of Protempo that the products discussed on
3 August 27, 2016 were new, functioning, re-sellable, and available for immediate
4 purchase by and delivery to Protempo, and were suitable for resale to Protempo's
5 network of distributors.

- 6 ○ These representations were further set forth at Exhibit A of the Amended
7 Agreement, identifying \$2,121,161 worth of specified products to be sold
8 and made available to Protempo. The Amended Agreement also
9 incorporated and reaffirmed the representations set forth at Section 5.3.1,
10 subsection (c) of the Original Agreement, stating that “the Products are
11 brand new and are not refurbished or used stock.” The Amended
12 Agreement additionally incorporated and reaffirmed the Original
13 Agreement’s statement that “Jawbone holds all right, title, and interest in
14 and to the Products, and the Products are free and clear of all liens, security
15 interest, and other third party claims to ownership of the Products” (Ex. A,
16 § 5.2.1(b)).
- 17 ○ The true facts – of which Rahman and Child were aware when they directed
18 the false representations be made, and when Child signed the Amended
19 Agreement, and Rahman directed that the Amended Agreement be signed –
20 were that:
 - 21 ▪ The products were subject to a lien in favor of North American
22 Production Sharing, Inc. (“NAPS”), as a result of Jawbone’s failure
23 to pay hundreds of thousands of dollars in storage and handling fees;
 - 24 ▪ As a result of Jawbone’s intention not to pay and failure to pay its
25 outstanding invoices to NAPS, NAPS would not release the
26 products to Protempo;
 - 27 ▪ Jawbone did not have \$2,121,161 worth of products available for
28 Protempo, and several months after entry into the Amended

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Agreement, had only delivered a fraction of the products Protempo was promised;

- Jawbone was short thousands of units to be provided to Protempo, many of which were units that were not fit for retail sales and did not pass quality tests; and,
- Many of the same products promised to Protempo were already committed to use by Jawbone to fulfill customer warranty claims.

- During a September 11, 2016 video conference, Mr. Jordan reiterated to Adam Brown of Protempo that the products were brand-new, in working order, and could be and would be subject to warranties Jawbone would honor as to Protempo's distributor customers.

- These representations were further set forth in the Amended Agreement, which provided (as incorporated from the Original Agreement and reaffirmed in the Amended Agreement) that “the Products are brand new and are not refurbished or used stock” (Ex. A, § 5.2.1(c)); and that “Jawbone offers a limited warranty to end-user purchasers of its Products Distributor shall direct end-user purchasers to Jawbone for resolution of any Product warranty claims” (Ex. A, § 5.2.2).
- The true facts – of which Rahman and Child were aware when they directed the false representations be made, and when Child signed the Amended Agreement, and Rahman directed that the Amended Agreement be signed – were that:
 - The products were significantly aged, and were highly defective or otherwise inoperative, and could not be re-sold;
 - The products had an exorbitantly high rate of consumer complaints, thus reinforcing that the products were significantly faulty and/or not in working condition; and,
 - Jawbone was not honoring warranties on its products, and had no

1 intention of honoring warranties on the products Defendants
2 intended that Protempo purchase.

- 3 • During the e-mails, videoconferences and meetings taking place on September 10,
4 11 and 12, 2016 (among other times), Mr. Jordan and Matt DeBenedetti, among
5 others at Jawbone, represented to the identified Protempo employees that the
6 products Jawbone intended that Protempo purchase would be delivered or made
7 available by Jawbone in a timely fashion, and in time for Protempo to have the
8 products for the crucial holiday sales season.
 - 9 ○ Exhibit A to the Amended Agreement likewise identified \$2,121,161 worth
10 of specified products to be sold and made immediately available to
11 Protempo.
 - 12 ○ The true facts – of which Rahman and Child were aware when they directed
13 the false representations be made, and when Child signed the Amended
14 Agreement, and Rahman directed that the Amended Agreement be signed –
15 were that:
 - 16 ▪ Shipment of the products was dependent on funding from Jawbone;
17 and,
 - 18 ▪ Jawbone would not be able to timely pay its vendors, which would
19 delay shipment of the products.

20 17. Rahman and Child knew these statements were false and that Jawbone would not
21 and could not keep these promises to Protempo; nevertheless, Child signed the parties'
22 agreements, and Rahman directed that the agreements be signed with knowledge of their falsity
23 and Jawbone's intention not to perform and inability to perform.

24 18. Immediately following the parties' entry into the Amended Agreement, Protempo
25 paid Jawbone the full required \$1,910,794, and expected to timely receive the brand-new,
26 unencumbered products it had been promised and had purchased.

27 19. Only after Jawbone had taken Protempo's \$1,910,794 payment did Protempo
28 discover that Defendants' representations and promises were false.

1 20. NAPS refused to release the products Protempo had purchased absent payment in
2 full of Jawbone's \$450,000 debt for overdue storage and handling fees. Despite repeated requests
3 by Protempo to Jawbone to pay Jawbone's debt to NAPS so Protempo could obtain the products it
4 had purchased, Jawbone refused, leaving Protempo with no viable alternative but to pay NAPS the
5 \$450,000 on Jawbone's behalf to obtain release of Protempo's products and allow Protempo to
6 fulfill its own obligations to downstream distributors. NAPS and Protempo executed a contract
7 ("Assignment of Debt") by which NAPS assigned its entire right, title, and interest in Jawbone's
8 debt to Protempo.

9 21. As a result of Jawbone's false representations and promises, and its failure to pay
10 NAPS to allow release of the products, the products were delivered to Protempo late, causing
11 Protempo to miss out on sales during the crucial holiday season and to lose Protempo's largest
12 deal with a distributor.

13 22. When Protempo finally received and could inspect the products it purchased under
14 the Amended Agreement, it discovered that \$129,624 worth of products were missing.
15 Additionally, after taking delivery of the products and providing them for distribution, Protempo
16 discovered for the first time that numerous batches of Jawbone's UP2 wearable fitness product
17 were dead on arrival (including, for example, dead irreplaceable batteries and other malfunctions)
18 and the products experienced massive failure rates.

19 23. Rahman, Child and others at Jawbone nevertheless led Protempo to believe
20 otherwise and withheld information from Protempo in negotiating the parties' agreement,
21 committing a blatant "bait and switch" involving millions of dollars of faulty and encumbered
22 products in a desperate attempt to obtain the immediate cash infusion Jawbone required to pay its
23 mounting debts.

24 24. Jawbone's actions have caused significant injury to Protempo. To date, \$1,234,621
25 worth of Jawbone's UP2 product purchased by Protempo under the parties' agreements are
26 defective and unsellable. In addition to its resulting financial damages, Protempo has suffered
27 significant disruptions to its business and to several of its important relationships with distributors
28 and others. Jawbone has also refused to reimburse Protempo the \$450,000 debt that Protempo was

1 forced to pay NAPS in order to secure the release of the purchased products; failed to deliver the
2 missing products totaling \$129,624; and failed to take any action to remedy the product shortfall,
3 such as refunding Protempo's overpayment or delivering the promised products. Jawbone has
4 also failed to fix or otherwise address or remedy the numerous defective products it sold to
5 Protempo.

6 25. Protempo's damages are on-going and far exceed the jurisdictional minimum of
7 this Court. Despite oral and written demands by Protempo, Defendants have failed and refuse to
8 compensate Protempo for its damages.

9 **FIRST CAUSE OF ACTION**

10 **(For Promissory Fraud Against All Defendants)**

11 26. Protempo realleges and incorporates by reference Paragraphs 1 through 25, above,
12 as if set forth in their entirety.

13 27. Between August and September 2016, at both Rahman's and Child's direction, and
14 with their involvement, approval, ratification and encouragement, Defendants made the false
15 promises of performance, orally (in face-to-face meetings and phone calls), and in writing
16 (including by e-mail), to Protempo's identified employees, including but not limited to Adam
17 Brown, Mark Priscott, and others, as set forth at Paragraph 16 of this Complaint.

18 28. At the time Defendants made the promises to Protempo, Defendants had no
19 intention of performing them.

20 29. Defendants made their promises with the intent to induce Protempo to pay its \$1.9
21 million to Jawbone and enter into the Amended Agreement.

22 30. Protempo, at the time the promises were made and at the time Protempo took the
23 actions herein alleged, was ignorant of Defendants' secret intention not to perform, and Protempo
24 could not, in the exercise of reasonable diligence, have discovered Defendants' secret intention.
25 In reliance on Defendants' promises, Protempo paid its \$1.9 million to Jawbone and entered into
26 the Amended Agreement. If Protempo had known of Defendants' actual intentions, Protempo
27 would not have taken such actions.

28 31. Defendants failed to abide by their promises as herein alleged, including but not

1 limited to as alleged at Paragraph 16 of this Complaint.

2 32. As a proximate result of Defendants' fraudulent conduct, Protempo has and will
3 continue to suffer general, consequential, and compensatory damages, as alleged above.

4 33. The acts of Defendants were done with a conscious disregard of Protempo's rights,
5 and with the specific intent to defraud Protempo into providing an up-front payment of \$1,910,794
6 and to pay other sums, such as to constitute fraud, oppression and malice under California Civil
7 Code section 3294. By virtue of Defendant's willful and wrongful conduct, Protempo is entitled
8 to punitive and exemplary damages.

9 **SECOND CAUSE OF ACTION**

10 **(For Fraud And Intentional Deceit Against All Defendants)**

11 34. Protempo realleges and incorporates by reference Paragraphs 1 through 33, above,
12 as if set forth in their entirety.

13 35. Between August and September 2016, at both Rahman's and Child's direction, and
14 with their involvement, approval, ratification and encouragement, Defendants made the false
15 statements and misrepresentations, orally (in face-to-face meetings and phone calls), and in
16 writing (including by e-mail), to Protempo's identified employees, including but not limited to
17 Adam Brown, Mark Priscott, and others, as set forth at Paragraph 16 of this Complaint.

18 36. The representations made by Defendants were in fact false, and the true facts were
19 as set forth at Paragraph 16.

20 37. When Defendants made their representations, they knew them to be false and made
21 these representations with the intention to deceive and defraud Protempo and to induce Protempo
22 to pay its \$1.9 million to Jawbone and enter into the Amended Agreement, or with the expectation
23 that Protempo would so act.

24 38. Protempo, at the time Defendants made their representations and at the time
25 Protempo took the actions herein alleged, was ignorant of the falsity of Defendants'
26 representations and believed them to be true. In reliance on these representations, Protempo was
27 induced to and did pay its \$1.9 million to Jawbone and entered into the Amended Agreement.
28 Had Protempo known the actual facts, it would not have taken such actions. Protempo's reliance

1 on Defendants' representations was justified because, *inter alia*, Protempo could not, in the
2 exercise of reasonable diligence, have discovered the true facts (for example, the products at issue
3 were stored on other continents, and their condition was known only to Defendants, and Protempo
4 was without the necessary internal information for Jawbone).

5 39. As a proximate result of Defendants' fraudulent conduct, Protempo has and will
6 continue to suffer general, consequential, and compensatory damages, as alleged above.

7 40. The acts of Defendants were done with a conscious disregard of Protempo's rights,
8 and with the specific intent to defraud Protempo into providing an up-front payment of \$1,910,794
9 and to pay other sums, such as to constitute fraud, oppression and malice under California Civil
10 Code section 3294. By virtue of Defendant's willful and wrongful conduct, Protempo is entitled
11 to punitive and exemplary damages.

12 **THIRD CAUSE OF ACTION**

13 **(For Negligent Misrepresentation Against All Defendants)**

14 41. Protempo realleges and incorporates by reference Paragraphs 1 through 40 above,
15 as if set forth in their entirety.

16 42. Between August and September 2016, at both Rahman's and Child's direction, and
17 with their involvement, approval, ratification and encouragement, Defendants made the false
18 statements and misrepresentations, orally (in face-to-face meetings and phone calls), and in
19 writing (including by e-mail), to Protempo's identified employees, including but not limited to
20 Adam Brown, Mark Priscott, and others, as set forth at Paragraph 16 of this Complaint.

21 43. As set forth at Paragraph 16 of this Complaint, the information Defendants
22 provided to Protempo was in fact false. The true facts, of which Protempo was ignorant, were that
23 (i) the products were subject to NAPS' claim for substantial unpaid fees; (ii) NAPS would not
24 release the products until its unpaid fees were paid; (iii) Jawbone did not have the inventory to
25 fulfill its agreement with Protempo; and (iv) many of the products were inoperative and highly
26 defective.

27 44. If Defendants did not intentionally lead Protempo to believe false information as
28 alleged above, then Defendants had no reasonable grounds to believe the information they

1 provided was true.

2 45. Defendants intended for Protempo to rely on such negligent misrepresentations,
3 and Protempo did reasonably rely on the misrepresentations as alleged above.

4 46. As a direct, proximate, and foreseeable result of Defendants' conduct, Protempo
5 has and will continue to suffer general, consequential, and compensatory damages, as alleged
6 above.

7 **FOURTH CAUSE OF ACTION (DIRECT CLAIMS)**

8 **(For Breach of Contract Against Jawbone and DOES 1-10)**

9 47. Protempo realleges and incorporates by reference Paragraphs 1 through 46, above,
10 as if set forth in their entirety.

11 48. On or about September 14, 2016 Protempo entered into the Amended Agreement
12 with Jawbone, whereby Jawbone promised to provide brand-new products free and clear of all
13 encumbrances in exchange for payment in the amount of \$2,121,161 by Protempo.

14 49. Protempo has performed all terms, conditions, and agreements on its part to be
15 performed under the Amended Agreement.

16 50. Jawbone has materially breached its obligations to Protempo under the Agreement
17 by failing to deliver \$129,624 worth of products which Protempo purchased, and failing to honor
18 the warranties set forth in the Agreement, among other breaches.

19 51. The Amended Agreement contains an implied covenant of good faith and fair
20 dealing, which includes a covenant that neither party will deprive the other party of the intended
21 benefits of the agreement. When a condition in a contract involves the performance of an act
22 within the control of a party, the party has a duty to make a good faith effort to satisfy the
23 condition.

24 52. As a result of the conduct alleged above, and in particular, failing to deliver the full
25 product for which Protempo paid, Jawbone breached the implied covenant of good faith and fair
26 dealing.

27 53. As a direct and proximate result of Jawbone's breach of the Amended Agreement,
28 Protempo has been damaged in an amount to conform to proof at trial, but in no event less than

1 \$129,624, plus any and all accrued interest.

2 **FIFTH CAUSE OF ACTION**

3 **(For Unjust Enrichment Against Jawbone and DOES 1-10)**

4 54. Protempo realleges and incorporates by reference Paragraphs 1 through 53, above,
5 as if set forth in their entirety.

6 55. By virtue of its wrongful conduct toward Protempo alleged above, and specifically,
7 as a result of its failure to compensate Protempo for its out-of-pocket expenditures (including
8 payment of Jawbone's \$450,000 debt to NAPS), Jawbone has been unjustly enriched.

9 56. It would be manifestly unjust for Jawbone to retain any of the benefits it has gained
10 through its wrongful conduct. Subject to and as alleged above, unless the Court orders restitution
11 to Protempo, Jawbone will unjustly benefit from its actions.

12 **SIXTH CAUSE OF ACTION**

13 **(For Breach of Warranty Against Jawbone and DOES 1-10)**

14 57. Protempo realleges and incorporates by reference Paragraphs 1 through 56, above,
15 as if set forth in their entirety.

16 58. Pursuant to the Original Agreement and each of its subsequent amendments,
17 Jawbone represented and warranted that products were unencumbered, were brand-new and not
18 refurbished, and were not previously used.

19 59. Jawbone breached the express warranties contained in the parties' agreements
20 regarding the quality of product sold to Protempo by delivering to Protempo products that were
21 dead on arrival and products which showed massive failure rates. In particular, the UP2 products
22 Jawbone sold to Protempo contained faulty batteries incapable of holding a charge. As a result of
23 such breaches, Protempo did not receive products as warranted by Jawbone.

24 60. After discovering the defects in the products sold and delivered to Protempo in
25 breach of Jawbone's express warranties, Protempo timely informed Jawbone both orally and in
26 writing of such breaches and of the nature of the damages suffered by Protempo as a result of such
27 breaches. Despite such notice, Jawbone has failed and refused and continues to fail and refuse to
28 respond to such notice or to otherwise compensate Protempo for the damages it has suffered.

1 **EIGHTH CAUSE OF ACTION**

2 **(For Account Stated Against Jawbone and DOES 1-10)**

3 68. Protempo realleges and incorporates by reference Paragraphs 1 through 67, above,
4 as if set forth in their entirety.

5 69. Within the last two years, Jawbone became indebted to Protempo on an account
6 stated in the amount of at least \$450,000.

7 70. Protempo is informed and believes and on that basis alleges that although repeated
8 demands for payment have been made and Jawbone admitted that it owed the \$450,000 and
9 promised to pay that amount, the principal sum due to Protempo – currently \$450,000, plus
10 interest thereon at the maximum legal rate according to proof – remains due, owing, and unpaid
11 from Jawbone to Protempo on an account stated.

12 **NINTH CAUSE OF ACTION**

13 **(For Open Book Account Against Jawbone and DOES 1-10)**

14 71. Protempo realleges and incorporates by reference Paragraphs 1 through 70 above,
15 as if set forth in their entirety.

16 72. Within the last year, Jawbone has become indebted to Protempo on an open book
17 account in the principal sum of \$579,624, which includes Jawbone's unpaid debt of \$450,000 to
18 NAPS and the \$129,624 worth of products Jawbone failed to deliver to Protempo.

19 73. Protempo has kept an account of the debits and credits involved in the transactions.
20 Although repeated demands for payment have been made, as of the date of this Complaint, there is
21 now due, owing, and unpaid the principal sum of \$579,624 together with interest accruing thereon.

22 **TENTH CAUSE OF ACTION (ASSIGNED CLAIMS)**

23 **(For Breach of Contract Against Jawbone and DOES 1-10)**

24 74. Protempo realleges and incorporates by reference Paragraphs 1 through 73, above,
25 as if set forth in their entirety.

26 75. Pursuant to the Assignment of Debt, NAPS "grant[ed], assign[ed], transfer[ed] and
27 set[] over unto [Protempo] its entire right, title and interest in and to the Debt, including without
28 limitation, all rights, benefits and advantages of [NAPS] to be derived therefrom[.]" Protempo is

1 informed and believes and based thereon alleges that NAPS acquired a warehouseman's lien on
2 the products Jawbone was storing in its facility.

3 76. As a result of the Assignment of Debt, Protempo is entitled to enforce NAPS's
4 warehouseman's lien to the extent allowed by applicable law.

5 77. Protempo is informed and believes and based thereon alleges that NAPS and
6 Jawbone had an agreement, by which Jawbone was required to pay NAPS for all storage and
7 handling fees NAPS incurred from storing Jawbone's products.

8 78. Protempo is informed and believes and based thereon alleges that NAPS has
9 performed all terms, conditions, and agreements on its part to be performed under the agreement,
10 except for those that were excused, waived, and/or discharged by Jawbone's conduct, including
11 Jawbone's fraud and deceit, or which Jawbone is prevented or estopped to assert.

12 79. Jawbone has breached its obligations to NAPS by failing to pay \$450,000 in
13 storage and handling fees.

14 80. Protempo is informed and believes and based thereon alleges that the agreement
15 between NAPS and Jawbone contained an implied covenant of good faith and fair dealing, which
16 includes a covenant that neither party will deprive the other party of the intended benefits of the
17 agreement. When a condition in a contract involves the performance of an act within the control
18 of a party, the party has a duty to make a good faith effort to satisfy the condition.

19 81. As a result of the conduct alleged above, and in particular, failing to pay NAPS the
20 storage and handling fees, Jawbone breached the implied covenant of good faith and fair dealing.

21 82. As a direct and proximate result of Jawbone's breach of its obligations to pay its
22 storage and handling fees, NAPS, and by assignment, Protempo, has been damaged in an amount
23 to conform to proof at trial, but in no event less than \$450,000, plus any and all accrued interest.

24 **ELEVENTH CAUSE OF ACTION (ASSIGNED CLAIMS)**

25 **(For Account Stated Against Jawbone and DOES 1-10)**

26 83. Protempo realleges and incorporates by reference Paragraphs 1 through 82 above,
27 as if set forth in their entirety.

28 84. Pursuant to the Assignment of Debt, NAPS "grant[ed], assign[ed], transfer[ed] and

1 set[] over unto [Protempo] its entire right, title and interest in and to the Debt, including without
2 limitation, all rights, benefits and advantages of [NAPS] to be derived therefrom[.]”

3 85. Within the last two years, Jawbone became indebted to NAPS on an account stated
4 in the amount of at least \$450,000.

5 86. Protempo is informed and believes and on that basis alleges that although repeated
6 demands for payment have been made and Jawbone admitted that it owed \$450,000 and promised
7 to pay that amount, the principal sum due to NAPS, and by assignment, to Protempo – currently
8 \$450,000, plus interest thereon at the maximum legal rate according to proof – remains due,
9 owing, and unpaid from Jawbone to NAPS, and by assignment, Protempo on an account stated.

10 **TWELFTH CAUSE OF ACTION (ASSIGNED CLAIMS)**

11 **(For Open Book Account Against Jawbone and DOES 1-10)**

12 87. Protempo realleges and incorporates by reference Paragraphs 1 through 86, above,
13 as if set forth in their entirety.

14 88. Pursuant to the Assignment of Debt, NAPS “grant[ed], assign[ed], transfer[ed] and
15 set[] over unto [Protempo] its entire right, title and interest in and to the Debt, including without
16 limitation, all rights, benefits and advantages of [NAPS] to be derived therefrom[.]”

17 89. Within the last year, Jawbone has become indebted to NAPS, and by assignment,
18 Protempo on an open book account in the principal sum of \$450,000.

19 90. NAPS, and by assignment, Protempo has kept an account of the debits and credits
20 involved in the transactions.

21 91. Although repeated demands for payment have been made, as of the date of this
22 Complaint, there is now due, owing and unpaid the principal sum of \$450,000 together with
23 interest accruing thereon.

24 **THIRTEENTH CAUSE OF ACTION**

25 **(Violation of Penal Code section 496(a) Against All Defendants)**

26 92. Protempo realleges and incorporates by reference Paragraphs 1 through 91, above,
27 as if set forth in their entirety.

28 93. Defendants induced Protempo to remit payment of \$1,910,794 under false

1 pretenses as alleged herein, including but not limited to as set forth at Paragraphs 12 through 18.
2 Therefore Defendants obtained Protempo's money in a manner constituting theft pursuant to Penal
3 Code section 496(a).

4 94. Penal Code section 496(c) permits a person who has been injured by a violation of
5 Penal Code section 496(a) to bring a civil action pursuant thereto for treble damages.

6 95. As a direct and proximate cause of the foregoing acts and omissions of Defendants,
7 Protempo been damaged in an amount to be proven at trial, but not less than \$1,910,794.

8 96. Pursuant to Penal Code section 496(c), such sum shall be trebled. Plaintiffs are
9 informed and believe that Defendants liability therefore exceeds \$5,732,382.

10 **PRAYER FOR RELIEF**

11 WHEREFORE, Protempo prays for judgment against Defendants as follows:

- 12 1. For damages in an amount to conform to proof at trial, but no less than \$1,814,245;
- 13 2. For interest in the maximum amount allowed by law;
- 14 3. For treble damages pursuant to Penal Code section 496(c);
- 15 4. For exemplary and punitive damages pursuant to Civil Code section 3294;
- 16 5. For attorneys' fees and costs of suit incurred herein as may be allowed by law; and
- 17 6. For such other and further relief as the court deems just and proper.

18
19 Dated: December 22, 2017

RUTAN & TUCKER, LLP
RICHARD K. HOWELL
GERARD M. MOONEY
GOLSA HONARFAR

20
21
22 By: _____

Richard K. Howell
Attorneys for Plaintiff
PROTEMPO LIMITED

EXHIBIT A

NON-EXCLUSIVE SALES & DISTRIBUTION AGREEMENT

This **NON-EXCLUSIVE SALES & DISTRIBUTION AGREEMENT** ("Agreement"), is effective as of April 29, 2016 ("Effective Date") by and between ALIPHCOM, dba Jawbone, a California corporation, with offices at 99 Rhode Island St., San Francisco, CA 94103 USA ("Jawbone") and PROTEMPO LIMITED, a New Zealand corporation, with offices at 21 Taylors Road, Morningside, Auckland 1025, New Zealand ("Distributor").

1. Products & Pricing.

- 1.1. Products. Jawbone and Distributor are entering into a non-exclusive commercial relationship for the distribution and sale in the Territory to Distributor of the Jawbone-branded products ("Products"), as further set forth on **Exhibit A**. Jawbone may, in its sole discretion, and without incurring any liability to Distributor, change the features, or discontinue the sale, of any of the Products, provided Jawbone provide at least 6 months notice before any information becomes public regarding the discontinuing of support for the Jawbone app. Additional Jawbone products may be added to this Agreement only upon the mutual written agreement of the parties. Distributor shall be permitted to sell the Products to and through its own authorized resellers and shall use commercially reasonable efforts to ensure that its authorized resellers perform in accordance with the terms of this Agreement, and to monitor for and inform Jawbone of any deviances.
- 1.2. Prices. Prices are defined on Exhibit A. Jawbone will not offer price protection or other support for the Products should market prices change.
- 1.3. No Returns. Subject to Section 5.2.1(c) and except in respect of Rejected Goods (as defined herein), no returns are authorized for the Products for any reason.
- 1.4. Exclusivity; Right of First Refusal. Subject to Section 1.5 below and except for direct sales to Jawbone's corporate wellness customers in connection with Jawbone's corporate wellness program, Jawbone will not sell or agree to sell Products to any customer other than Distributor for the period between the Effective Date through July 31, 2016 ("Exclusivity Period"). Following the Exclusivity Period and through December 31, 2016, in the event that Jawbone wishes to sell any additional quantities of Products beyond the amounts set forth on Exhibit A, Distributor shall have a right of first refusal ("ROFR") for thirty (30) days to purchase such Products. The ROFR will begin upon Jawbone submitting a written offer via email for Products to Distributor, and all other terms of this Agreement will apply to such offer. In the event of expiration or Distributor's rejection of the ROFR, Jawbone is free to sell the Products to any other third parties, provided that the terms offered to third parties are substantially the same as those offered to Distributor. For clarification, the offering of amended terms or prices for the purchase of Products on more favourable terms shall constitute a new offer and Distributor shall receive a new ROFR.
- 1.5. Sales on Jawbone's Web Store. Notwithstanding anything to the contrary in this Agreement, Jawbone will continue selling Products on its own web store ([REDACTED]) ("Jawbone Web Store"). Unless otherwise agreed to in writing by Distributor, Jawbone will offer the Products at prices at or above the "Minimum [REDACTED]" prices set forth in the table on **Exhibit A**.

2. Order Process & Shipping.

- 2.1. PO Submission. Distributor shall purchase Products by issuing one or more Purchase Orders ("POs") via email to the address specified in **Exhibit B**, or as otherwise specified in writing by Jawbone. The PO shall be signed by Distributor's authorized representative. The PO shall specify ordered Products, Jawbone's product number, any internal product numbers assigned by Distributor, quantity, unit price, total price of order per Product, complete shipping address and instructions, PO number, line item number, Distributor point of contact information, and any other special instructions.
- 2.2. PO Acceptance: All POs from Distributor are subject to acceptance by written confirmation by Jawbone. Jawbone is under no obligation to accept any PO. Jawbone shall, in writing within five (5) business days of

receipt, accept a PO or offer a proposed modification to the PO terms. Except as otherwise agreed in writing by the Parties, accepted POs are non-cancellable. This Agreement applies to all quotations made and POs accepted by Jawbone and is an integral part of the sales contract between Jawbone and Distributor. Whenever this Agreement conflicts with or is expanded or added to by any terms and conditions of Distributor's purchase order, this Agreement shall govern and supersede the terms and conditions of Distributor's PO.

- 2.3. Shipping; Delivery. Jawbone shall ship Products FOB Origin to one of three shipping points located in the America or EMEA designated by Jawbone (each, a "Jawbone FOB Point") as set forth in **Exhibit A**. The Jawbone FOB Point shall be determined on a case-by-case basis depending on the nearest location for the inventory of Products requested by Distributor. Jawbone is responsible for shipping costs to the Jawbone FOB Point, and Distributor is responsible for any and all shipping costs thereafter. For purposes of this Agreement, "Delivery" shall occur once the Products are delivered to the Distributor's carrier at the Jawbone FOB Point. Title and risk of loss for damage to the Products passes to Distributor upon Delivery. Notwithstanding the foregoing, as between Distributor and Jawbone, title to any software incorporated in the products remains with Jawbone. Jawbone shall use commercially reasonable efforts to Deliver the Products within the delivery date(s) specified on the applicable accepted Purchase Order. Delivery date(s) to be mutually agreed by the parties. Within three (3) business days of the Distributor receiving the Products at the Jawbone FOB Point as specified on the accepted Purchase Order, those goods having been released to the freight forwarder of the Distributor, ("Inspection Period"), Distributor shall notify Jawbone and Jawbone's outside legal counsel referred to in Section 3 below of any Products that do not conform with the accepted Purchase Order; to the representations set forth in Section 5.2.1; which have been delivered damaged due to inadequate packing by Jawbone; or which were delivered more than 10 days after the agreed delivery date ("Rejected Products"). Distributor agrees that, after the Inspection Period, and except for any Rejected Products, all other Products shall be deemed irrevocably accepted ("Product Acceptance").

3. Payment; Taxes. Jawbone shall invoice Distributor for each accepted PO at the address set forth in **Exhibit B**. Following acceptance by Jawbone of a PO, payment in U.S. dollars shall be deposited by Distributor into Jawbone's outside legal counsel's escrow account (the "Escrow") pursuant to the payment instructions set forth on **Exhibit B** and provided that Jawbone's outside legal counsel has entered into the undertaking set out in **Exhibit C**. Payment into the Escrow for the full amount of Products subject to the accepted PO is required in advance of shipping. Upon Product Acceptance, Distributor will timely notify via email Jawbone's outside legal counsel to release the corresponding amount of funds in Escrow to Jawbone. If Products that are the subject of the accepted PO are not Delivered by Jawbone within ten (10) business days of Distributor paying funds into Escrow, or if the Distributor provides written notification of Rejected Products as set forth in Section 2.3 above, then outside legal counsel will immediately refund the corresponding amount of the funds to the Distributor and, in the case of Rejected Products, Distributor will immediately return such Rejected Products to Jawbone at the Jawbone FOB Point. Distributor shall be responsible for payment of all taxes (other than taxes based on Jawbone's income), fees, duties (not including import and customs duties), and other governmental charges, and any related penalties and interest, arising from the payment of the Product price to Jawbone or delivery of Product to Distributor.

4. Confidentiality. On August 19, 2015, the parties executed a Mutual Non-Disclosure Agreement ("NDA"), the terms and conditions of which are incorporated herein. For the avoidance of doubt, the terms of this Agreement are Confidential Information (as that term is defined in the NDA).

5. Representation and Warranties.

- 5.1. By Distributor. Distributor represents, warrants, and covenants to Jawbone that: (a) it has the authority to enter into the Agreement, and that the persons signing the Agreement on behalf of Distributor are authorized to sign; and (b) it shall not make any false or misleading representations about Jawbone or the Product(s).
- 5.2. By Jawbone.
- 5.2.1. Jawbone represents, warrants, and covenants to Distributor that: (a) it has the authority to enter into the Agreement, and the persons signing the Agreement on behalf of Jawbone are authorized to sign; (b) as of the date of this Agreement, Jawbone holds all right, title, and interest in and to the Products, and the

Products are free and clear of all liens, security interest, and other third party claims to ownership of the Products; and (c) the Products are brand new and are not refurbished or used stock.

5.2.2. Jawbone offers a limited warranty to end-user purchasers of its Products as further described in the user manual and at <https://jawbone.com/warranty>. Distributor shall direct end-user purchasers to Jawbone for resolution of any Product warranty claims. Except as set forth in this Section 5.2.2, no other warranties apply to the Products.

5.2.3. **Exclusive Warranties.** TO THE EXTENT PERMITTED BY APPLICABLE LAWS, THE FOREGOING WARRANTIES ARE DISTRIBUTOR'S SOLE AND EXCLUSIVE WARRANTIES. JAWBONE SPECIFICALLY DISCLAIMS THE IMPLIED WARRANTIES OF MERCHANTABILITY, TITLE, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT.

6. **Termination.** This Agreement shall terminate on December 31, 2016. Either party may terminate this Agreement in the event of a material breach which is not cured within five (5) days notice to the party in breach. All terms that by their nature should survive the termination or expiration of this Agreement shall survive where necessary to effectuate the intent of the parties.

7. **Limitation of Liability.** TO THE EXTENT PERMITTED BY APPLICABLE LAWS, IN NO EVENT SHALL JAWBONE OR ITS SUPPLIERS BE LIABLE FOR ANY SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL LOSSES OR DAMAGES WHATSOEVER (INCLUDING WITHOUT LIMITATION, LOSS OF PROFITS, OTHER COMMERCIAL LOSS, OR COST OF PROCUREMENT OF SUBSTITUTE GOODS), EVEN IF JAWBONE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH POTENTIAL LOSSES OR DAMAGES. IN NO EVENT SHALL JAWBONE'S CUMULATIVE LIABILITY UNDER OR IN CONNECTION WITH THE AGREEMENT EXCEED THE AGGREGATE CONSIDERATION PAID BY DISTRIBUTOR TO JAWBONE HEREUNDER. THIS LIMITATION OF LIABILITY IS CUMULATIVE, WITH ALL PAYMENTS FOR CLAIMS IN CONNECTION WITH THE AGREEMENT BEING AGGREGATED TO DETERMINE SATISFACTION OF THE LIMIT. THE EXISTENCE OF ONE OR MORE CLAIMS SHALL NOT ENLARGE THE LIMIT. DISTRIBUTOR ACKNOWLEDGES THAT THE PRICE CHARGED TO DISTRIBUTOR HEREUNDER FOR THE PRODUCTS REFLECTS THE ALLOCATION OF RISK SET FORTH IN THE AGREEMENT AND THAT JAWBONE WOULD NOT ENTER INTO THE AGREEMENT WITHOUT THESE LIMITATIONS ON ITS LIABILITY. IN ADDITION, JAWBONE DISCLAIMS ALL LIABILITY OF ANY KIND ON BEHALF OF JAWBONE'S SUPPLIERS AND LICENSORS.

8. **Miscellaneous.**

8.1. **No Relationship.** Nothing set forth in this Agreement creates or shall be deemed to create a partnership, joint venture, or agency relationship between Distributor and Jawbone. Distributor's relationship to Jawbone is that of an independent contractor, neither party is an agent or partner of the other, and nothing contained in the Agreement shall be construed to give either party the power to direct or control the day-to-day activities of the other. Distributor shall not have, and shall not represent to any third party that it has, any authority to act on behalf of Jawbone. All financial obligations associated with Distributor's business are the responsibility of Distributor.

8.2. **Licenses and Export.** Distributor agrees to comply with all applicable laws, including export laws. Distributor shall obtain any required non-U.S. governmental authorizations, including without limitation any import licenses and foreign exchange permits, from the appropriate authorities. Distributor shall provide proof of compliance with required non-U.S. governmental authorization to Jawbone upon request.

8.3. **Notices.** Notices to Distributor and Jawbone hereunder must be given by personal delivery or overnight courier to Distributor at 21 Taylors Road, Morningside, Auckland, New Zealand, Attn Mark Priscott and to Jawbone at 99 Rhode Island St., San Francisco, CA 94103 USA, Attn: General Counsel.

8.4. **Waiver; Severability.** The failure of a party to require performance by the other party of any provision of the Agreement does not affect the full right to require such performance at any time thereafter; nor does a waiver by either party of a breach of any provision thereof a waiver of the provision itself. The invalidity or unenforceability of any provision set forth herein do not in any way affect the validity or enforceability of any other provision.

- 8.5. Force Majeure. In no event shall either party be responsible for any breach of the Agreement (except the payment of money owed) due to the occurrence of any events beyond its reasonable control, including, but not limited to war, insurrection, governmental action, acts of God, or any other similar causes beyond the control of a party, provided that such party uses reasonable efforts, under the circumstances, to notify the other party of the circumstances causing the delay and to resume performance as soon as possible.
- 8.6. General. This Agreement, including any Exhibits and documents referred to herein or attached hereto, constitutes the entire and exclusive statement of agreement between the parties with respect to the subject matter and it supersedes any prior or contemporaneous oral or written communications between the parties. In the event of conflict between the terms of this Agreement and the terms of any Exhibit hereto, the terms of the Agreement shall govern. Neither party may assign this Agreement without the other party's prior written consent (not to be unreasonably withheld). Any attempted assignment in violation of the foregoing shall be void. This Agreement may only be modified by a written document executed by the parties. This Agreement shall be construed in accordance with the laws of the State of California without regard to conflict of law principles. The United Nations Convention on Contracts for the International Sale of Goods does not apply to the Agreement. Each party irrevocably submits to the exclusive jurisdiction of the courts of the State of California located in San Francisco County and the courts of the United States in the Northern District of California for the purpose of any suit, action or other proceeding arising out of the Agreement or any transaction contemplated hereby; provided, however, that either party may take action in any court having jurisdiction to protect its Confidential Information and intellectual property rights. The official text of the Agreement (and any Exhibits thereto or notice submitted hereunder) shall be in English. In the event of any dispute concerning the construction or meaning of the Agreement, reference shall be made only to the Agreement as written in English and not to any translation into another language.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed.

Distributor

DocuSigned by:
Mark Priscott
 Signature: _____
668F3E792A07426...

Jawbone

DocuSigned by:
Jason Child
 Signature: _____
4787091056009493...

Printed Name: Mark Priscott _____

Printed Name: Jason Child

Title: General Manager _____

Title: Chief Financial Officer

Date: 4/29/2016 _____

Date: 4/29/2016 _____

EXHIBIT A

Products:

Product	Price	Units	Cash Payment	Minimum	
					Prices
MINI	\$39.00	49,582	\$1,933,698	\$	129.99
UP4 (version as of 4/28/2016)	\$25.75	11,553	\$297,490	\$	119.99
UP3 (version as of 4/28/2016)	\$29.00	204,716	\$5,936,764	\$	99.99
UP2 Rope	\$18.00	118,126	\$2,126,268	\$	79.99
UP2	\$17.00	54,685	\$929,645	\$	79.99
UP MOVE Black	\$10.00	10,000	\$100,000	\$	49.99
UP Move Colors	\$6.50	154,649	\$1,005,219	\$	49.99
Total		603,311	\$12,329,083		

Territory: Worldwide

Jawbone FOB Point:	<u>Americas</u>	<u>EMEA – IMM EU</u>	<u>EMEA - Luzern</u>	<u>APAC</u>
	2290 Enrico Fermi Dr, Suite 19 San Diego, CA 92154	Logistický areál Westpoint D2 Hala 3, č.p. 1070 Lozorno 900 55 Slovak Republic	Blanchardstown Business & Technology Park Snugborough Road Dublin 15	[TBD]

EXHIBIT B

ADDRESSES AND PAYMENT INSTRUCTIONS

Distributor Addresses	Jawbone Addresses
<p>Send invoices to:</p> <p>Distributor Name: Protempo Limited</p> <p>Distributor Address:</p> <p>21 Taylors Road, Morningside, Auckland, New Zealand</p> <p>finance@protempo.com</p>	<p>Send Distributor Purchase Orders to:</p> <p>[REDACTED]</p> <p>and</p> <p>[REDACTED]</p> <p>or as otherwise directed by Jawbone in writing</p>

Escrow Information:

General Trust Account
City National Bank
San Francisco Private Client Services
150 California Street, Suite 1200
San Francisco, CA 94111
ABA # [REDACTED]
Swift Code: CINAUS6L
Account Name: *Cooley LLP Attorney Trust Account*
Account # [REDACTED]
Wire Details: FBO AliphCom

Payment Instructions: Payment is due prior to shipping of Products. Payment shall be by wire in U.S. dollars. Wire instructions for the Escrow will be sent in an encrypted email, and Distributor will need to sign into the Cooley LLP email gateway to retrieve the wire instructions.

EXHIBIT C

ESCROW AGENT UNDERTAKING

Ladies and Gentlemen,

Cooley LLP ("Cooley") is counsel to Aliphcom d/b/a Jawbone ("Jawbone") from time to time on a variety of matters. It has come to Cooley's attention that Jawbone and Protempo Limited ("Protempo") are contemplating a transaction in the form attached to this letter ("Agreement") and that, in connection with the Agreement, the parties would like Cooley to provide an escrow account ("Escrow") for handling payment of monies owed.

In this regard, Cooley agrees to hold in the Escrow any monies paid by Protempo in connection with the Agreement. Cooley will only release such funds from the Escrow to Jawbone or Protempo as required by Section 3 of the Agreement and only and strictly as required by Section 3 of the Agreement. Cooley agrees to release funds to Jawbone or Protempo immediately upon receiving Protempo's instructions regarding Product Acceptance or Rejected Products. All communications to Cooley shall be sent via email to [REDACTED]

The parties acknowledge and agree that Cooley is not acting as a fiduciary or agent to Jawbone, Protempo, or any other third party with respect to any funds deposited into the Escrow, and Cooley accepts no fiduciary duties with respect to these funds.

Sincerely,

Craig D. Jacoby

ACKNOWLEDGED AND AGREED.

JAWBONE

DocuSigned by:
Jason Child
4797891D8CC463

PROTEMPO

DocuSigned by:
Mark Priscott
669F3E796A074A6

EXHIBIT B

**AMENDMENT NO. 1 TO
NON-EXCLUSIVE SALES & DISTRIBUTION AGREEMENT**

This Amendment No. 1 ("**Amendment**") to that certain Agreement (as herein defined) is entered into as of June 2, 2016, (the "**Amendment Effective Date**") by and between AliphCom, dba Jawbone, a California corporation, with offices at 99 Rhode Island St., San Francisco, CA 94103 USA ("**Jawbone**") and Protempo Limited, a New Zealand corporation, with offices at 21 Taylors Road, Morningside, Auckland 1025, New Zealand ("**Distributor**"). Capitalized terms not otherwise defined herein shall have the meaning specified in the Agreement.

RECITALS

WHEREAS Jawbone and Distributor previously entered into a Non-Exclusive Sales & Distribution Agreement dated April 29, 2016 (the "**Agreement**"); and

WHEREAS the parties would like to add additional Products to be sold under the Agreement;

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby amend the Agreement as set forth below:

1. Section 1.1. shall be deleted in its entirety and replaced with the following:
 - 1.1 **Products.** Jawbone and Distributor are entering into a non-exclusive commercial relationship for the distribution and sale in the Territory to Distributor of the Jawbone-branded products ("**Products**"), as further set forth on an Exhibit A. Additional Jawbone products may be added to this Agreement only upon the mutual written agreement of the parties and by adding an additional Exhibit A (e.g., Exhibit A-1, Exhibit A-2, etc.) with any corresponding details for such transaction. Each Exhibit A (e.g., Exhibit A, Exhibit A-1, Exhibit A-2, etc.) shall collectively be defined as "**Exhibit A.**" Jawbone may, in its sole discretion, and without incurring any liability to Distributor, change the features, or discontinue the sale, of any of the Products, provided Jawbone provide at least 6 months notice before any information becomes public regarding the discontinuing of support for the Jawbone app. Distributor shall be permitted to sell the Products to and through its own authorized resellers and shall use commercially reasonable efforts to ensure that its authorized resellers perform in accordance with the terms of this Agreement, and to monitor for and inform Jawbone of any deviances.
2. Exhibit A-1 (attached hereto) is hereby added to the Agreement.
3. Except as expressly amended herein, all other terms and conditions of the Agreement shall remain in full force and effect.

(signature page follows)

IN WITNESS WHEREOF, each of the undersigned parties has caused this Amendment to be executed and delivered as of the Amendment Effective Date.

Distributor

DocuSigned by:
Signature: Mark Priscott
054F3E792A074A5

Printed Name: Mark Priscott

Title: General Manager

Date: 6/9/2016

Jawbone

DocuSigned by:
Signature: Jason Child
675996681A5F461...

Printed Name: Jason Child

Title: CFO

Date: 6/9/2016

EXHIBIT A-1**Products:***Ship by:**6/10/2016**6/24/2016*

Product	Price	Pre-packed units	To be packed units	Total Units	Cash Payment	Minimum Jawbone.com prices
UP2 Rope	\$14.40	13,126	46,874	60,000	\$864,000	\$79.99
UP3 (version as of 4/28/2016)	\$23.20	24,380	22,620	47,000	\$1,090,400	\$99.99
GRAND TOTALS		37,506	69,494	107,000	\$1,954,400	

Payment Terms: Notwithstanding the payment instructions in Section 3 of the Agreement, payment for the Products set forth on this Exhibit A-1 shall be in the form of a direct cash payment to Jawbone pursuant to the wire instructions set forth below. Payment-in-full by Distributor for all Products subject to this Exhibit A-1 is due by June 9, 2016. Jawbone will not ship the Products until payment-in-full is received. Distributor shall be responsible for payment of all taxes (other than taxes based on Jawbone's income), fees, duties (not including import and customs duties), and other governmental charges, and any related penalties and interest, arising from the payment of the Product price to Jawbone or delivery of Product to Distributor.

Wire Instructions:

Company Name: AliphCom

Bank: Wells Fargo Bank

Bank Account #: [REDACTED]

Routing / ABA #: [REDACTED]

Beneficiary: AliphCom

SWIFT: WFBIUS6S

Address: WELLS FARGO BANK, N.A. PO BOX
63020, SAN FRANCISCO, CA 94163**Jawbone FOB Point:**

<u>Americas</u>	<u>EMEA – IMM EU</u>	<u>EMEA - Luzern</u>	<u>APAC</u>
2290 Enrico Fermi Dr., Suite 19 San Diego, CA 92154	Logistický areál Westpoint D2 Hala 3, č.p. 1070 Lozorno 900 55 Slovak Republic	Blanchardstown Business & Technology Park Snugborough Road Dublin 15	[TBD]

EXHIBIT C

**AMENDMENT NO. 2 TO
NON-EXCLUSIVE SALES & DISTRIBUTION AGREEMENT**

This Amendment No. 2 ("Second Amendment") to that certain Agreement (as herein defined) is entered into as of June 9, 2016, (the "Second Amendment Effective Date") by and between AliphCom, dba Jawbone, a California corporation, with offices at 99 Rhode Island St., San Francisco, CA 94103 USA ("Jawbone") and Protempo Limited, a New Zealand corporation, with offices at 21 Taylors Road, Morningside, Auckland 1025, New Zealand ("Distributor"). Capitalized terms not otherwise defined herein shall have the meaning specified in the Agreement.

RECITALS

WHEREAS Jawbone and Distributor previously entered into a Non-Exclusive Sales & Distribution Agreement dated April 29, 2016 (the "Agreement"), and a First Amendment to the Agreement dated June 2, 2016 (the "First Amendment," and together with the Agreement, the "Agreement"); WHEREAS the parties would like to add additional Products to be sold under the Agreement;

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby amend the Agreement as set forth below:

1. Exhibit A-2 (attached hereto) is hereby added to the Agreement.
2. Except as expressly amended herein, all other terms and conditions of the Agreement shall remain in full force and effect.

(signature page follows)

IN WITNESS WHEREOF, each of the undersigned parties has caused this Second Amendment to be executed and delivered as of the Second Amendment Effective Date.

Distributor

DocuSigned by:
Signature: Mark Priscott
885337702A07446

Printed Name: Mark Priscott

Title: General Manager

Date: 6/9/2016

Jawbone

DocuSigned by:
Signature: Jason Child
975998881A5F481...

Printed Name: Jason Child

Title: CFO

Date: 6/9/2016

EXHIBIT A-2**Products:***Ship by:**Payment due by:*

6/22/2016

6/9/2016

Product	Price	Total Units	Cash Payment	Minimum prices
ERA 2.0	\$7.20	1,995	\$14,364	N/A
ERA 2.0-SB	\$18.00	218	\$3,924	N/A
ICON	\$4.80	558	\$2,678	N/A
JAMBOX	\$13.03	2,554	\$33,279	N/A
JB2X	\$3.60	77	\$277	N/A
MINI JAMBOX	\$31.98	13,781	\$440,716	\$129.99
UP24	\$7.65	624	\$4,774	N/A
GRAND TOTALS		19,807	\$500,012	

Payment Terms: Notwithstanding the payment instructions in Section 3 of the Agreement, payment for the Products set forth on this Exhibit A-2 shall be in the form of a direct cash payment to Jawbone pursuant to the wire instructions set forth below. Payment-in-full by Distributor for all Products subject to this Exhibit A-1 is due by June 9, 2016. Jawbone will not ship the Products until payment-in-full is received. Distributor shall be responsible for payment of all taxes (other than taxes based on Jawbone's income), fees, duties (not including import and customs duties), and other governmental charges, and any related penalties and interest, arising from the payment of the Product price to Jawbone or delivery of Product to Distributor.

Wire Instructions:

Company Name: AliphCom

Bank: Wells Fargo Bank

Bank Account #: [REDACTED]

Routing / ABA #: [REDACTED]

Beneficiary: AliphCom

SWIFT: WFBIUS6S

Address: WELLS FARGO BANK, [REDACTED] PO BOX
63020, SAN FRANCISCO, CA 94163Jawbone FOB Point:

<u>Americas</u>	<u>EMEA – IMM EU</u>	<u>EMEA - Luzern</u>	<u>APAC</u>
2290 Enrico Fermi Dr., Suite 19 San Diego, CA 92154	Logistický areál Westpoint D2 Hala 3, č.p. 1070 Lozorno 900 55 Slovak Republic	Blanchardstown Business & Technology Park Snugborough Road Dublin 15	[TBD]

EXHIBIT D

**AMENDMENT NO. 3 TO
NON-EXCLUSIVE SALES & DISTRIBUTION AGREEMENT**

This Amendment No. 3 ("**Third Amendment**") to that certain Agreement (as herein defined) is entered into as of September 14, 2016, (the "**Third Amendment Effective Date**") by and between AliphCom, dba Jawbone, a California corporation, with offices at 99 Rhode Island St., San Francisco, CA 94103 USA ("**Jawbone**") and Protempo Limited, a New Zealand corporation, with offices at 21 Taylors Road, Morningside, Auckland 1025, New Zealand ("**Distributor**"). Capitalized terms not otherwise defined herein shall have the meaning specified in the Agreement.

RECITALS

WHEREAS Jawbone and Distributor previously entered into a Non-Exclusive Sales & Distribution Agreement dated April 29, 2016, as amended on June 2, 2016 and June 9, 2016 (collectively, the "**Agreement**");

WHEREAS the parties would like to further amend the Agreement as set forth herein;

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby amend the Agreement as follows:

1. Section 1.1. shall be deleted in its entirety and replaced with the following:

1.1 Products. Jawbone and Distributor are entering into a non-exclusive commercial relationship for the distribution and sale in the Territory to Distributor of the Jawbone-branded products ("**Products**"), as further set forth on an Exhibit A. Additional Jawbone products may be added to this Agreement only upon the mutual written agreement of the parties and by adding an additional Exhibit A (e.g., Exhibit A-1, Exhibit A-2, etc.) with any corresponding details for such transaction. Each Exhibit A (e.g., Exhibit A, Exhibit A-1, Exhibit A-2, etc.) shall collectively be defined as "**Exhibit A**." Jawbone may, in its sole discretion, and without incurring any liability to Distributor, change the features, or discontinue the sale, of any of the Products, provided Jawbone provides at least 12 (twelve) months notice before any information becomes public regarding the discontinuing of support for the Jawbone app. Distributor shall be permitted to sell the Products to and through its own authorized resellers and shall use commercially reasonable efforts to ensure that its authorized resellers perform in accordance with the terms of this Agreement, and to monitor for and inform Jawbone of any deviances.

2. Section 1.4. shall be deleted in its entirety and replaced with the following:

1.4 Exclusivity; Right of First Refusal. Subject to Section 1.5 below and except for direct sales to Jawbone's corporate wellness customers in connection with Jawbone's corporate wellness program, Jawbone will not sell or agree to sell Products to any customer other than Distributor for the period between the Effective Date through July 31, 2016 ("**Exclusivity Period**"). Following the Exclusivity Period and through April 1, 2017, in the event that Jawbone wishes to sell any additional quantities of Products beyond the amounts set forth on Exhibit A, Distributor shall have a right of first refusal ("**ROFR**") for thirty (30) days to purchase such Products. The ROFR will begin upon Jawbone submitting a written offer via email for Products to Distributor, and all other terms of this Agreement will apply to such offer. In the event of expiration or Distributor's rejection of the ROFR, Jawbone is free to sell the Products to any other third parties, provided that the terms offered to third parties are substantially the same as those offered to Distributor. For clarification, the offering of amended terms or prices for the purchase of Products on more favourable terms shall constitute a new offer and Distributor shall receive a new ROFR.

3. Exhibit A-3 (attached hereto) is hereby added to the Agreement.
4. Except as expressly amended herein, all other terms and conditions of the Agreement shall remain in full force and effect.

(signature page follows)

IN WITNESS WHEREOF, each of the undersigned parties has caused this Second Amendment to be executed and delivered as of the Second Amendment Effective Date.

Distributor

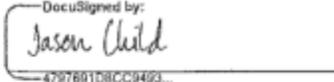
Signature: 

Printed Name: Mark Priscott _____

Title: General Manager _____

Date: 9/14/2016 _____

Jawbone

Signature: 

Printed Name: Jason Child _____

Title: CFO _____

Date: 9/14/2016 _____

EXHIBIT A-3**Products:**

Product	Pick up by 9/23		4-6 Wk Lead Time		Retail Price	New Bulk Price	Retail \$	Bulk \$	9/16 Cash	Cash due on final shipment release	Total Cash
	TJ Retail Volume	Luzern Retail Volume	TJ Bulk Units	Total Units							
UP3	16,291	5,769	57,355	79,415	\$16.24	\$13.27	\$358,254	\$665,318	\$1,023,572	\$95,783	\$1,119,355
ERA 2.0	939	582	3,160	4,681	\$5.04	\$3.60	\$7,666	\$11,376	\$19,042	\$-	\$19,042
ERA 2.0-SB	709	55	47	811	\$12.60	\$9.00	\$9,626	\$423	\$10,049	\$-	\$10,049
BIG	329	126	685	1,140	\$59.50	\$42.50	\$27,073	\$29,113	\$56,185	\$-	\$56,185
JAMBOX	721	139	6	866	\$9.12	\$6.52	\$7,843	\$39	\$7,882	\$-	\$7,882
MINI	1,725	1	24	1,750	\$22.39	\$15.99	\$38,645	\$384	\$39,029	\$-	\$39,029
UP MOVE	30,506	152	22,351	53,009	\$4.55	\$3.25	\$139,494	\$72,641	\$212,135	\$-	\$212,135
UP2	1,420	772	19,896	22,088	\$10.08	\$10.55	\$22,095	\$143,251	\$165,347	\$66,694	\$232,041
UP2 Rope	15,176	7,177	14,763	37,116	\$10.08	\$10.24	\$225,318	\$106,294	\$331,612	\$44,891	\$376,503
UP24	495	2,413	106	3,014	\$5.36	\$3.83	\$15,587	\$406	\$15,993	\$-	\$15,993
UP4	378	0	1,796	2,174	\$18.03	\$14.55	\$6,815	\$23,132	\$29,948	\$2,999	\$32,947
Total	68,689	17,186	120,189	206,064			\$858,417	\$1,052,376	\$1,910,794	\$210,367	\$2,121,161

Notes:

- Cash due to Jawbone bank account by COB 9/16/2016.
- TJ Retail and Luzern Retail units to be ready for Distributor pickup by 9/23/2016.
- TJ Bulk units require packout before they can be shipped, and will be held at the Americas FOB Point until packaging arrives. Packout will occur at Americas FOB Point. Distributor is liable for all costs associated with packout of the TJ Bulk units (e.g., packaging, labor), which costs are reflected in TJ Bulk units pricing above. Jawbone estimates packout of the TJ Bulk units will require 4-6 weeks from the time that packaging materials are received at the Americas FOB Point. The parties shall work together in good faith to determine shipment quantities and intervals of the TJ Bulk units. The UP3 and UP4 TJ Bulk units will be packed in Frustration Free Packaging (FFP).

Payment Terms: Notwithstanding the payment instructions in Section 3 of the Agreement, payment for the Products set forth on this Exhibit A-3 shall be in the form of a direct cash payment to Jawbone pursuant to the wire instructions set forth below. Payment-in-full by Distributor for all Products subject to this Exhibit A-3 is due by September 16, 2016. Jawbone will not ship the Products until payment-in-full is received. Distributor shall be responsible for payment of all taxes (other than taxes based on Jawbone's income), fees, duties (not including import and customs duties), and other governmental charges, and any related penalties and interest, arising from the payment of the Product price to Jawbone or delivery of Product to Distributor.

Wire Instructions:

Company Name: AliphCom

Bank: Wells Fargo Bank

Bank Account #: [REDACTED]

Routing / ABA #: [REDACTED]

Beneficiary: AliphCom

SWIFT: WFBIUS6S

Address: WELLS FARGO BANK, [REDACTED] PO BOX
63020, SAN FRANCISCO, CA 94163

Jawbone FOB Point:

<u>Americas</u> <i>(for TJ Retail units and TJ Bulk units)</i>	<u>EMEA</u> <i>(for Luzern Retail units)</i>
2290 Enrico Fermi Dr., Suite 19 San Diego, CA 92154	Blanchardstown Business & Technology Park Snugborough Road Dublin 15

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA, COUNTY OF ORANGE

3
4 I am employed by the law office of Rutan & Tucker, LLP in the County of Orange, State
5 of California. I am over the age of 18 and not a party to the within action. My business address is
6 611 Anton Boulevard, Suite 1400, Costa Mesa, California 92626-1931.

7 On December 22, 2017, I served on the interested parties in said action the within:
8 **SECOND AMENDED COMPLAINT FOR: (1) Promissory Fraud; (2) Fraud and**
9 **Intentional Deceit; (3) Negligent Misrepresentation; (4) Breach of Contract (Direct**
10 **Claims); (5) Unjust Enrichment; (6) Breach of Warranty; (7) Conversion; (8) Account**
11 **Stated; (9) Open Book Account; (10) Breach of Contract (Assigned Claims); (11) Account**
12 **Stated (Assigned Claims); (12) Open Book Account (Assigned Claims); (13) Violation of**
13 **Penal Code section 496(a).**

14 as stated below:

15 Brian D. Murray
16 Loeb & Loeb LLP
17 10100 Santa Monica Blvd., Suite 2200
18 Los Angeles, CA 90067

19 Jeffrey Goldenhersh
20 Skadden, Arps, Slate, Meagher & Flom LLP
21 300 South Grant Avenue
22 Los Angeles, CA 90071

23 *Attorneys for Defendant Jason Child*

24 *Attorneys for Defendant Hosain Rahman*

25 (BY FEDEX) by depositing in a box or other facility regularly maintained by FedEx, an
26 express service carrier, or delivering to a courier or driver authorized by said express
27 service carrier to receive documents, a true copy of the foregoing document in sealed
28 envelopes or packages designated by the express service carrier, addressed as shown
above, with fees for overnight delivery provided for or paid.

Executed on December 22, 2017, at Costa Mesa, California.

I declare under penalty of perjury under the laws of the State of California that the
foregoing is true and correct.

20
21 _____
Melody Conour
(Type or print name)

22
23 
24 _____
(Signature)