

ATTORNEY GENERAL OF THE STATE OF NEW YORK

In the Matter of

Runtastic GmbH

Assurance No.: 16-174

**ASSURANCE OF DISCONTINUANCE
UNDER EXECUTIVE LAW
SECTION 63, SUBDIVISION 15**

Pursuant to the provisions of Section 63(12) of the Executive Law, New York Education Law Section 6515, and Article 22-A of the General Business Law, Eric T. Schneiderman, Attorney General of the State of New York, caused an inquiry to be made into certain business practices of Runtastic GmbH (“Runtastic¹”). Based upon that inquiry, the Office of the Attorney General (“the OAG”) has made the following findings, and Runtastic has agreed to modify its business practices and comply with the following provisions of this Assurance of Discontinuance (“Assurance”).

I. BACKGROUND

1. The proliferation of smartphones and other mobile devices has created intense demand for mobile applications,² which consumers generally purchase through two online stores, Apple’s App Store (which offers versions for iPhones and compatible devices), and Google Play (which offers versions for Android phones and compatible devices).

¹ In this Assurance, “Runtastic” shall mean Runtastic’s owners, officers, agents, servants, employees, and those persons in active concert or participation with them.

² “Mobile application” is defined herein as a program designed to be or capable of being used on a smartphone or other mobile device.

2. Health-related mobile applications have become especially popular, with more than 165,000 currently available.³ The majority of these provide general medical reference and education or allow consumers to track their fitness or symptoms based on data they input themselves, and may promote health awareness. A narrower category of mobile applications (hereafter, “Health Measurement Apps”), however, purport to measure vital signs or other indicators of health using only a smartphone’s camera and sensors, without any external device. These Health Measurement Apps can be harmful to consumers if they provide inaccurate or misleading results.⁴ For example, these apps can provide false reassurance that a consumer is healthy, which might cause her to forego necessary medical treatment and thereby jeopardize her health. Conversely, Health Measurement Apps can incorrectly indicate a medical issue, causing a consumer to unnecessarily seek medical treatment – sometimes from a hospital emergency room.

II. THE OAG’S INVESTIGATION AND FINDINGS

3. Runtastic is an Austrian company with its principal place of business at Pluskaufstraße 7, Business Center, 4061 Pasching bei Linz, Austria.

4. The OAG’s Health Care Bureau received reports that consumers are downloading a Health Measurement App named “Heart Rate Monitor, Heartbeat & Pulse Tracker” (“Heart

³ See <http://www.latimes.com/business/technology/la-me-mobile-health-safety-20160412-story.html>.

⁴ See, e.g., <http://www.imedicalapps.com/2015/02/apple-google-health-app-patients/>; <http://www.nejm.org/doi/full/10.1056/NEJMh1403384>; http://www.slate.com/blogs/future_tense/2013/09/24/mhealth_fda_needs_to_regulate_digital_snake_oil.html; <http://www.motherjones.com/environment/2015/01/medical-apps-not-helping>; http://www.wired.com/2014/07/medical_apps/.

Rate Monitor”),⁵ and using it to measure their heart rate, or pulse. The OAG subsequently launched an investigation regarding Heart Rate Monitor.

5. Runtastic created, and since 2009, has offered, a variety of apps for sale to consumers, including in New York State, through Apple’s App Store and Google Play. Heart Rate Monitor was first made available by Runtastic on December 18, 2012, and, according to the company, “[t]urn[s] your iPhone into your personal HEART RATE MONITOR.”⁶ American consumers have downloaded more than 1 million copies of Heart Rate Monitor, and the app has generated tens of thousands of dollars in revenue.

6. Heart rate, the number of times the heart beats per minute, is a vital sign that health care providers monitor in their patients.⁷ Healthy people typically have a resting heart rate between 60 and 100 beats per minute (“BPM”). A resting heart rate above or below this range can indicate a medical condition, such as heart disease.⁸ Clinicians measure heart rate using a heart rate monitor, which employ two types of technologies: electrocardiography (“ECG”), which measures the heart’s electrical activity, and photoplethysmography (“PPG”), which senses the rate of blood flow via light shined through the skin. Chest-strap heart rate monitors use ECG. A device called a pulse oximeter, which uses PPG to measure the level of oxygen in the blood, may also be used to measure heart rate.

⁵ The App is available in a free version, a “Pro” version for \$1.99, and as part of “packs” that include other apps.

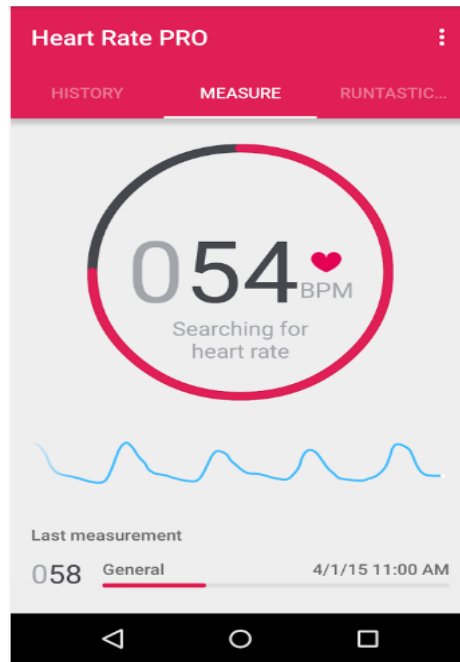
⁶ <https://itunes.apple.com/us/app/runtastic-heart-rate-monitor/id586956623?mt=8>.

⁷ <https://medlineplus.gov/ency/article/002341.htm>.

⁸ <http://www.mayoclinic.org/healthy-lifestyle/fitness/expert-answers/heart-rate/faq-20057979>.

A. Runtastic's Marketing of Heart Rate Monitor

7. Runtastic instructs the consumer that to use Heart Rate Monitor, she must place her index finger against the back camera lens and flashlight of a smart phone. The app then generates a number for her heart rate, as shown in this screenshot⁹:



As depicted above, the user sees a graph with peaks and troughs while Heart Rate Monitor purports to measure her heart rate. A user cannot tell whether the peaks and troughs are related to her actual heart rate, because there is no scale indicating what the graph shows. Heart Rate Monitor allows a user to save, and share via email and social media, the heart rate measurements that the app generates.

8. Heart Rate Monitor purports to provide readings for heart rate at rest, and before, and after, physical activity, because users can tag recorded readings with labels indicating the physical state in which the measurement was made, as shown in this screenshot¹⁰:

⁹ <https://play.google.com/store/apps/details?id=com.runtastic.android.heartrate.pro&hl=en>.



9. Runtastic placed Heart Rate Monitor in the “Health & Fitness” category in Apple’s App Store, and in the listing it created for the App Store, makes the following claims about Heart Rate Monitor¹¹:

- a. “Turn your iPhone into your personal HEART RATE MONITOR....”
- b. “It’s easy to determine your physical or mental condition based on your pulse....”
- c. “Measure your heart rate after a training session to find out how your cardiovascular system is doing under stress.”
- d. “EFFICIENT ANALYSIS.”

¹⁰ <https://itunes.apple.com/us/app/runtastic-heart-rate-monitor/id586956623?mt=8>.

¹¹ <https://itunes.apple.com/us/app/runtastic-heart-rate-monitor/id586956623?mt=8>.

10. Runtastic placed Heart Rate Monitor in the “Health & Fitness” category in the Google Play store, and in the listing it created for Google Play store, makes the following claims about Heart Rate Monitor¹²:

- a. “Download Runtastic HEART RATE MONITOR app and turn your Android phone into an Instant Heart Rate Monitor - yep, that’s possible!”
- b. “Your pulse is racing, your heart is in your mouth: It’s easy to determine your physical or mental condition based on your pulse - and not only when you’re excited. Measure your heart rate after a training session to find out how your cardiovascular system is doing under stress. Or, take an HR measurement before your next exam. Runtastic Heart Rate shows you how fast your heart is beating at any given moment, no extra devices needed. Your smartphone will do the job. Unbelievable? Just try it out!”
- c. “Measure your heart rate with your smartphone camera.”
- d. “EFFICIENT ANALYSIS.”
- e. “Eager to know if your fitness level has improved? Measure your heart rate on a regular basis and monitor the progress of your resting heart rate.”
- f. “Download the Runtastic Heart Rate App today, check your heart rate regularly and show your friends how cool & calm you remain even when in a seemingly stressful situation!”

11. Runtastic claims that Heart Rate Monitor allows a user to “[c]heck your heart rate anytime, anywhere – when you wake up, before & after exercise or after a stressful business meeting! The Runtastic Heart Rate app measures your heartbeat with great accuracy, using your smartphone camera sensor, helping you get a better sense of your overall health and fitness! Want instant, reliable HR results? Download Runtastic Heart Rate today!”¹³

12. The net impression that Runtastic conveys to the consumer about Heart Rate Monitor is that the app will accurately measure and monitor her heart rate after she has engaged in strenuous physical activity, whatever her physical condition. The name of the app and the

¹² <https://play.google.com/store/apps/details?id=com.runtastic.android.heartrate.pro&hl=en>.

¹³ <https://www.runtastic.com/en/apps/heartrate>.

statements and images referenced in Paragraphs 7 through 11 above, taken together, strongly suggest that the app will accurately measure heart rate, which is a vital sign, with the accuracy of a medical device.

13. Runtastic made the above-noted claims about Heart Rate Monitor without providing sufficient evidence substantiating that the app accurately measures the heart rate of individuals who have engaged in strenuous exercise such as running, despite specifically promoting its use in such conditions.¹⁴

14. The United States Food and Drug Administration (“FDA”) regulates heart rate monitors used to measure heart rate as Class II medical devices,¹⁵ which means they are “higher risk devices than Class I and require greater regulatory controls to provide reasonable assurance of the device’s safety and effectiveness.”¹⁶

15. Heart Rate Monitor can potentially harm consumers by providing inaccurate or misleading results, since accurate heart rate readings are critical to the health of consumers whose medical conditions require them to maintain (or not exceed) a certain heart rate. Consumers could jeopardize their health by relying on inaccurate heart rate readings and potentially reaching dangerous heart rates. For example, if Heart Rate Monitor provides a consumer with a reading of 82 BPM when the consumer’s actual heart rate is much higher, the consumer could exceed the maximum target heart rate for his or her age during exercise, and thereby jeopardize his or her health. A person’s maximum heart rate is generally calculated as 220 BPM minus a person’s age.¹⁷ A person who exceeds 85% of her maximum heart rate (her

¹⁴ Runtastic claims that it performed testing of Heart Rate Monitor prior to the OAG’s investigation, but it did not retain any records of such testing.

¹⁵ See 21 C.F.R. § 870.2300.

¹⁶ <http://www.fda.gov/AboutFDA/Transparency/Basics/ucm194438.htm>.

¹⁷ See <http://www.mayoclinic.org/healthy-lifestyle/fitness/in-depth/exercise-intensity/art->

“maximum target”) during vigorous exercise is at risk of ventricular tachycardia (rapid heart rhythm in the bottom chambers of the heart) and ST-segment depression (abnormalities in ECG), conditions which can indicate increased risk of cardiac mortality.¹⁸ To illustrate, for a 40-year-old person, her maximum heart rate is 180 BPM, and her maximum target is 153 BPM.

16. Numerous on-line, consumer reviews indicate that Heart Rate Monitor is being used by people after exercise, and by people with serious medical conditions (for example, irregular heart rate, stress, chest pain, heart flutter, heart disease, pulmonary hypertension, and cancer), to track their heart rate. Some reviews indicate that its heart rate readings are inaccurate. For example, on July 14, 2015, a user wrote in a review: “Not accurate. Took my heart rate and it said 40 something. That can’t be right because mine is usually faster than other people’s.”

17. As a result of the OAG’s investigation, Runtastic provided to the OAG additional evidence reflecting testing of Heart Rate Monitor. Such testing was supervised by individuals who possess a Ph.D in computer science, M.A. in computer engineering, and an M.A. in mobile computing. One of these individuals is a signatory to the AOD, and attests that Heart Rate Monitor provides accurate heart rate measurements both at rest and after exercise.

20046887?pg=2.

¹⁸ See Atwal, Porter, & MacDonald, *Cardiovascular effects of strenuous exercise in adult recreational hockey: the Hockey Heart Study*. 166 *Canadian Medical Association J.* 303-307 (Feb. 2002); Koplán & Stevenson, *Ventricular tachycardia and sudden cardiac death*. 84 *Mayo Clinic Proceedings* 289-97 (Mar. 2009); Birnbaum et al., *Prognostic significance of precordial ST segment depression on admission electrocardiogram in patients with inferior wall myocardial infarction*. 28 *J. Am. Coll. Cardiology* 313-18 (Aug. 1996).

18. As a result of the OAG’s investigation, Runtastic disclosed clearly and prominently¹⁹, on its website, in app store listings for Heart Rate Monitor, and in a pop-up message that appears upon first use of the app:

WARNING: NOT FOR MEDICAL USE

“If knowing your pulse rate is critical to your health, you need to have your pulse taken by a medical professional. Heart Rate Monitor is not intended to diagnose, prevent or treat any condition, or to be a substitute for professional medical care. Measurements and statistics are intended for informational and educational purposes only, to support general health and wellness. The Heart Rate Monitor app has not been tested with individuals with health conditions and has not been cleared or approved by the U.S. Food and Drug Administration.

19. Runtastic deleted the claim that Heart Rate Monitor allows users to determine “how their cardiovascular system is doing under stress.”

B. Runtastic’s Privacy Practices

20. Runtastic maintains a Privacy Policy that states how the company handles users’ personal information, including heart rate readings generated by Heart Rate Monitor. Prior to the OAG’s investigation, Runtastic did not require that all users expressly consent to the Policy. Rather, unless a user created an account with Runtastic, the company deemed a consumer to have consented to the Privacy Policy by default, if the consumer used the Runtastic web site. This default consent for consumers that used the app without creating an account did not ensure that all users understood Runtastic’s Privacy Policy, because they may never have seen it.

¹⁹ “Clearly and prominently,” as used in this Assurance, means, in textual communications (*e.g.*, printed publications or words displayed on the screen of a computer or mobile device), that the required disclosures are of a type, size, and location sufficiently noticeable for an ordinary consumer to read and comprehend them, in print that contrasts highly with the background on which they appear. The required disclosures must: (1) be presented in an understandable language and syntax; and (2) include nothing contrary to, inconsistent with, or in mitigation of any statement contained within the disclosure or within any document linked to or referenced therein.

21. The combination of the statements in Runtastic's Privacy Policy that "[h]ealth data will never be shared with advertisers or similar agencies," and that the "user explicitly agrees that Runtastic shall have the right to use all automatically collected personally identifiable information, in accordance with the privacy settings of such user, for purposes of the Runtastic applications" was unclear.

22. Runtastic collected and provided to third parties the unique device identifier of users of Heart Rate Monitor, which is personally identifiable information. In other words, Runtastic gives third parties information about users of Heart Rate Monitor that third parties may use to identify users. Runtastic did not disclose this practice to users.

23. Runtastic has a "Live Tracking" feature that enables third parties to see the route and data of the user's sports activity on the runtastic.com platform. The Privacy Policy states that this feature can be deactivated via Profiles-Settings-Privacy, but this option is not available within the app itself. The Privacy Policy also stated that the user activates this feature and that the user will be queried before each session, but this did not occur. On Google Play, a user posted a review in February 2016, stating: "They allow people to see me live on my run, even though I did not enable this setting."

24. Runtastic did not disclose to users of Heart Rate Monitor that the personal health information collected and stored by Runtastic, and subsequently shared by the user via Heart Rate Monitor, may not be protected under the Health Insurance Portability and Accountability Act ("HIPAA").

25. Although Runtastic states in its Privacy Policy that it will not pass on personally identifiable user information to third parties, except as required by law or with the explicit

consent of users, Runtastic did not disclose to consumers the risk that third parties who receive non-personally identifiable user data from Runtastic may reidentify data about specific users.²⁰

26. As a result of the OAG's investigation, Runtastic now secures express consent to its Privacy Policy from users of its mobile applications, via a message that provides users the ability to physically scroll through the entire Policy and, before using the app, requires users to click on a button that states: "I have read and agree to the Terms of Service and Privacy Policy." This applies to any revisions to the Privacy Policy.

27. As a result of the OAG's investigation, Runtastic modified its Privacy Policy to state clearly and prominently the following:

- a. Runtastic deems all user information confidential and does not disclose such information without the express informed consent of the user. Such consent shall be secured through an express action by the consumer such as clicking a check-box, providing an electronic signature, or other substantially similar method, after clear and conspicuous disclosure immediately above such check-box or electronic signature, indicating that the consumer is agreeing to the disclosure of his or her information by Runtastic. A pre-checked box shall not be considered evidence of consent. Runtastic does not release user information to any person or organization not specifically authorized by the individual user. Runtastic does transfer user information to: (i) other health and fitness services, such as MyFitnessPal or Jawbone, after users explicitly consent to the transfer when they connect to such services; and (ii) vendors, service providers, and other partners such as Google Analytics, Emarsys, or Adjust, who help Runtastic to provide and improve its services, such as providing technical infrastructure services or analyzing how the services perform or how they are used.
- b. Runtastic may share Runtastic users' non-health information (such as user-created profile information) with Runtastic "friends" when the user has created a Runtastic account. This default can be changed by Runtastic users in the privacy settings of their account.

²⁰ See Paul Ohm, Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization, 57 UCLA Law Rev. 1701 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1450006; Sweeney L., Only You, Your Doctor, and Many Others May Know, Technology Science, September 29, 2015, available at <http://techscience.org/a/2015092903>.

- c. The “live tracking” feature of Runtastic’s apps can be activated only after express activation by the respective user.
- d. Runtastic provides users an easy-to-use mechanism via its website for a user to request the destruction of all of user information. Runtastic shall comply with such requests within ten days and maintain a record of the destruction for one year.
- e. Runtastic provides users the option to opt out of marketing through an easy-to-use mechanism via its website.
- f. Runtastic deletes all data associated with any canceled or deleted user accounts after a reasonable period of time but no later than thirty (30) days after the user cancels his or her account.
- g. Runtastic has implemented reasonable security policies and procedures designed to protect user information.
- h. Runtastic may disclose user information in response to lawful requests from federal, state, local, or foreign law and civil enforcement agencies.
- i. Runtastic may share with its affiliates, agents and business partners “aggregated” data compiled from the information that it collects from users. Although this data does not identify users personally, there is a risk that third parties who receive such data from Runtastic may reidentify specific users.
- j. Personal health information collected and stored by Runtastic, and subsequently shared by the user via Heart Rate Monitor, may not be protected under the Health Insurance Portability and Accountability Act (“HIPAA”).

III. RELEVANT NEW YORK STATE LAW

28. The New York State Executive Law prohibits “repeated fraudulent or illegal acts” in the conduct of any business, trade or commerce, and allows the OAG to institute a special proceeding for restitution, damages, and/or injunctive relief against any party which has committed such acts. N.Y. Exec. Law § 63(12).

29. The New York General Business Law prohibits “deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service” in New York State, as well as “false advertising in the conduct of any business,” and authorizes the OAG to bring an action to enjoin any such practices. N.Y. Gen. Bus. Law §§ 349 and 350.

30. Marketing a Health Measurement App without substantiation that it accurately measures what it purports to measure, and without fully and clearly disclosing privacy practices, constitute deceptive business practices in violation of New York Executive Law § 63(12) and General Business Law §§ 349 and 350.

NOW, WHEREAS, Runtastic neither admits nor denies the Attorney General’s findings in Paragraphs 4 through 16 and 20 through 25 above; and

WHEREAS, New York laws prohibiting deceptive business practices and misleading advertising confer important consumer and public health protections; and

WHEREAS, Runtastic has cooperated with the OAG’s investigation; and

WHEREAS, the Attorney General is willing to accept the terms of this Assurance under Executive Law Section 63(15) and to discontinue his investigation; and

WHEREAS, the parties each believe that the obligations imposed by this Assurance are prudent and appropriate; and

WHEREAS, the Attorney General has determined that this Assurance is in the public interest.

IT IS HEREBY UNDERSTOOD AND AGREED, by and between the parties that:

IV. PROSPECTIVE RELIEF

A. Documentation of Substantiation

31. If Runtastic makes any material change to its claims concerning the functionality of Heart Rate Monitor, it must perform testing to substantiate any such claims. The testing must be performed by researchers qualified by training and experience to conduct such testing. Runtastic shall secure and preserve all data, analyses, and documents regarding such testing, and make them available to the OAG upon request.

B. Marketing Changes

32. Runtastic shall maintain the changes to Heart Rate Monitor described above in Paragraphs 18 and 19.

33. Runtastic shall not make, or assist others in making, expressly or by implication, including through the use of a mobile application name, endorsement, depiction, or illustration, any false or misleading representation or claim regarding the features or efficacy of a mobile application.

C. Privacy Protections

34. Runtastic shall maintain the changes to its Privacy Policy and acceptance procedure described above in Paragraphs 26 and 27.

35. Runtastic shall not misrepresent in any manner, expressly or by implication, the extent to which it maintains the privacy or security of user information,²¹ including but not limited to:

- a. Its collection or disclosure of any user information, including but not limited to users' device identifier; and
- b. The extent to which Runtastic makes or has made user information accessible to third parties.

36. Prior to sharing any de-identified user information (that users consent to allow Runtastic to share) with third parties, Runtastic shall, in writing, secure the express written agreement of such third parties that they will not attempt to re-identify the information to any particular individual.

37. To protect the security of user information, Runtastic shall:

²¹ "User information," as used in this Assurance, means any information collected from a user and/or provided to a user (*e.g.*, a heart rate measurement) by a Runtastic app.

- a. Establish and implement reasonable security policies and procedures designed to protect user Information. Such policies and procedures, a reasonable summary of which shall be documented in writing, shall be appropriate to the nature and scope of Runtastic's activities and the sensitivity of the covered information.
- b. At least bi-annually, review its existing security policies and procedures designed to protect user Information, and update such policies and procedures as necessary to maintain reasonable security.

V. CIVIL PENALTIES

38. Within thirty (30) days of the Effective Date, Runtastic shall pay \$5,000 to the OAG as a civil penalty. Such sum shall be payable by check to "State of New York Department of Law."

VI. LIQUIDATED DAMAGES

39. If Runtastic violates any provision of this Assurance, the OAG may elect to demand that Runtastic pay liquidated damages of \$5,000 per violation for such non-compliance. Before liquidated damages may be imposed, the OAG shall give Runtastic written notice that Runtastic may be subject to liquidated damages under this Paragraph. In the event that Runtastic does not cure the violation within ten (10) days of receipt of the OAG's written notice, the OAG may impose liquidated damages pursuant to this Paragraph. The damages period shall commence on the date that Runtastic receives the OAG's written notice and end on the date that Runtastic cures the violation or provides the requested information.

VII. GENERAL PROVISIONS

40. Compliance: Runtastic shall submit to the OAG, within ninety (90) days of the Effective Date, a detailed letter certifying and setting forth its compliance with the terms of this Assurance.

41. Runtastic's Representations: The OAG has agreed to the terms of this Assurance based on, among other things, the representations made to the OAG by Runtastic and its counsel

and the OAG's own factual investigation as set forth in the above Findings. To the extent that any material representations are later found to be inaccurate or misleading, this Assurance is voidable by the OAG in its sole discretion.

42. Communications: All communications, reports, correspondence, and payments that Runtastic submits to the OAG concerning this Assurance or any related issues are to be sent to the attention of the person identified below:

Michael D. Reisman, Esq.
Assistant Attorney General
Health Care Bureau
Office of the New York State Attorney General
120 Broadway

New York, New York 10271

43. Receipt by the OAG of materials referenced in this Assurance, with or without comment, shall not be deemed or construed as approval by the OAG of any of the materials, and Runtastic shall not make any representations to the contrary.

44. All notices, correspondence, and requests to Runtastic shall be directed as follows:

Mr. Christian Kaar
Runtastic GmbH
Pluskaufstraße 7 / Business Center
4061 Pasching/Linz (Austria)

45. Valid Grounds and Waiver: Runtastic hereby accepts the terms and conditions of this Assurance and waives any rights to challenge it in a proceeding under Article 78 of the Civil Practice Law and Rules or in any other action or proceeding.

46. No Deprivation of the Public's Rights: Nothing herein shall be construed to deprive any member or other person or entity of any private right under law or equity.

47. No Blanket Approval by the Attorney General of Runtastic's Practices: Acceptance of this Assurance by the OAG shall not be deemed or construed as approval by the OAG of any of Runtastic's acts or practices, or those of its agents or assigns, and none of them shall make any representation to the contrary.

48. Monitoring by the OAG: To the extent not already provided under this Assurance, Runtastic shall, upon request by the OAG, provide all documentation and information necessary for the OAG to verify compliance with this Assurance. Runtastic may request an extension of particular deadlines under this Assurance, but OAG need not grant any such request. This Assurance does not in any way limit the OAG's right to obtain, by subpoena or by any other means permitted by law, documents, testimony, or other information.

49. No Limitation on the Attorney General's Authority: Nothing in this Assurance in any way limits the OAG's ability to investigate or take other action with respect to any non-compliance at any time by Runtastic with respect to this Assurance, or Runtastic's noncompliance with any applicable law with respect to any matters.

50. No Undercutting of Assurance: Runtastic shall not take any action or make any statement denying, directly or indirectly, the propriety of this Assurance or expressing the view that this Assurance is without factual basis. Nothing in this paragraph affects Runtastic's: (a) testimonial obligations, or (b) right to take legal or factual positions in defense of litigation or other legal proceedings to which the OAG is not a party. This Assurance is not intended for use by any third party in any other proceeding.

51. Under Executive Law Section 63(15), evidence of a violation of this Assurance shall constitute prima facie proof of a violation of the applicable law in any action or proceeding thereafter commenced by the OAG.

52. This Assurance shall be governed by the laws of the State of New York without regard to any conflict of laws principles.

53. If a court of competent jurisdiction determines that Runtastic has breached this Assurance, Runtastic shall pay to the OAG the cost, if any, of such determination and of enforcing this Assurance, including, without limitation, legal fees, expenses, and court costs.

54. If the Assurance is voided or breached, Runtastic agrees that any statute of limitations or other time-related defenses applicable to the subject of the Assurance and any claims arising from or relating thereto are tolled from and after the date of this Assurance. In the event the Assurance is voided or breached, Runtastic expressly agrees and acknowledges that this Assurance shall in no way bar or otherwise preclude the OAG from commencing, conducting or prosecuting any investigation, action or proceeding, however denominated, related to the Assurance, against Runtastic, or from using in any way any statements, documents or other materials produced or provided by Runtastic prior to or after the date of this Assurance.

55. None of the parties shall be considered to be the drafter of this Assurance or any provision for the purpose of any statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafter hereof. This Assurance was drafted with substantial input by all parties and their counsel, and no reliance was placed on any representation other than those contained in this Assurance.

56. In the event that any one or more of the provisions contained in this Assurance shall for any reason be held to be invalid, illegal, or unenforceable in any respect, in the sole discretion of the OAG such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance.

57. This Assurance contains an entire, complete, and integrated statement of each and every term and provision agreed to by and among the parties, and the Assurance is not subject to any condition not provided for herein. This Assurance supersedes any prior agreements or understandings, whether written or oral, between and among the OAG and Runtastic regarding the subject matter of this Assurance.

58. This Assurance may not be amended or modified except in an instrument in writing signed on behalf of all the parties to this Assurance.

59. The division of this Assurance into sections and subsections and the use of captions and headings in connection herewith are solely for convenience and shall have no legal effect in construing the provisions of this Assurance.

60. Binding Effect: This Assurance is binding on and inures to the benefit of the parties to this Assurance and their respective successors and assigns, provided that no party, other than the OAG, may assign, delegate, or otherwise transfer any of its rights or obligations under this Assurance without prior written consent of the OAG. "Successors" includes any entity which acquires the assets of Runtastic or otherwise assumes some or all of Runtastic's current or future business.

61. Effective Date: This Assurance is effective on the date that it is signed by the Attorney General or his authorized representative (the "Effective Date"), and the document may be executed in counterparts, which shall all be deemed an original for all purposes.

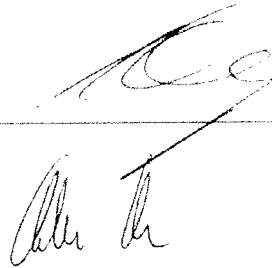
AGREED TO BY THE PARTIES:

Dated: _____

January 30, 2017

Runtastic GmbH

By: _____



REFILED 10976
LCC
CHRISTIAN KAAR
CTO

Dated: New York, New York


January 31, 2017

ERIC T. SCHNEIDERMAN

Attorney General of the State of New York

LISA LANDAU
Bureau Chief
Health Care Bureau

By: _____



MICHAEL D. REISMAN
Assistant Attorney General
Health Care Bureau