

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

LOGANTREE LP,

Plaintiff,

v.

GARMIN INTERNATIONAL, INC. and  
GARMIN USA, INC.,

Defendants.

Case No. 17-1217-EFM-ADM

**MEMORANDUM AND ORDER**

This is a patent infringement case in which plaintiff LoganTree LP (“LoganTree”) accuses defendants Garmin International, Inc. and Garmin USA, Inc.’s (“Garmin”) activity and fitness tracking devices of infringement. This matter is now before the court on the parties’ dispute over the extent to which Garmin must produce source code printouts in addition to the 207 pages Garmin already produced relating to the accused step-counting functionality. LoganTree has filed a Motion for Leave to File Its Motion to Compel Out of Time (ECF 120), which is denied because the court would summarily deny the proposed motion to compel for failing to adequately meet and confer, and also because LoganTree has not demonstrated excusable neglect for filing the motion late. Conversely, Garmin has filed a Motion for a Protective Order Preventing the Unnecessary Printing of Complete Blocks of Source Code. (ECF 129.) That motion is granted because the additional source code printouts are not relevant to the accused functionality, and also because LoganTree’s request violates the applicable protective order provision that prohibits requesting source code printouts for purposes of review. However, the court denies LoganTree’s motion

without prejudice to renewing its motion to compel orally at an in-person hearing as set forth below—this time, after LoganTree complies with its meet-and-confer obligations.

LoganTree also filed a Motion to Modify, in Part, the Amended Scheduling Order to allow it additional time to serve its infringement expert disclosures once Garmin produces additional source code printouts. (ECF 123.) LoganTree has not shown good cause for the requested extension. But denying LoganTree the opportunity to serve an infringement expert disclosure would, as a practical matter, effectively resolve the case on the merits by depriving LoganTree of the opportunity to present expert testimony on the key issue of infringement. This court is required to avoid imposing such a harsh sanction if the court can alleviate the prejudice to Garmin from any belated expert disclosure, which the court can and will. Accordingly, the court holds all further scheduling order deadlines in abeyance pending resolution of the source code issues. Once those issues are fully resolved, the court will reset those scheduling order deadlines, including the deadline for LoganTree to serve its infringement expert disclosures.

## **I. BACKGROUND**

On August 23, 2017, LoganTree filed its complaint in which it alleges that it is the owner by assignment of all right, title, and interest in U.S. Patent No. 6,059,576, entitled “Training and Safety Device, System and Method to Aid in Proper Movement During Physical Activity,” as reexamined (“the ‘576 Patent”). The ‘576 Patent generally relates to an electronic device, system, and method that measures, analyzes, and records data about the wearer’s body movements using an accelerometer, programmable microprocessor, internal clock, and memory. (ECF 1 ¶ 16.) LoganTree alleges that dozens of Garmin’s wearable accelerometer-based activity trackers infringe the asserted claims of the ‘576 Patent. (*Id.* ¶¶ 31-38.)

The case was stayed for most of 2019 pending *inter partes* review of the ‘576 Patent. (ECF 37, 41.) Once those proceedings were complete, discovery opened on October 1, 2019. *See* FED. R. CIV. P. 26(d)(1) (parties may seek discovery after the Rule 26(f) conference). (ECF 42 (setting October 1, 2019, as the deadline for the Rule 26(f) conference).) On October 28, 2019, the court entered the parties’ agreed protective order. (ECF 51.) It contained a number of provisions that are fairly standard in a patent infringement case to protect the highly proprietary and often trade secret nature of source code. (*Id.* ¶ 7(c).) Among other things, it requires the producing party to make source code available for inspection on a standalone computer with visual monitoring by the producing party. (*Id.* ¶ 7(c)(1).) On November 4, 2019, Garmin notified LoganTree that it would make its source code available for inspection. (ECF 130-5, at 7-9 (Garmin’s Response to RFP No. 3).) LoganTree did not come inspect the source then, or at any time in the next eighteen months.

Meanwhile, the parties completed claim construction proceedings. The court issued a *Markman* order on January 19, 2021. (ECF 106.) One of the disputed claim limitations was “first time stamp information *reflecting a time* at which the movement data causing the first user-defined event occurred,” which the court construed to mean “first time stamp information *recorded or noted by the system* at which the movement data causing the first user-defined event occurred.” (*Id.* at 9 (emphasis added).) On February 4, Garmin wrote to LoganTree to request that it dismiss the case in light of the court’s claim construction. LoganTree’s infringement theory is based on the accused products’ step-counting functionality and, according to Garmin, its system never records a timestamp based on a user meeting a step goal.

On February 12, the court reconvened a scheduling conference to discuss remaining case-management deadlines. The amended scheduling order required the parties to serve their final contentions by March 15 (infringement) and April 15 (invalidity), complete fact discovery by May

18, serve initial expert disclosures by July 5 and rebuttal expert disclosures by August 20, and complete expert discovery by September 13. (ECF 110, at 2.) Further, it set the pretrial conference on September 24 and a dispositive motions deadline of October 13. (*Id.*)

LoganTree served its final infringement contentions on March 15 and (for reasons not apparent to the court) revised infringement contentions on March 31. (ECF 111, 113.) Notably, LoganTree served these final infringement contentions without having ever inspected the source code. The issue of LoganTree inspecting Garmin's source code did not first resurface until April. It was Garmin's counsel who—on April 12 (about five weeks before fact discovery was set to close on May 18)—asked LoganTree if it was going to want to review the source code. (ECF 130-6, at 2 (“[Y]ou still have not requested depositions of any Garmin witnesses or access to Garmin source code. Please let us know as soon as possible if you will be requesting either depositions or source code access before the close of discovery.”).) Apparently, this prodded LoganTree into action. On May 3, LoganTree forwarded Garmin the sign-on to the protective order for its source code expert. (ECF 130-7, at 2.) And, on May 4, the parties filed a stipulation temporarily modifying the source code review procedures in light of the COVID-19 pandemic to allow remote review via Citrix, with the review monitored by Zoom. (ECF 114.) LoganTree's source code expert reviewed the source code on May 6 (a half day) and the entire week of May 10-14. (ECF 130-3, at 10.) In the midst of that review, on May 11, LoganTree deposed Robert Blair, the Garmin engineer who wrote the code that is relevant to the accused step-counting functionality and Garmin's Rule 30(b)(6) corporate designee on the source code. (ECF 128-1; ECF 130-3, at 10.) Blair reviewed the source code to prepare for his deposition. (ECF 128-1, at 6:19-11:8.) However, LoganTree's counsel did not ask him a single question about how the code operates. Fact discovery closed just days later, on May 18.

After the source code review, LoganTree requested printouts of 75 files of complete source code modules totaling more than 2,600 pages of printed source code. Garmin objected to this request on the grounds that it was too broad and violated the protective order provision regarding source code printouts. That provision allows the receiving party to request “paper copies of *limited portions* of source code.” (ECF 51 ¶ 7(c)(8) (emphasis added).) It explains what is meant by “limited portions”—those “reasonably necessary for the preparation of court filings, pleadings, expert reports, or other papers, or for deposition or trial” but a party is not allowed to “request paper copies for the purpose of reviewing blocks of the Source Code.” (*Id.* ¶ (7)(c)(8).) Garmin contended that many of the files LoganTree requested were irrelevant and included functionalities within Garmin’s watches that are not accused of infringement, such as heart rate tracking, distance calculations, calorie tracking, sleep tracking, and simulation code, as well as code relating to unaccused products. It therefore appeared to Garmin that LoganTree was requesting exactly what the protective order prohibits—seeking printouts “for the purpose of reviewing blocks of the Source Code.” Despite Garmin’s objection, LoganTree maintained that its source code expert insisted that he needed all 2,600+ pages.

On June 8, the court convened a pre-motion discovery conference to see if it could help the parties resolve the dispute, or at least narrow the areas of disagreement for motion practice. (ECF 130-3.) Garmin explained its concerns about producing code for non-accused functionalities and non-accused products, the risks associated with producing complete code modules, and that Garmin was not opposed to producing some amount of code reasonably necessary for the expert to support his opinions, but that it was clear from the breadth of LoganTree’s request that its expert was seeking printouts to conduct review in the first instance, which the protective order expressly prohibits. (*Id.* at 9-15.) Garmin also offered to allow LoganTree’s expert further electronic review

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