IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

LOGANTREE LP,

                              Plaintiff,

vs.

                                        Case No. 6:17-cv-01217

GARMIN INTERNATIONAL, INC. and

GARMIN USA, INC.,

                              Defendants.

GARMIN'S REPLY TO ITS MOTION TO STRIKE NEW MICROPROCESSOR THEORIES IN LOGANTREE'S EXPERT REPORT

LoganTree makes a strange argument to save its eleventh-hour theories. Apparently conceding that it never provided Garmin with notice of Goal Streak and Connect in its contentions, LoganTree suggests these new arguments are "demonstrative" in nature. ECF No. 167, at 4. Only LoganTree knows what it means by "demonstrative" because no further explanation is provided in its opposition brief. Nonetheless, calling something "demonstrative" cannot save LoganTree from its failures to comply with the most basic requirement of the Patent Local Rules—"early notice of their infringement … contentions." *Digital Ally, Inc. v. Taser Int'l, Inc.*, No. 16-CV-2032-CM-TJJ, 2018 WL 1138283, at *7 (D. Kan. Mar. 2, 2018). And suggesting the new theories are not evidence because they are "demonstrative" runs afoul of the 10th Circuit's most basic definition of evidence. *Lillie v. U.S.,* 953 F.2d 1188, 1190 (10th Cir. 1992) ("any kind of presentation to the jury or the judge to help the fact finder determine what the truth is and assimilate and understand the evidence is itself evidence."). These new theories are not "demonstrative;" they are "disingenuous." LoganTree is relying on Goal Streak and Connect to meet the limitations of the claims. LoganTree knew of these theories many months ago. And LoganTree made the decision to hide these theories from Garmin until its validity arguments in other forums were finalized.

First, to the extent LoganTree is arguing Goal Streak merely "demonstrates" the operation of Step Goal, this is false. Goal Streak, unlike Daily Step Goals, is not a "user-defined" event based on "user-defined parameters," as the claim requires. **Ex. A**, *Excerpt of Myers Depo Trans.*, at 51:9–18; ECF No. 1-3, at Claims 1, 20. It is simply a "counter" that a user can <u>never</u> adjust or set. *Id.* A non-user defined functionality cannot be "demonstrative" of a user-defined functionality. And, Mr. Myers does far more than use Goal Streak as an example of Step Goal. Instead, he includes an extensive discussion of the Goal Streak source code and its (alleged) timestamps <u>and</u> maps Goal Streak to the claims. **Ex. B**, *Excerpt of Myers' Report*, at 14, 18, 58, 127, 131, 171, 236, 239, 243, 281, 347, 351, 354, 394 (Goal Streak source code discussion); *id.*, at 64–71, 94–101, 177–184,

207–214, 287–294, 318–324, 401–408, 434–440 (mapping Goal Streak to the claims). Mr. Myers relies on Goal Streak to meet the limitations of the claims, not merely as an example of Step Goal.[1]

Second, LoganTree accused, then abandoned, Garmin Connect in this case proving this is not merely a "demonstrative" addition to the expert report. In its Complaint, LoganTree originally accused Garmin Connect and its processor for meeting the "storing" limitation. *See* ECF No. 1-4, at 11 (highlighting in purple the role of Connect in "storing" and "analyzing"). LoganTree then expressly abandoned its allegations against Garmin Connect in its Initial Infringement Contentions, relying solely on the processor within the watches. ECF No. 158-6. And, given the operation of Garmin Connect, it is misleading for LoganTree to suggest its re-introduction of Garmin Connect is to merely "demonstrate" the operation of the processor in the watches. As explained to LoganTree by Garmin's witnesses, Garmin Connect receives raw data from the watches and uses its own processors to analyze, store, and display data to the users. ECF No. 134, Ex. B, *Blair Depo Trans.*, at 17:7–22:13. Thus, Garmin Connect cannot simply be "demonstrative" of behavior on the watches.

Finally, the timing of LoganTree's addition of Goal Streak and Garmin Connect shows this eleventh-hour addition is not "demonstrative" but instead, "disingenuous." LoganTree originally abandoned its allegations against Garmin Connect so it could argue to the Patent Office that its patent was not invalid because the claims were focused on a single processor located within the "portable self-contained movement measuring device" of the claims. ECF No. 158-8, at 1–2. LoganTree did not re-introduce Garmin Connect after the IPR because it needed to argue to the District of Delaware that its invention was not abstract based on the unique, improved relationship between the claimed device's internal movement sensor and microprocessor. ECF No. 158-9, at 8–9; *see also* ECF No. 158-10, at 10 (noting the patent was not invalid because "[t]he specific

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[1] LoganTree was aware of Goal Streak over 6 months ago (as early as April 2021) when its expert discussed the Goal Streak theory with LoganTree's attorneys. **Ex. A**, at 58:11–59:5. This is precisely why LoganTree does not argue diligence in discovering Goal Streak and moving to amend.

arrangement between the sensor and the microprocessor" was important for patentability).[2] Having survived these invalidity challenges, LoganTree then served its expert report on infringement adding the processor of the Garmin Connect servers to the "detecting" and "storing" limitations. ECF No. 160; *see also* ECF No. 166, at 1–2 (reciting complete history of LoganTree's inconsistent positions).

The prejudice to Garmin (and other litigants) from LoganTree's gamesmanship is significant.[3] Garmin, the Patent Office, the Federal Circuit, the District of Delaware, and other litigants relied on LoganTree's identifications of a processor within the portable, self-contained unit to uphold the validity of the '576 Patent. Having lost its IPR, Garmin relied on LoganTree's interpretation of the claims to fashion its discovery strategy in this case, to search for prior art, and to prepare its invalidity expert report. Now, LoganTree seeks to change those mappings to hopefully save its infringement case. This should not be allowed, and it cannot be cured. Garmin cannot go back in time to address these new allegations with the Patent Office—it is statutorily barred from doing so. 35 U.S.C. § 315(e)(1). The District of Delaware already denied the motion to dismiss based on LoganTree's characterizations of the patent. No extension of time or new expert reports can allow for a re-do in these forums where Garmin has spent millions of dollars chasing LoganTree's shifting sands approach to litigation. The Court should strike LoganTree's new theories from its expert report and force LoganTree to proceed with the manual step goal theory it disclosed and maintained throughout this entire case.

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[2] LoganTree did not file its opposition to the motion to dismiss in Delaware explaining the important relationship between the processor and the sensor until June 2, 2021. ECF No. 158-9, at 8–9. This is precisely why LoganTree ignored the expert report deadlines in this case and sought an extension that would take it past the Delaware Court's ruling on the invalidity issues.

[3] This Court rejected nearly identical arguments to those now posited by LoganTree and found that ample prejudice exists to deny adding new theories into a case given the late stage of litigation. There, the Court rejected the "curable" argument and found prejudice because discovery was closed, claim construction was passed, and pre-trial and trial deadlines were approaching. *See Digital Ally, Inc. v. Taser Int'l, Inc.*, 2018 WL 5620654, at *2 (D. Kan. Oct. 30, 2018).

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Respectfully submitted,

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