

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

PHILIPS NORTH AMERICA LLC,

Plaintiff,

v.

FITBIT, INC.,

Defendant.

Civil Action No. 1:19-cv-11586-IT

FITBIT STATEMENT IN ADVANCE OF STATUS CONFERENCE

Fitbit respectfully submit this Statement in advance of the September 9, 2020 Scheduling Conference set by the Court's March 25, 2020 order. (D.I. 54.) Fitbit provides this report pursuant to this Court's scheduling order (D.I. 54) and Local Rule 16.6 (c)(3)(D) which requires a joint statement a week before the status conference set for September 9, 2020. Fitbit and Philips have meet and conferred regarding the claim construction issues, Fitbit's Renewed Motion to Dismiss under Section 101, and the impact of the Garmin claim construction ruling on this case. When the deadline for submission of a joint report was imminent and Philips did not initiate preparation of a Joint Statement (as Plaintiff's typically do), Fitbit provided this document to Philips today, as a framework for Philips' input. When Fitbit pressed Philips for its insert to meet the filing deadline, Philips responded that it did not think such a joint report was necessary and in any event could not provide input today. Thus this report is submitted on behalf of Fitbit alone. Of course, if your Honor desires a joint submission after the deadline set forth in the Local Rules, Fitbit will work with Philips to provide one.

A. Pending Motions/Issues:

There are three open motions/issues before the Court: (1) Fitbit’s Renewed Motion to Dismiss under Section 101 (D.I. 33); (2) claim construction (D.I. 72–73, 76–78); and (3) Fitbit’s Motion for Partial Summary Judgment of Invalidity of the ’007 patent under 35 U.S.C. § 112 (currently stayed, but will be mooted by a claim construction order determining the “means for computing” is indefinite) (D.I. 43).

With respect to claim construction, Fitbit filed a Motion to Submit Supplemental Authority (D.I. 98) to provide the Court with the claim construction order (“Order”) entered in a related case on August 28, 2020—*Philips North Am. LLC v. Garmin Int’l, Inc.*, No. 2:19-CV-06301-AB (C.D. Cal.), that construes a number of overlapping terms from the same patents and claims at issue in this case.

Judge Birotte’s *Markman* order in Philips’ litigation against Garmin in the Central District of California addresses the following claim terms that are also disputed by the parties in this case:

’007 patent

Term:	Judge Birotte’s construction in Philips’ C.D. Cal. suit:	Fitbit proposed construction
“means for computing”	Indefinite under 35 U.S.C. § 112	Indefinite under 35 U.S.C. § 112
“means for suspending and resuming operation of said means for computing when a speed of the athlete falls below a predetermined threshold”	Moot, based on determination that “means for computing” is indefinite	Indefinite under 35 U.S.C. § 112

'233 patent

Term:	Judge Birotte's construction Philips' C.D. Cal. case:	Fitbit's proposed construction
"first personal device"	first personal medical device	first personal medical device
"wireless communication"	"rejects plaintiff's [Philips'] position and declines to construe the term 'wireless communication' at this time"	No Construction necessary
"governing information transmitted between the first personal device and the second device"	"declines to construe the term 'governing information transmitted between the first personal device and the second personal device'"	No Construction necessary

In addressing these outstanding motions/issues, Fitbit proposes that the Court:

- (1) Issue its claim construction opinion first, given that briefing, claim construction discovery, and a hearing on currently disputed terms has occurred;
- (2) After issuing its claim construction opinion, resolve Fitbit's Rule 12 motion, applying the Court's constructions of any disputed terms. Fitbit also proposes that the Court confirm that resolution of Fitbit's motion does not change even under any constructions proposed by Philips that were not adopted as the Court's constructions for this case.

Fitbit believes that favorable resolution of its Rule 12 motion is proper at this stage, as explained in its papers and during the hearing on its motion. Fitbit also believes that its proposal could increase the likelihood of resolution of the parties' disputes by the Federal Circuit with respect to claim construction.

B. Changes to Schedule:

Fitbit propose no changes to the existing schedule. Given the impact that Court's ruling on the claim construction and Motion to Dismiss may have on the case, Fitbit proposes that the Court schedule a follow-up status conference 14 days after the issuance of the claim construction order or Motion to Dismiss, whichever comes first.

C. Mediation:

The Parties will have engaged in two mediation sessions on September 2 and 3, 2020, in an effort to seek resolution of the ITC complaint that Philips filed against Fitbit, and expect to discuss potential resolution of this matter as well during the course of the mediation.

D. Anticipated Motions:

At the moment, Fitbit does not currently anticipate filing any additional motions. Following resolution of Fitbit's Rule 12 motion, Fitbit may file a motion to stay this litigation with respect to at least the '233 and/or '377 patents, if they have not been found invalid as patent-ineligible and the Patent Trial and Appeal Board institutes petitions for *inter partes* review filed by Fitbit on all asserted claims of those patents. Fitbit expects institution decisions on its petitions, which were filed on April 8, 2020 ('233 patent) and April 15, 2020 ('377 patent), by late October/early November 2020.

Dated: September 2, 2020

FITBIT, INC.

By Its Attorneys,

/s/ Yar R. Chaikovsky

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