UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PHILIPS NORTH AMERICA LLC, Plaintiff, v. FITBIT, INC. Defendant.	)	C.A. No. 1:19-cv-11586 **JURY TRIAL DEMANDED**

PHILIPS'S STATEMENT IN ADVANCE OF STATUS CONFERENCE

Philips respectfully submits this Statement in advance of the September 9, 2020 Scheduling Conference and apologizes for the delay in submitting this statement to the evening of the day it was due. Philips inadvertently failed to docket the deadline per L.R. 16.6(c)(3) and Dkt. 54, and did not appreciate that the deadline for filing a joint statement was today when counsel for Fitbit provided a draft of a Joint Statement that they desired to file at 2:18PM, while all of Philips's attorneys in this matter were tied up incase depositions, a mediation between the parties and other matters. Counsel for Philips explained to Counsel for Fitbit that it did not believe there to be a deadline for filing a Joint Statement. Rather than explain its understanding of the deadline to Philips, Fitbit filed its unilateral statement. Philips would propose that the parties withdraw their competing statements, and provide the Court with a Joint Statement by 6:00PM on Friday Sept. 4th, so that the parties can have time to meaningfully confer on the statement and provide a more complete and useful submission to the Court. In the mean time, Philips provides the following as it's statement in advance of the Status Conference:

A. Pending Motions:

There are no pending motions beyond those identified in Fitbit's statement. However, Philips notes that earlier this evening it filed a response to Fitbit's Motion for Leave to Submit Supplemental Authority with Regard to Claim Construciton (Dkt. 102), which identified the lack of any preclusive effect of an interlocutory claim construction order in another case.

With regards to Fitbit's proposal that the Court address claim construction prior to a decision on Fitbit's Motion to Dismiss, Philips states as follows:

After the hearing on Fitbit's Rule 12(b)(6) motion, the Court entered an order, Dkt. 92, directing that the parties "file a joint proposal of how to proceed if agreed or notifying the court they cannot reach an agreement." (emphasis added). The Court explained during the hearing that: "If there's a disagreement about it, just leave it to me. I don't -- I don't need you to argue it. But if there's a joint proposal, let me know." 8-20-2020 Hearing Transcript at 59, emphasis added. Thus, Philips believes that the parties should not further be disputing how the court should proceed on that issue.

However, since Fitbit has made a unilateral filing articulating its position, Philips believes that the court should address Fitbit's motion to dismiss in the posture that it was filed, which is as a Rule 12(b)(6) motion where pleadings in the complaint are taken as true and all inferences are drawn in favor of Philips. *See CardioNet, LLC v. InfoBionic Inc.*, 955 F.3d 1358, 1370 (Fed. Cir. 2020)("nothing in the record supports the district court's fact finding (and InfoBionic's assertion) that doctors long used the claimed diagnostic processes"); *Aatrix Software v. Green Shades*, 882 F.3d 1121, 1128 (Fed. Cir. 2016)("Whether the claim elements or the claimed combination are well-understood, routine, conventional is a question of fact"); *Bascom Global Internet Services, Inc. v. AT&T Mobility LLC*, 827 F.3d 1341, 1350-51 (Fed. Cir.

2016)("construed in favor of the nonmovant — BASCOM — the claims are 'more than a drafting effort designed to monopolize the [abstract idea].' Instead, the claims may be read to 'improve[ ] an existing technological process.'). Philips believes there is benefit in having an unambiguous record as to what was and was not decided at the Rule 12(b)(6) stage to avoid reversible error, and points out that if the motion were denied, Fitbit would be free to raise the issue (with the benefit of a more developed record) at the summary judgment stage in the unlikely event that Fitbit can demonstrate the absence of genuine issues of material fact.

B. Discovery Issues

a. Fitbit's Failure to Produce Technical Documents

After the Scheduling Conference held on March 25, 2020, the Court Ordered that Fitbit make its intial disclosure production of technical documents under L.R. 16.6(d)(4) by April 14, 2020 (*See* Dkt. 53 and 54). However, Fitbit chose not to produce any technical documetns demonstrating the functionality of the accused products. Since Fitbit began making other productions over the summer, Philips understood that production of technical documents, while inexcusably delayed, would eventually be provided, and was planning to rely on a production of technical documents before engaging in a detailed review of source code. After all, it is rare that a defendant in a patent litigation would completely refuse to produce technical documents on the accused products. Fitbit has agreed to make its source code available, and that review is commencing without first having the benefit of other technical documents, but that provides no basis for Fitbit's continued refusal to produce other technical documents concerning infringement of the accused products. On August 24th, Philips demanded the production of technical documents and requested a meet and confer if Fitbit refused. Fitbit has not responded with regards to Philips's request to meet and confer, and while Fitbit has made a number of

supplemental document productions, none of these contained technical documents of the sort contemplated by L.R. 16.6(d)(4). At the present stage, Fitbit continues to choose not to produce technical documents pertaining to infringement of the patents by its products.

b. Fitbit's Apparent Misrepresentations with Regard to Knowledge of the '377 Patent and Potential Need for Additional Discovery

In response to Philips's Interrogatory No. 2, which inquired as to Fitbit's first knowledge of the asserted patents, Fitbit responded by stating that it would produce documents under Rule 33(d), but did not identify any specific documents. This past week, in preparation for, and during, the deposition of Dr. Roger Quy, who is an inventor on the '377 Patent, Philips learned that Fitbit reviewed Mr. Quy's patent portfolio (which included the '377 Patent) in the 2013-2015 time period. Yet, Fitbit has not produced the contemporaneous materials documenting this knowledge and its evaluation of the patents and its infringement, nor has Fitbit supplemented its interrogatory response. As discussed further below, an extension of fact discovery may be warranted so that Philips can properly determine the extent of Fitbit's knowledge of the '377 Patent and when it actually first became aware of it.

C. Changes to Schedule:

Philips suggests that a modest extension to the fact discovery period of perhaps 45 days is warranted in view of Fitbit's refusal to produce technical documents, the recently uncovered facts that Fitbit was aware of the '377 patent much earlier than it let on, as well as complications associated with reviewing the source code materials that Fitbit has agreed to make available via remote means.[1] This additional time would allow Philips to properly review and assess Fitbit's

[1] The laptop provided for review needed certain software updates, and then there were issues with the availability of passwords as well with regards coordinating the schedule of Philips's expert. Philips has appreciated that Fitbit has worked to address these issues as they arise, but they are issues that reflect the complications associated with a secure remote source code review.

technical documents prior to expert discovery, for Philips to investigate (and for Fitbit to produce) information related to Fitbit's early knowledge of the '377 Patent, and generally complete discovery in a timely fasion. Additionally, while Fitbit has served notices of deposition on six Fitbit witnesses, as well as a notice under 30(b)(6), Fitbit has yet to provide any dates for any depositions. It seems impractical that the case can proceed without some form of extension to fact discovery.

D. Mediation:

The Parties engaged in a mediation session on September 2, 2020 but not resolution of this dispute was reached.

E. Anticipated Motions:

To the extent the discovery issues identified above are not resolved prior to, or at, the status conference, Philips intends to file a formal motion to compel the discovery that Fitbit has refused to produce.

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