

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

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PHILIPS NORTH AMERICA LLC,

Plaintiff,

v.

FITBIT, INC.,

Defendant.

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

**FITBIT'S OBJECTION TO PHILIPS'S STATEMENT IN ADVANCE  
OF STATUS CONFERENCE (D.I. 103)**

Fitbit respectfully objects to Philips's late filing of its Statement In Advance of Status Conference (D.I. 103). Fitbit is mindful of the Court's order that the parties provide a joint report in advance of the status conference. Fitbit solicited Philips' input for the draft joint report to meet the Court's requirements, and submitted a unilateral report only when Philips told Fitbit it would not provide input to the joint report in time to meet the Court deadline. This objection is necessary to correct the factual misstatements in Philips' untimely and unilateral submission. Pursuant to the Court's scheduling order (D.I. 54) and Local Rule 16.6 (c)(3)(D), a joint status report was due by close of business on September 2, 2020. When Fitbit recognized that it had not received a draft status report from Philips (given that it is customary for Plaintiff to take the lead), Fitbit prepared a draft joint report and sent to Philips in an attempt to reach agreement. Despite Fitbit providing its draft over three hours before the joint report was due and despite the fact that Fitbit and Philips had already met and conferred on the issues in the draft, Philips responded that it did not think such a joint report was necessary and could not provide input until September 3, 2020. In order to avoid missing the Court-mandated deadline, Fitbit filed its statement on its own.

Further, Fitbit emailed Philips shortly after filing and requested that if or when Philips intended to offer its portion of the joint report, Fitbit be provided with an opportunity to include comments to Philips' report, just as Fitbit provided Philips with that opportunity. Philips ignored the request and filed its statement at 10:48 PM on September 2, 2020. The statement is untimely and mischaracterizes both the facts surrounding Fitbit's timely submission, and the status of discovery in this action.

With respect to Philips' argument of alleged non-compliance with Local Rule 16.6 (d)(4)(B), which specifically identifies production of source code as a means for compliance, Fitbit believes that it has complied with this Court's requirements and, in any event, had asked Philips what it contended was missing. Specifically, on **April 15, 2020** Fitbit informed Philips that it had collected source code materials responsive to Local Rule 16.6 (d)(4)(B) and these materials are available pursuant to paragraphs 9 and 12 of the protective order entered in this action. Philips took no action to review the materials that were available. Philips first complaint that Fitbit's production was allegedly deficient was **August 24, 2020**, yet Philips had still not yet examined any of the source code-related materials that were available since April 15. Indeed, Philips did not qualify an expert to access the source code-related materials until **August 28, 2020**. Philips expert did not access the source code materials until **September 2, 2020**. Philips could not have formed any legitimate basis for complaint regarding the production of technical information because they had not yet examined what was available.

On **August 26, 2020** Fitbit asked Philips to identify exactly what they contend is missing from the technical disclosure of material sufficient to show how the accused features operate, making note of the fact that Philips has not yet examined any Fitbit source code; Philips did not respond. In sum, beyond an attorney claiming that the Local Rule 16.6 (d)(4)(B) production was

deficient, Philips has identified no basis for its complaint that Fitbit's production is deficient. Indeed how could it form a basis for complaint, since it has not examined any of the source code-related materials specifically identified as responsive to Rule 16.6 (d)(4)(B) that Fitbit has made available since April 15, 2020.

Philips suggestion that the Court extend existing deadlines 45 days is without good cause. Philips sat on its hands for four and a half months while Fitbit's source code-related materials were available to review and they did nothing. Extending deadlines in such a situation rewards Philips' lack of diligence. Philips requested the accelerated schedule that the Court adopted at the scheduling conference on March 24, 2020 in the first instance. Fitbit is prepared to meet that schedule.

With respect to Philips's claim regarding Fitbit's response to Philips's Interrogatory No. 2, Philips's report submitted at 10:48 pm on September 2 was the first time that it has raised the issue with Fitbit. Fitbit is now investigating and will supplement its response if appropriate. Fitbit notes that Philips has had access to Mr. Quy since before the lawsuit was filed and represented him at his deposition. It is therefore surprising that it is raising this issue so late.

If the Court wishes, Fitbit will work with Philips to prepare a joint report, as it offered to do before the initial submission, however Fitbit does not believe the substance of the parties' positions will be any different. Fitbit looks forward to discussing with the Court the claim construction issues and the pending motions that were supposed to be the subject of the status conference. If the Court wishes to discuss discovery issues Fitbit is fully prepared to provide the Court with facts.

Dated: September 3, 2020

FITBIT, INC.

By Its Attorneys,

*/s/ Yar R. Chaikovsky*

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**CERTIFICATE OF SERVICE**

I certify that a true copy of the above document was served on the attorney of record for each party via the Court's CM/ECF system, which will send notification of this filing (NEF) to all registered participants, and paper copies will be sent to those indicated as nonregistered participants.

Dated: September 3, 2020

By: /s/ Yar R. Chaikovsky  
Yar R. Chaikovsky (*Pro Hac Vice*)