

EXHIBIT D

Custer, John W.

From: Rodrigues, Ruben J.
Sent: Wednesday, February 17, 2021 8:13 AM
To: Peterman, Chad
Cc: BOST - F - Philips - Fitbit; Philips - Fitbit
Subject: RE: [EXTERNAL] Re: Philips v. Fitbit - Scope of Review and Dr. Buy's contact information.

Hi Chad,

We believe we understand your positions and will consider our meet and confer on this issue completed and will get an opposed Motion with a request for emergency relief on file this evening to push the fact discovery deadline by two months. We will point out in that filing Fitbit's refusal to be reasonable on this issue required the unnecessary filing, resulting in added and unnecessary work for the parties and the Court.

Let me know if you're available to meet and confer at 6:00PM today on the other issues I e-mailed about yesterday.

Regards,

-Ruben

-----Original Message-----

From: Peterman, Chad <chadpeterman@paulhastings.com>
Sent: Wednesday, February 17, 2021 7:54 AM
To: Rodrigues, Ruben J. <RRodrigues@foley.com>
Cc: BOST - F - Philips - Fitbit <BOSTFPhilipsFitbit@foley.com>; Philips - Fitbit <Philips-Fitbit@paulhastings.com>
Subject: Re: [EXTERNAL] Re: Philips v. Fitbit - Scope of Review and Dr. Buy's contact information.

** EXTERNAL EMAIL MESSAGE **

Ruben -

Philips pushed for a fast fact discovery schedule from the beginning of the case and the parties worked to meet the deadlines with some modest extensions. At this point, as expressed in my earlier emails, we believe that no further extensions are warranted. To the extent that there are a few currently noticed or currently subpoenaed depositions that need to occur out of time, we have already stated our position that those are allowable.

Moreover, the court made it clear that any extension request needed to be made by motion. We stand by our prior correspondence regarding the schedule and do not consent to extending fact discovery past the current date.

Chad

On Feb 16, 2021, at 7:52 PM, RRodrigues@foley.com wrote:

[REDACTED]

There

may be other things that I don't have front of mind right now, though we have no intention of serving any new requests, and can agree not to during this period. The attempt to itemize every single item though demonstrates the concern we have with some sort of piecemeal itemization of exceptions to the close of fact discovery as opposed to simply extending the deadline. On our end, it's unclear to us what Fitbit would argue is barred by the cut-off were we to simply move it until after the Court can entertain our positions at the status conference. The Court already suggested it was open to some larger extension of the discovery period, so we don't feel as though there's any real justification at this point for Fitbit's refusal to agree to this modest extension to March 5th that would avoid the need to emergency briefing this week.

In light of that, can we come to an agreement to push the fact-discovery cut-off to March 5th so that the Court can entertain our competing views on the rest of the schedule at the next status conference?

Regards,

-Ruben

From: Peterman, Chad <chadpeterman@paulhastings.com>
Sent: Tuesday, February 16, 2021 7:02 PM
To: Rodrigues, Ruben J. <RRodrigues@foley.com>
Cc: BOST - F - Philips - Fitbit <BOSTFPhilipsFitbit@foley.com>; Philips - Fitbit <Philips-Fitbit@paulhastings.com>
Subject: RE: [EXTERNAL] Re: Philips v. Fitbit - Scope of Review and Dr. Buy's contact information.

** EXTERNAL EMAIL MESSAGE **

Ruben –

We are trying to understand your proposal. Would you explain what you are trying to keep open besides source code access and potential supplements to the source code in your request to extend fact discovery until at least March 5?

Thanks
Chad

From: RRodrigues@foley.com<mailto:RRodrigues@foley.com>
<RRodrigues@foley.com<mailto:RRodrigues@foley.com>>
Sent: Tuesday, February 16, 2021 5:02 PM
To: Peterman, Chad <chadpeterman@paulhastings.com<mailto:chadpeterman@paulhastings.com>>
Cc: BOSTFPhilipsFitbit@foley.com<mailto:BOSTFPhilipsFitbit@foley.com>; Philips - Fitbit <Philips-Fitbit@paulhastings.com<mailto:Philips-Fitbit@paulhastings.com>>
Subject: [EXT] RE: [EXTERNAL] Re: Philips v. Fitbit - Scope of Review and Dr. Buy's contact information.

Hi Chad,

I'm going to focus the response here on the scheduling issues, as I see that as the issue that we need to principally resolve sooner than later. We think an overall extension to the fact discovery period is warranted since that would not require piecemeal agreements on what the parties are agreeing to proceed with after next week's discovery cut-off. It's also unclear what sorts of limitations you intend to impose on the "continued review" you're offering to Dr. Buy after the close of fact discovery. Last week Dr. Buy identified a number of missing items from Fitbit's Source Code production,

and perhaps may identify further missing items as he continues his review. Would Fitbit refuse to supplement that production once Feb. 23rd comes and goes despite allowing his continued "review"?

That said, we would be open to the notion that no new discovery requests be served in any extended fact discovery period, but the parties have an obvious disagreement as to what falls within the bounds of existing requests. All that said, we do think it makes sense to perhaps have a more detailed scheduling discussion with the Court on March 3rd, and not bother the court with expedited briefing to push next week's fact discovery cut-off. To that end, would you agree to extending the fact discovery cut-off to at least Friday, March 5th so that we can then address with the Court Philips's request to extend all the deadlines by two months at the status conference on March 3rd? That would seem like the most efficient way for us to proceed.

Regards,

-Ruben

From: Peterman, Chad <chadpeterman@paulhastings.com<mailto:chadpeterman@paulhastings.com>>

Sent: Sunday, February 14, 2021 5:51 PM

To: Rodrigues, Ruben J. <RRodrigues@foley.com<mailto:RRodrigues@foley.com>>

Cc: BOST - F - Philips - Fitbit <BOSTFPhilipsFitbit@foley.com<mailto:BOSTFPhilipsFitbit@foley.com>>; Philips - Fitbit <Philips-Fitbit@paulhastings.com<mailto:Philips-Fitbit@paulhastings.com>>

Subject: RE: [EXTERNAL] Re: Philips v. Fitbit - Scope of Review and Dr. Buy's contact information.

** EXTERNAL EMAIL MESSAGE **

Ruben –

In December, you premised Philips' request to extend fact discovery into February because of "client availability, the demands of our team, competing deadlines, the demands of our experts, etc." Rodrigues email to David Beckwith et al. (12/1/2020). At the recent status conference and in your February 3 email you shifted tone, Philips premised its request to extend fact discovery solely on source code review (a premise that you did not mention at all in December or until shortly before the conference). Despite Philips' lack of diligence in reviewing the code (including waiting four months before even starting to review the code), Fitbit agreed to extend the review time past the current close of discovery for over a month. Unsatisfied with Fitbit's counterproposal, Philips now alleges a host of manufactured or misleading discovery disputes and attempts to leverage its own inability to timely produce documents from [REDACTED] and testimony from [REDACTED] in an attempt to further justify extending all fact discovery. Philips' tactics are transparent and wholly inappropriate.

We maintain our position that closing fact discovery on February 23 is appropriate, with the following exceptions:

- 1) Philips is allowed to review source code until the end of March
- 2) All currently noticed party and third party depositions that are not currently scheduled must be completed as soon as reasonably possible, including within a few weeks after February 23 if necessary

Fitbit does not agree to the service of any additional discovery requests or deposition notices/subpoenas or to reopening closed depositions. As I stated in my earlier emails, Philips already took several Fitbit technical depositions knowing that it did not have source code. Those witnesses answered all of Philips' questions and only referenced source code [REDACTED], which [REDACTED] is designated on.

Further, given that the Court will have a status conference in early March where we may have some clarity on the Court's intentions with respect to Markman and 12(b)(6) determination, we propose that the parties only move the Court to extend fact discovery on the limited basis outlined above and agree to revisit the rest of the schedule following the status conference. Without having some indication of the Court's timing (including whether the Court wants additional hearings or briefing), negotiating a schedule is inefficient unless Philips would agree to trigger dates based on the Markman decision as we initially opposed.

Turning to the other points you raised in your email:

1) The subpoena that we served is timely and would count as the 10th deposition, which we can take without leave of

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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