

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

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

**JOINT STATEMENT**

The Parties respectfully submit this Joint Statement to provide information in advance of the March 24<sup>th</sup>, 2020 Scheduling Conference, which was set by the Court’s order of December 2, 2019. (D.I. 31.).

Philips’ statement requesting a Telephonic Hearing

Due to the situation with COVID-19, the Philips requests that the court hold the March 24<sup>th</sup> Scheduling Hearing by telephonic means only. Unlike Fitbit, who is requesting the conference be cancelled, Philips believes that the scheduling conference would be useful to get the case moving again after the partial stay of discovery that Fitbit was already provided. Fitbit’s strategy to date has focused on maximizing delay, and filing serial dispositive motions as pretext for that delay.

Philips strongly opposes Fitbit’s request to continue the scheduling conference for 60 days. Under the schedule that Philips proposes, all the deadlines **through the end of June** relate to claim construction, and involve exchanges between the parties and electronic filings with the

Court—activities that can take place while working from home. The parties have already exchange infringement, non-infringement, and invalidity contentions—and there is no reason to further delay claim construction proceedings. To the extent accommodations need to be made on an item by item basis, the parties can handle them in the context of the overall schedule, but putting everything off for 60 more days is unwarranted.

That the parties can be productive during the work from home procedures temporarily in place is evidenced by Fitbit’s ability to prepare and file a Motion for Partial Summary Judgment seeking to invalidate the asserted ’007 Patent for indefiniteness. (*See* Dkt. 44, filed March 19, 2020.) If Fitbit can prepare a motion for summary judgment during the COVID-19 situation, it stands to reason that it can engage in exchanging claim terms for construction and claim construction briefing. To the extent any claim construction experts are relied on necessitating expert depositions in May, the parties can evaluate the situation then, and could always conduct those depositions by video if travel restrictions remain in place—though hopefully the situation will have improved significantly or passed by then.

Fitbit’s Motion for Partial Summary Judgment itself demonstrates the need to get through claim construction sooner than later—and surely not in February of 2021 as proposed in Fitbit’s schedule. Absent in Fitbit’s Motion is any discussion of how the term “athletic performance feedback data” should be construed in isolation or in the context of the claim—yet interpretation of the claim is a predicate to any determination as to whether support under 35 U.S.C. § 112 ¶ 6 is required or provided in the patent specification. *See Lockheed Martin Corp. v. Space Systems/Loral, Inc.*, 324 F.3d 1308, 1319 (Fed. Cir. 2003) (“Once a court establishes that a means-plus-function limitation is at issue, it must identify and construe that limitation, thereby

determining what the claimed function is, and what structures disclosed in the written description correspond to the ‘means’ for performing that function.”

Prior to Fitbit filing the motion, Philips explained to Fitbit that, if Fitbit sought to raise the issue of indefiniteness of the ‘007 Patent, then Fitbit should do so during claim construction, when the Court would already be evaluating the specification and other claim terms. This is commonly how such issues are addressed at least in the first instance. Under Philips’s schedule, that process would be completed in a few months. Instead, Fitbit filed its motion. Philips therefore suggests that the interpretation and alleged indefiniteness of the ‘007 patent should be addressed firstly in the context of claim interpretation and, to the extent that any issues remain, Fitbit could renew its motion accordingly.

A further stay of discovery would be highly prejudicial to Philips. To date, relying on the temporary stay of discovery imposed at the scheduling conference in December of 2019, Fitbit has chosen to only produced prior art in this case. Philips has not received any technical documentation describing how the accused products function, despite the parties’ agreement to comply with L.R. 16.6(d) by the dates agreed to in the original proposed schedule.

#### Fitbit’s statement

As to Philips’ request for a telephonic hearing, Fitbit agrees that if the Court should decide to proceed with the March 24 conference, it should be held by telephonic means only. Fitbit’s counsel may not be able to travel to Boston given the “shelter-in-place” order in California, where counsel is located. Fitbit also notes that the Boston Harbor hotel its counsel had booked for this hearing has just now closed until May.

As to the overall schedule, Fitbit requests that the Court wait 60 days prior to implementing a case schedule. At the last scheduling conference this Court entered a partial stay

on discovery, pending the Court's ruling on Fitbit's case-dispositive motion to dismiss all asserted claims based on patent ineligibility. This motion is pending, and thus the rationale for the current discovery stay remains irrespective of any considerations brought on by the COVID-19 virus.

In addition, the current posture of this case supports an extension of the current discovery stay. The pleadings are still open and no answer has been filed, with Fitbit's Rule 12(b)(6) motion to dismiss all Philips' asserted patents fully briefed and pending. As the Court stated at the Rule 26(f) conference, "I don't want the unnecessary expenses [of full discovery] if there seems to be a solid reason to hold this thing off." Dec. 2 Hrg. Tr. 23:2-3. And in response to Philips' counsel's statement that "an exploration of damages" was required, the Court responded that "[w]hy not hold off on this [damages discovery] until I get this first issue [of Fitbit's motion to dismiss] dealt with?" *Id.* at 9:3, 10:11-12. Again, even irrespective of any reasons to extend the current stay due to the COVID-19 outbreak, the rationale relied on by the Court at the December 2 hearing to support the current discovery stay remains.

Extending the current discovery stay does not prejudice Philips. Philips filed the Complaint on July 22, 2019, but waited until October 2, 2019 to serve the complaint on Fitbit. By the time Philips had served complaint two of the four asserted patents in suit had expired. A third asserted patent expired in January 2020 and the fourth patent is either already expired or at best will expire in less than a year, well before any trial in this action. Philips did not seek a preliminary injunction and, according to its interrogatory responses, does not seek lost profits damages, and "is presently unaware of any Philips products that would have imposed a requirement to mark pursuant to 35 U.S.C. § 287." The early procedural posture of the case, together with Philips' delay in bringing suit, suggests that an additional 60-day delay will result in no undue

prejudice, again irrespective of any considerations due to the COVID-19 outbreak.

In addition, Fitbit asserts that the rationale for extending the existing stay is further supported by the COVID-19 travel restrictions and public facility closings. Philips proposes the same pretrial and discovery schedule it urged and the Court rejected in early December, with no consideration of any accommodations or mechanics for addressing the COVID-19 virus. Fitbit respectfully submits that a reassessment of the case schedule in 60 days would allow the parties and the Court to determine a realistic schedule for discovery with the benefit of additional facts indicating what is prudent at that time to address the safety of the parties' employees, Court staff, employees of third-party vendors like court reporters, and the parties' counsel.

Currently, local governments in the San Francisco Bay area have ordered all citizens to "shelter-in-place," and for all "non-essential" businesses to close at least until April 7. *See* <https://www.sfdph.org/dph/alerts/files/HealthOrderC19-07-%20Shelter-in-Place.pdf>. Both Fitbit and its counsel in this action are currently subject to these orders from the San Francisco, San Mateo, and Santa Clara County governments. Fitbit and its counsel's offices are closed. California's governor has just imposed a "stay at home" order. All schools are closed, placing additional child care burdens on Fitbit employees and its legal counsel. With shelter-in-place and stay at home restrictions the ability to respond to discovery is negatively impacted. Travel restrictions and social distancing requirements would prevent Fitbit's witnesses from being available for depositions. Given the restrictions, complying with discovery obligations at this time would be challenging. The current restrictions, and the fact that new infections in the U.S. continue to increase every day (confirmed infections in the U.S. doubled in the past two days ending March 19), also supports at least a 60 day continuance of the existing stay on discovery, in addition to the rationale relied on by the Court in December to impose the stay of discovery in

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