UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PHILIPS NORTH AMERICA LLC,	)	
	)	
Plaintiff,	)	
	)	**Civil Action No.**
v.	)	**19-11586-FDS**
	)	
FITBIT LLC,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM AND ORDER ON
PLAINTIFF'S MOTION FOR LEAVE TO
AMEND INFRINGEMENT CONTENTIONS

SAYLOR, C.J.

This is an action for patent infringement. Plaintiff Philips North America LLC has sued defendant Fitbit LLC, asserting claims under 35 U.S.C. § 271 for infringement of three patents of which Philips is the owner and assignee. The patents at issue concern technology related to connected-health products, such as wearable fitness trackers.

Philips has filed a motion seeking leave of the Court to serve supplemental infringement contentions to cover four new Fitbit products: the Charge 4, Versa 3, Inspire 2, and Sense. These products were first made available to the public in 2020.

For the following reasons, that motion will be denied.

I. Background

A. Factual Background

Philips North America LLC is a Delaware limited liability company based in Massachusetts. (Second Am. Compl. ¶ 12). It develops, among other things, connected-health

technologies and related products, such as wearable fitness trackers that monitor and analyze personal health and fitness information. (*Id.* ¶¶ 2, 4-7, 12, 24-25). Its patent portfolio includes more than 60,000 patents. (*Id.* ¶ 8). It licenses its patented technologies to companies in the connected-health field. (*Id.* ¶¶ 6, 8).

Fitbit LLC is a Delaware limited liability company based in Massachusetts. (*Id.* ¶ 13; Mot. to Reflect Name Change). It develops, manufactures, and sells connected-health products. (Second Am. Compl. ¶¶ 13, 29-30).

The second amended complaint alleges that Fitbit infringes three patents owned by Philips: U.S. Patent No. 6,013,007 ("the '007 patent"), U.S. Patent No. 7,088,233 ("the '233 patent"), and U.S. Patent No. 8,277,377 ("the '377 patent").[1] The patents concern technology related to connected-health products, including GPS/audio athletic training, security mechanisms for transmitting personal data, wearable-technology products, and handling interrupted connections. (*Id.* ¶¶ 9, 12, 37).

The patent at issue for the present motion is the '377 patent, which is titled "Method and Apparatus for Monitoring Exercise with Wireless Internet Connectivity." ('377 patent at Title). It concerns the "monitoring of living subjects." (*Id.* col. 1 ll. 35-36). More particularly, it concerns "health-monitoring of persons where measured or input health data is communicated by a wireless device to and from a software application running on an internet-connected server and where the same may be studied and processed by the software application, a health professional, or the subject." (*Id.* col. 1 ll. 36-41).

[1] The original complaint alleged that Fitbit infringes a fourth patent: U.S. Patent No. 6,976,958 ("the '958 patent"). Philips has since withdrawn its allegations of infringement of that patent. The Court's claim construction order rendered invalid all asserted claims of the '007 patent. Additionally, the parties stipulated on October 20, 2021, that proceedings related to the '233 patent would be stayed pending any PTAB appeal. Therefore, only the '377 patent is currently at issue.

The patent provides for a "method and apparatus . . . for wireless monitoring of exercise, fitness, or nutrition by connecting a web-enabled wireless phone to a device which provides exercise-related information, including physiological data and data indicating an amount of exercise performed." (*Id.* at Abstract). It further provides that "[a]n application for receiving the exercise-related information and providing a user interface may be downloaded to the web-enabled wireless phone from an internet server" and that "[t]he exercise-related information may be transmitted to an internet server, and the server may calculate and return a response." (*Id.*).

The patent identifies two "complementary" systems that embody the invention. (*Id.* col. 2 l. 64). The first embodiment may be employed "to manage the disease state or condition of a patient" by "employ[ing] a health monitoring device." (*Id.* col. 2 l. 67; *id.* col. 3 ll. 1-2). That device would provide data by a wireless connection "for processing via the internet[,] including a review by a physician or other health care professional if required." (*Id.* col. 3 ll. 4-5). For example, a diabetic could connect a blood-glucose monitor to a wireless web device, download data to a diabetes-management company's server, and receive guidance concerning his next meal. (*Id.* col. 3 ll. 14-20).

The second embodiment enables implementation of a "health or lifestyle management plan" by allowing "[v]arious health parameters, such as those relating to nutrition or exercise, [to] be entered into a health monitoring device" and to be wirelessly communicated to a server. (*Id.* col. 3 ll. 6-11). In this embodiment, the system "may be employed to monitor the physiologic status of a healthy subject while eating, exercising, or performing other activities." (*Id.* col. 3 ll. 34-36). For example, an individual following an exercise program could attach a wireless web device to an exercise machine, send data from that machine over the Internet to the server of a health and fitness company, and receive personalized responses from that company.

(*Id.* col. 3 ll. 21-27).

B. Procedural Background

On July 22, 2019, Philips filed this action against Fitbit. The second amended complaint asserts three counts of patent infringement under 35 U.S.C. § 271, involving the '007 patent (Count 1); the '233 patent (Count 2); and the '377 patent (Count 3).

On July 22, 2021, the Court issued its Memorandum and Order on Claim Construction. In that decision, it concluded, among other things, that a means-plus-function claim term in the '007 patent—"means for computing athletic performance feedback data from the series of time-stamped waypoints obtained by said GPS receiver"—is indefinite under 35 U.S.C. § 112 for lack of corresponding structure for the claimed function. As to the '377 patent, the Court held that "indicating a physiologic status of a subject" does not require construction and should be given its plain and ordinary meaning.

Fitbit moved to dismiss the complaint for failure to state a claim upon which relief can be granted. On August 10, 2021, the Court denied the motion to dismiss. On August 24, 2021, Fitbit filed its Answer and asserted six counterclaims, seeking declaratory judgments of invalidity and non-infringement.

C. Infringement Contentions

Philips served its initial infringement contentions on January 31, 2020. (Philips Mem. at 1). It later served supplemental disclosures on May 15, 2020, but no new contentions with respect to any new products were added at that time. (*Id.*). Philips notified Fitbit in December 2020 that it intended to seek to add four products released that year to its infringement contentions regarding the '377 patent: the Charge 4, Versa 3, Inspire 2, and Sense. (Philips Ex. A). The release by Fitbit of the Charge 4 was first announced in March 2020. (Philips Ex. N at 1). The releases of the Versa 3, Inspire 2, and Sense were announced in August 2020. (Philips

Ex. O at 1).

According to Philips, it did not and could not have known about these new products until Fitbit publicly announced their release. Philips and Fitbit made at least some attempt to negotiate mutual contention amendments, although the parties dispute the scope and significance of such negotiations. (Philips Mem. at 2; Fitbit Opp. at 7). Philips has now moved for leave of the Court to serve supplemental infringement contentions for the '377 patent to cover the four new products.

II. Standard of Review

Local Rule 16.6 requires the patentee to disclose its infringement claims and theories, including claim charts that identify "each accused product" and provide "an element-by-element description of where and how each element of each asserted claim is found in each accused product or method." Local Rule 16.6(d)(1)(A). Those infringement contentions can be "amended and supplemented only by leave of court upon a timely showing of good cause." Local Rule 16.6(d)(5). To determine whether good cause exists, the court should consider the moving party's diligence and any prejudice to the non-moving party. *See O2 Micro Int'l. Ltd. v. Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1366 (Fed. Cir. 2006). "The burden is on the movant to establish diligence rather than on the opposing party to establish a lack of diligence." *Id.*

In contrast to the "liberal policy for amending pleadings, the philosophy behind amending claim charts is decidedly conservative, and designed to prevent the 'shifting sands' approach to claim construction." *LG Elecs. Inc. v. Q-Lity Comput. Inc.*, 211 F.R.D. 360, 367 (N.D. Cal. 2002) (quoting *Amtel Corp. v. Info. Storage Devices, Inc.*, 1998 WL 775115, at *2 (N.D. Cal. Nov. 5, 1998)). Mandating such disclosures is intended to "require parties to crystallize their theories of the case early in the litigation and to adhere to those theories once

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