IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

PHILIPS NORTH AMERICA LLC, Plaintiff, v. FITBIT LLC, Defendant.	Civil Action No. 1:19-cv-11586-FDS

DEFENDANT FITBIT LLC'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO STRIKE, IN PART, THE INFRINGEMENT EXPERT REPORT AND OPINIONS OF DR. TOM MARTIN PURSUANT TO FED. R. CIV. P. 37(c)(1) AND LOCAL RULE 16.6(d)

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INTRODUCTION

Defendant Fitbit LLC ("Fitbit") moves under Federal Rule of Civil Procedure 37(c)(1) to strike, in part, the November 16, 2021 Opening Report of Dr. Tom Martin (the "Martin Report"). The Martin Report presents three new infringement theories that Plaintiff Philips North America LLC ("Philips") did not disclose during discovery, including in response to Fitbit's Interrogatory No. 9 or in Philips' Local Rule 16.6(d) infringement contentions:

1) Fitbit directly infringes via joint infringement by directing and controlling users' performance of certain steps of claim 1 of U.S. Patent No. 8,277,377 ("the '377 patent");

2) Fitbit directly and indirectly infringes by providing users with Run Cardio Fitness Scores based on GPS data collected by the user's mobile phone or Fitbit device; and

3) certain accused Fitbit products are representative of others for the infringement analysis.

Upon the Martin Report's disclosure of these new theories, Fitbit requested additional time to investigate and address Philips' new allegations in responsive expert reports in an effort to mitigate prejudice, but Philips refused. (*See* Ex. 1 at 1.)

Although Fitbit served Interrogatory No. 9 specifically directed to Philips' new joint infringement theory, and repeatedly requested that Philips supplement its infringement contentions to provide more specificity, Philips never disclosed these three theories in its Interrogatory No. 9 response or Local Rule 16.6(d) infringement contentions. Rather, Philips laid in wait and then disclosed these three new theories for the first time in the Martin Report on November 16, 2021—nearly eight months after the close of fact discovery. In doing so, Philips violated Federal Rule of Civil Procedure 26(e) and Local Rule 16.6(d). Philips has no credible explanation for its failure to timely disclose these theories during discovery. Introducing these theories now—after the close of fact discovery and only weeks before Fitbit's rebuttal noninfringement report was due—prejudices Fitbit. Pursuant to Rule 37(c)(1), Fitbit requests that the Court strike Philips' three new infringement theories contained in the portions of the Martin Report indicated by green redaction

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