

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

PHILIPS NORTH AMERICA LLC,

Plaintiff,

v.

FITBIT, INC.,

Defendant.

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

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO FITBIT'S
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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I. Introduction

Plaintiff Philips North America LLC (“Philips”) respectfully requests that this Court deny Fitbit LLC’s (“Fitbit”) 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). Dkt. 268 (“Motion”); *see also* Dkt. 269 (“Memorandum”).

Philips provided over three hundred pages of infringement contentions that demonstrated how the accused Fitbit products met each element of the asserted claims of the ’377 Patent. These contentions identified with specificity each of the nine currently accused products and methods, each asserted claim of the ’377 Patent, an element-by-element description of where and how each element of each asserted claim is found in each accused product and method, as well as Philips’s allegations with regard to direct, indirect, and joint infringement. *See Exs. 1-9*, Dkt. 270-9, Dkt. 270-10, Dkt. 270-11. Dr. Martin, Philips’ infringement expert, drafted an opening report consistent with Philips’s contentions.

Contrary to Fitbit’s allegations, Dr. Martin’s Report did not present any new infringement theories. For instance, as explained below Philips’s infringement contentions included detailed claim charts for each of the nine currently accused products and, consistent with that approach, Dr. Martin provided opinions as to how each of the accused products infringe, including by physically inspecting four of the accused products. Fitbit claims (without citing any relevant authority) that Philips should have disclosed in its contentions that Dr. Martin might only physically test some of the accused products. Further, Dr. Martin discusses the Cardio Fitness Score functionality that Philips specifically identified in its claim charts as infringing, yet Fitbit contends that it had no notice that Philips was accusing Cardio Fitness Scores calculated via the Run model. Finally, as explained below, Philips’s contentions regarding joint infringement exceeded the requirements of Local Rule 16.6(a)(vii), and thus Fitbit’s argument that they were inadequate rings hollow.

Because Fitbit has not identified any portions of Dr. Martin's Report that present infringement theories not properly disclosed, the Court should deny Fitbit's motion.

II. Legal Standards

Local Rule 16.6(d)(1) governs disclosure of infringement contentions and provides:

[T]he patentee shall make the following disclosures:

(A) Infringement Claim Charts. Infringement claim charts identifying with as much specificity as reasonably possible from publically available information or other information then within the patentee's possession, custody or control:

- (i) each accused product and/or method
- (iii) an element-by-element description of where and how each element of each asserted claim is found in each accused product or method
- (vii) if any alleged infringement is based on the acts of multiple parties, the role of each such party in the infringement.

L.R. 16.6(d)(1)(A)(i), (iii), (vii).

"In patent litigation, expert reports are expected to provide more information than is contained in infringement contentions." *Digital Reg. of Texas, LLC v. Adobe Systems Inc.*, No. CV 12-01971, 2014 WL 1653131 at *2 (N.D. Cal. Apr. 24, 2014). When deciding whether to strike an expert report, the question is "has the expert permissibly specified the application of a disclosed theory, or has the expert impermissibly substituted a new theory altogether?". *Apple Inc. v. Samsung Electronics Co., Ltd.*, 5:12-CV-0630-LHK-PSG, 2014 WL 173409, at *1 (N.D.Cal. Jan. 9, 2014).

Preclusion under Fed. R. Civ. P. 37(c)(1) "is not a mandatory sanction if the late disclosure is harmless". *Abiomed, Inc. v. Maquet Cardiovascular LLC*, 2020 WL 4201187, at *3 (D. Mass. July 22, 2020).

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