

**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 REPLY BRIEF 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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Philips' Opposition (Dkt. 286) fails to explain how it adequately disclosed the new theories in the Martin Report. Philips also makes no attempt to show its late disclosures were substantially justified or, with one minor exception, harmless. Preclusion under Rule 37 is warranted.

I. PHILIPS DID NOT DISCLOSE ITS JOINT INFRINGEMENT THEORY.

Beyond performance of the claimed method, there are two other essential elements that Philips must prove in order to show that Fitbit is liable for joint infringement—that Fitbit: (1) conditions the receipt of a benefit on its users' performance of any method steps they allegedly perform, *i.e.*, the user cannot obtain the benefit without performing the method step(s), and (2) determines the manner or timing of its users' performance of those method steps. *Akamai Techs. v. Limelight Networks, Inc.*, 797 F.3d 1020, 1022-1023 (Fed. Cir. 2015). Neither Philips' L.R. 16.6(d) contentions nor its Interrogatory No. 9 response disclosed its contention for either element.

Philips claims that it “adequately disclosed its allegations of joint infringement in its infringement disclosures and in its response to Fitbit's Interrogatory No. 9, which incorporated Philips's infringement disclosures.” (Dkt. 286 at 10-11 (quoting Dkt. 270-10 at 9 of 14).) The one paragraph of text Philips cites and quotes from its March 17, 2020 infringement contentions does not allege or explain either of the aforementioned essential elements of divided infringement, much less how Fitbit meets them, as required by *Akamai*. Thus, Philips' March 17, 2020 infringement contentions do not respond to Interrogatory No. 9.¹

Like its May 15, 2020 operative contentions, the quoted text from Philips' March 17, 2020 contentions also never identifies which party performs which claim steps—as called for by Interrogatory No. 9 and Local Rule 16.6(d)(1)(A)(vii)'s requirement to disclose each party's “role” in the alleged infringement. The “roles” Philips identifies only obfuscate Philips contentions.

¹ Philips also fails to address that its March 17, 2020 infringement contentions were superseded by its subsequent May 15, 2020 infringement contentions.

For example, Philips identified Fitbit as “provid[ing] the accused activity tracker devices and the Fitbit App” and “maintain[ing] control and supervision [sic] requiring its users to maintain authorized accounts,” and identified Fitbit users as “us[ing] the Fitbit system, App, and services through their account.” (Dkt. 286 at 12.) But those generic allegations do not relate to any step in claim 1, as required by Interrogatory No. 9 and the Local Rules. (*See* Dkt. 270-17 at claim 1.)

Even now, Philips cannot articulate who it alleges performs claim step 1.c—“rendering a user interface on the web-enabled wireless phone.” Philips argues that it adequately disclosed that the *user* “render[s] a user interface,” via its contentions’ passive tense statement that “the user interface is rendered...via the Fitbit App” and generic allegation that Fitbit customers “us[e] the Fitbit system, App, and services.” (Dkt. 286 at 12.) These statements, Philips asserts, “clearly demonstrate that this limitation is performed when the Fitbit customer uses the Fitbit App, which renders the user interface.” (*Id.*) But this argument acknowledges that the “Fitbit App...renders the user interface,” just like Philips’ contentions, which state that “the user interface is rendered...via the Fitbit App,” plainly suggesting that *Fitbit* renders the user interface via its app. Philips muddies the waters even further, arguing that Dr. Martin opined that the Fitbit App “does the actual rendering” and the user does not “literally” render a user interface. (*Id.* at 13.) But that interpretation is directly at odds with the Martin Report’s ultimate opinion that the user performs step 1.c and every other claim step in directly infringing ’377 patent claim 1. (Dkt. 270-2 at 154-160 (section of the Martin Report titled “Fitbit’s Customers Practice the Claimed Invention”).) The fact that Philips still cannot settle on who it thinks performs ’377 patent claim step 1.c today highlights the inadequacy of Philips’ disclosure in contentions served almost two years ago.

Philips’s claim that its Local Rule 16.6(d) default disclosures adequately responded to Interrogatory No. 9 (Dkt. 286 at 14) also ignores that Interrogatory No. 9 calls for more information

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