

UNITED STATES DISTRICT COURT  
FOR THE FIRST DISTRICT OF MASSACHUSETTS

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PHILIPS NORTH AMERICA LLC,

Plaintiff,

vs.

FITBIT LLC,

Defendant.

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Case No. 1:19-cv-11586-FDS

**PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION TO STRIKE PORTIONS  
OF THE EXPERT REPORT AND EXCLUDE CERTAIN OPINIONS AND TESTIMONY  
OF DR. MICHAEL P. AKEMANN**

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## I. INTRODUCTION

Philips North America LLC (“Philips”) opposes Fitbit LLC’s (“Fitbit”) Motion to Strike Portions of the Expert Report and Exclude Certain Opinions and Testimony of Dr. Michael P. Akemann (“Motion”) regarding a reasonable royalty for Fitbit’s infringement of the ’377 patent. (Dkt. 304.) Fitbit’s Motion mischaracterizes Dr. Akemann’s analytical methods, fails to cite authority to support its position, and amounts to nothing more than a dispute as to the weight Dr. Akemann’s testimony should be accorded rather than admissibility. Fitbit’s long-winded complaint that Dr. Akemann fails to apportion the value of the invention’s contribution to the price of the Accused Products confuses Dr. Akeman’s per-unit approach (based on the value of the invention) with an *ad valorem* approach (based on the value of the infringing product) that Dr. Akeman did not utilize. Ultimately, Fitbit rests on its own **opinion** that the Benchmark Licenses relied on by Dr. Akemann are not comparable, but this is not a basis to exclude Dr. Akemann’s opinion. Instead, this sort of challenge to Dr. Akemann’s analysis is best explored through cross-examination. *See Virnetx, Inc. v. CiscoSys., Inc.*, 767 F.3d 1308, 1331 (Fed. Cir. 2014) (comparability of licenses is “factual issue best addressed by cross examination and not be exclusion” and “the jury [is] entitled to hear the expert testimony and decide for itself what to accept or reject.”).

As such Fitbit’s Motion is an unsupported and improper effort to exclude expert testimony under *Daubert*. The Court should deny Fitbit’s Motion.

## II. LEGAL STANDARDS

Under *Daubert*, the district judge is a gatekeeper, not a fact finder. *Bricklayers and Trowel Trades Intern. Pension Fund v. Credit Suisse Securities (USA) LLC*, 752 F.3d 82, 91 (1st Cir. 2014); *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1305–06 (Fed. Cir. 2011) (“First Circuit law does not allow the district court in a jury trial to evaluate ‘the credibility of witnesses,

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