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

FITBIT'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT OF NONINFRINGEMENT OF U.S. PATENT NO. 8,277,377 BASED ON PLAINTIFF'S FAILURE OF PROOF (DKT. 331)

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I. INTRODUCTION

Philips' Opposition (Dkt. 363) rests on the idea that the cases Fitbit relies upon are inapposite, and other cases that Philips relies upon are more on-point. But Philips does not even attempt to undermine the relevant legal test—namely, that to prove direct infringement, a patentee must either point to specific instances of direct infringement or show that the accused device necessarily infringes. Further, Philips does not dispute Fitbit's statements of material fact, so it is undisputed that the eight Fitbit wearables do not necessarily infringe. Thus, the only outstanding question that the Court must decide is whether Philips provided adequate, potentially admissible evidence of specific instances of direct infringement.

In that regard, Philips again does not contradict the relevant legal test—where the evidence shows, at best, that Fitbit taught its customers each alleged step of the claimed method in isolation, but does not teach all of the steps of the claimed method together, in the required order, it requires too speculative a leap to conclude that any Fitbit customer actually performed the claimed method. Nonetheless, Philips exclusively presents evidence that allegedly shows Fitbit teaching, or Fitbit users performing, individual elements of '377 patent claim 1 in isolation. None of Philips' evidence shows Fitbit teaching, or a Fitbit user performing, all of the elements of claim 1 in the required order as the legal test demands, despite Philips' mischaracterizations to the contrary.

Philips has not presented evidence from which a reasonable juror could find infringement, and thus, summary judgment of noninfringement for the eight Fitbit wearables[1] is appropriate.

II. THE *FUJITSU*, *E-PASS*, AND *ACCO BRANDS* CASES ARE ANALOGOUS, PHILIPS' CITED CASES ARE NOT

Fitbit's opening brief explained why the *Fujitsu*, *E-Pass*, and *ACCO Brands* cases are analogous to the facts here and compel summary judgment of noninfringement. (*See generally*

[1] The eight Fitbit wearables are defined in Fitbit's opening brief. (Dkt. 332 at 1 n.1.)

Dkt. 332 (discussing *Fujitsu Ltd. v. Netgear Inc.*, 620 F.3d 1321 (Fed. Cir. 2010); *ACCO Brands, Inc. v. ABA Locks Mfr. Co.*, 501 F.3d 1307 (Fed. Cir. 2007); *E-Pass Techs., Inc. v. 3Com Corp.*, 473 F.3d 1213 (Fed. Cir. 2007)); *see also* Dkt. 364[2] at 10-18.) Philips claims that three other cases are closer to the facts here. (*See* Dkt. 363 at 2-4 (discussing *Toshiba Corp. v. Imation Corp.*, 681 F.3d 1358 (Fed. Cir. 2012); *Moleculon Res. Corp. v. CBS, Inc.*, 793 F.2d 1261 (Fed. Cir. 1986); *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1317 (Fed. Cir. 2009)).) Philips' attempts to distinguish *Fujitsu*, *E-Pass*, and *ACCO Brands* miss the mark, and Philips ignores key distinctions of *Toshiba*, *Lucent*, and *Moleculon* that render them inapplicable here.

A. Philips' Attempts To Distinguish Fitbit's Cases Fall Short

Philips' attempts to distinguish Fitbit's cases are misleading and irrelevant.

For example, Philips' attempts to distinguish *E-Pass* find no support in the opinion itself. First, Philips claims that the *Lucent* court (not the *E-Pass* court) noted that in *E-Pass*, "the patentees failed to introduce circumstantial evidence of infringing acts." (Dkt. 363 at 10.) But that does not mean the patentee did not introduce any circumstantial evidence. Instead, the *E-Pass* opinion describes the various circumstantial evidence introduced by the patentee, most notably "a set of excerpts from the product manuals for various of the accused devices," *E-Pass*, 473 F.3d at 1213, much like what Philips relies on here. Philips also wrongly claims that "the main analysis provided by *E-Pass*" is whether users perform the claim steps "out of order." (Dkt. 363 at 11.) But the *E-Pass* opinion never indicates that its noninfringement finding was based on whether users could perform the claim steps "out of order." *See generally* 473 F.3d 1213. The crux of the summary judgment of noninfringement in *E-Pass* was that, like Philips here, the patentee did not introduce

[2] Philips' opposition extensively cross-cites the documents supporting its own motion for summary judgment (*i.e.*, Dkt. 340, 341, 342). Thus, Fitbit similarly cites its opposition to Philips' motion for summary judgment and supporting documents herein (*i.e.,* Dkt. 364, 365, 367).

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