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

REDACTED

**PLAINTIFF'S PRESENTATION FOR
SUMMARY JUDGMENT MOTIONS**

Philips v. Fitbit

Case No. 1:19-cv-11586 (D. Mass)
Hon. Chief Judge Saylor

Plaintiff's Presentation on Motions for Summary Judgment
June 24, 2022

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Pending Motions for Summary Judgment

Dkt. 340, 364, 378 – Philip's motion for Summary Judgment of Direct Infringement and No Invalidity on iFIT Prior Art

<u>Also</u>
Dkt. 305, 323 – Philips's motion to Preclude the Testimony of Dr. Joseph A. Paradiso Regarding the iFit Prior Art System

Dkt. 330, 362, 372 – Fitbit's motion for Summary Judgment of Noninfringement of U.S. Patent No. 8,277,377

Dkt. 332, 363, 373 – Fitbit's motion for Summary Judgment of Noninfringement of U.S. Patent No. 8,277,377 Based on Plaintiff's Failure of Proof

Dkt. 334, 361, 374 – Fitbit's motion for Summary Judgment of Invalidity of U.S. Patent No. 8,277,377 Under 35 U.S.C. § 101

Dkt. 337, 360, 376 – Fitbit's motion for Summary Judgment of No Joint or Induced Infringement of U.S. Patent No. 8,277,377

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Infringement of Quy '377 by Fitbit
(element-by-element)

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U.S. Patent No. 8,277,377

1. A method for interactive exercise monitoring, the method comprising the steps of:

  a. downloading an application to a web-enabled wireless phone directly from a remote server over the internet;

  b. coupling the a web-enabled wireless phone to a device which provides exercise-related information;

  c. rendering a user interface on the web-enabled wireless phone;

  d. using the application, receiving data indicating a physiologic status of a subject;

  e. using the application, receiving data indicating an amount of exercise performed by the subject;

  f. wherein at least one of the data indicating a physiologic status of a subject or the data indicating an amount of exercise performed by the subject is received from the device which provides exercise-related information, and wherein the data indicating a physiologic status of a subject is received at least partially while the subject is exercising;

  g. sending the exercise-related information to an internet server via a wireless network;

  h. receiving a calculated response from the server, the response associated with a calculation performed by the server based on the exercise-related information; and

  i. using the application, displaying the response.

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U.S. Patent No. 8,277,377 - Preamble

Preamble: *A method for interactive exercise monitoring, the method comprising the steps of:*

- There is no dispute that the preamble is not limiting.

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U.S. Patent No. 8,277,377 – 1(a)

Limitation 1(a): *downloading an application to a web-enabled wireless phone directly from a remote server over the internet*

Set up with your phone or tablet

The free Fitbit app is compatible with more than 200 devices that support iOS, Android, and Windows 10 operating systems.

To get started:

1. Find the Fitbit app in one of the locations below, depending on your device. If you're unsure if the Fitbit app is compatible with your phone or tablet, see http://www.fitbit.com/devices.
   - Apple App Store for iOS devices such as an iPhone or iPad.
   - Google Play Store for Android devices such as the Samsung Galaxy S6 and Motorola Droid Turbo 2.
   - Microsoft Windows Store for Windows 10 devices such as the Lumia phone or Surface tablet.
2. Install the app. If you don't have an account with the store, must create one before you can download the app.
3. When the app is installed, open it and tap Join Fitbit to be guided through a series of questions that help you create your Fitbit account, or log in to your existing account.
4. Continue following the on-screen instructions to connect, or "pair", Ionic to your phone or tablet. Pairing makes sure the watch and phone or tablet can communicate with one another (sync data back and forth).

See e.g., Ionic User Manual, Dkt. 342-02 at page 10 of 79

See generally Dkt. 340 at 4-5

6

```
3      Q.   And Apple uses servers to allow
4   users to download applications over the
5   internet from the Apple App Store, is that
6   right?
7      A.   Yes, they do.
8      Q.   Okay.
9           And similarly Google uses servers
10   to allow users to download application over
11   the internet from the Google Play Store, is
12   that right?
13      A.   Yes, I believe of course they do.
14      Q.   All right.
15           So if a user downloads the Fitbit
16   app from the Apple App Store to an iPhone
17   like you did, they would be downloading an
18   application to a web-enabled wireless phone
19   from a remote server over the internet,
20   right?
21      A.   Yes.  The user is downloading an
22   application to their phone over the
23   internet, in this case from Apple, Google,
24   or from Microsoft.
25      Q.   And likewise, if a user downloads
                                          243
1      J. PARADISO - CONFIDENTIAL
2   the Fitbit app from the Google Play Store
3   to an Android phone, they are downloading
4   an application to a web-enabled wireless
5   phone from a remote server over the
6   internet, right?
7      A.   Yes, the user chooses to download
8   the application from the store.  It's
9   user's choice.  They do it.
```

See e.g., Paradiso Dep. Tr. (Dkt. 342-14) at 242:3-243:9

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U.S. Patent No. 8,277,377 – 1(b)

Limitation 1(b): *coupling the a web-enabled wireless phone to a device which provides exercise-related information;*

> ## Set up with your phone or tablet
>
> The free Fitbit app is compatible with more than 200 devices that support iOS, Android, and Windows 10 operating systems.
>
> To get started:
>
> 1. Find the Fitbit app in one of the locations below, depending on your device. If you're unsure if the Fitbit app is compatible with your phone or tablet, see http://www.fitbit.com/devices.
>   - Apple App Store for iOS devices such as an iPhone or iPad.
>   - Google Play Store for Android devices such as the Samsung Galaxy S6 and Motorola Droid Turbo 2.
>   - Microsoft Windows Store for Windows 10 devices such as the Lumia phone or Surface tablet.
> 2. Install the app. If you don't have an account with the store, must create one before you can download the app.
> 3. When the app is installed, open it and tap Join Fitbit to be guided through a series of questions that help you create your Fitbit account, or log in to your existing account.
> 4. Continue following the on-screen instructions to connect, or "pair", Ionic to your phone or tablet. Pairing makes sure the watch and phone or tablet can communicate with one another (sync data back and forth).

See e.g., Ionic User Manual, Dkt. 342-02 at page 10 of 79

7   *See generally* Dkt. 340 at 5

```
18    Q.   And I'm not asking whether Fitbit
19   is doing this.  I'm just asking if a user
20   pairs one of the accused device to say an
21   iPhone running the Fitbit app, is that user
22   coupling a web-enabled wireless phone to a
23   device which provides exercise-related
24   information?
25    A.   Well, the --
                                              268
1         J. PARADISO - CONFIDENTIAL
2            MR. SHAW:  Object to form.
3     A.   Well, the phone is coupling to
4   the device.  Is the user doing it -- the
5   user isn't going to the Bluetooth protocol
6   and doing that and the way this patent kind
7   of looks, you just get near the device,
8   you're in range and it works.  This is a
9   much more detailed dance here.  The user
10  basically is making the decision whether
11  they want to pair or not and -- yeah.
12    Q.   So am I correct to understand
13  that your opinion is that the user isn't
14  coupling the device.  It's the phone
15  coupling the device, is that right?
16    A.   The phone couples it.  If the
17  user decides to couple, then the phone will
18  couple.
19    Q.   Okay.
20         But -- so if a user pairs one of
21  the accused devices to an iPhone running
22  the Fitbit app, then you would agree that a
23  web-enabled wireless phone has been coupled
24  to a device which provides exercise-related
25  information, right?
                                              269
1         J. PARADISO - CONFIDENTIAL
2            MR. SHAW:  Object to form.
3     A.   If a user decides to pair it, the
4   phone will do its Bluetooth coupling.
5     Q.   Okay.
6     A.   The phone will do the coupling.
```
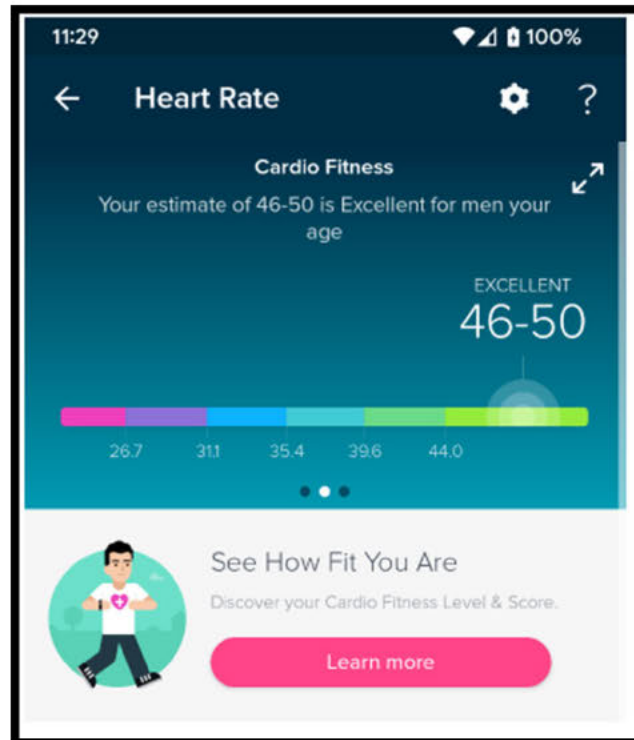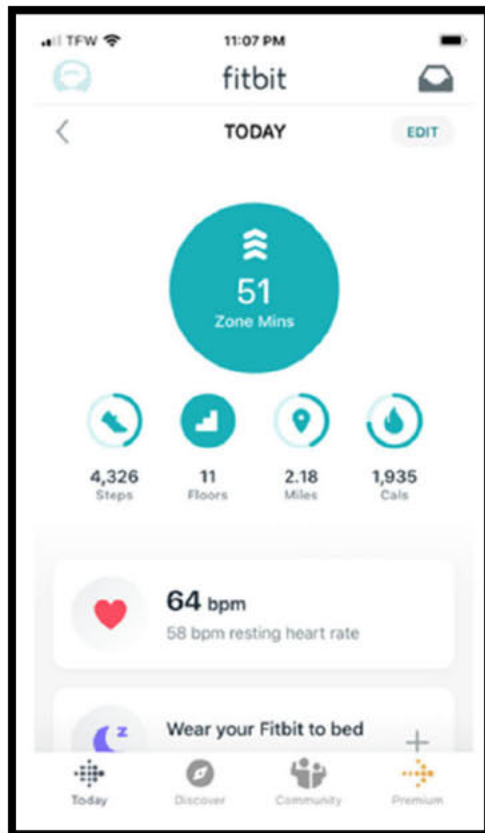
See e.g., Paradiso Dep. Tr. (Dkt. 342-14) at 267:18-269:6

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U.S. Patent No. 8,277,377 – 1(c)

Limitation 1(c): *rendering a user interface on the web-enabled wireless phone;*

See e.g., Martin Opening Report (Dkt. 342-1) at ¶¶ 73, 163

8   *See generally* Dkt. 340 at 13-14; Dkt. 360 at 6-9, Dkt. 378 at 12-13

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U.S. Patent No. 8,277,377 – 1(d)

Limitation 1(d): *using the application, receiving data indicating a physiologic status of a subject;*

- Every time a sync occurs, data indicating a physiologic status of a subject (i.e. heart rate data) is received by the paired smartphone using the Fitbit App.
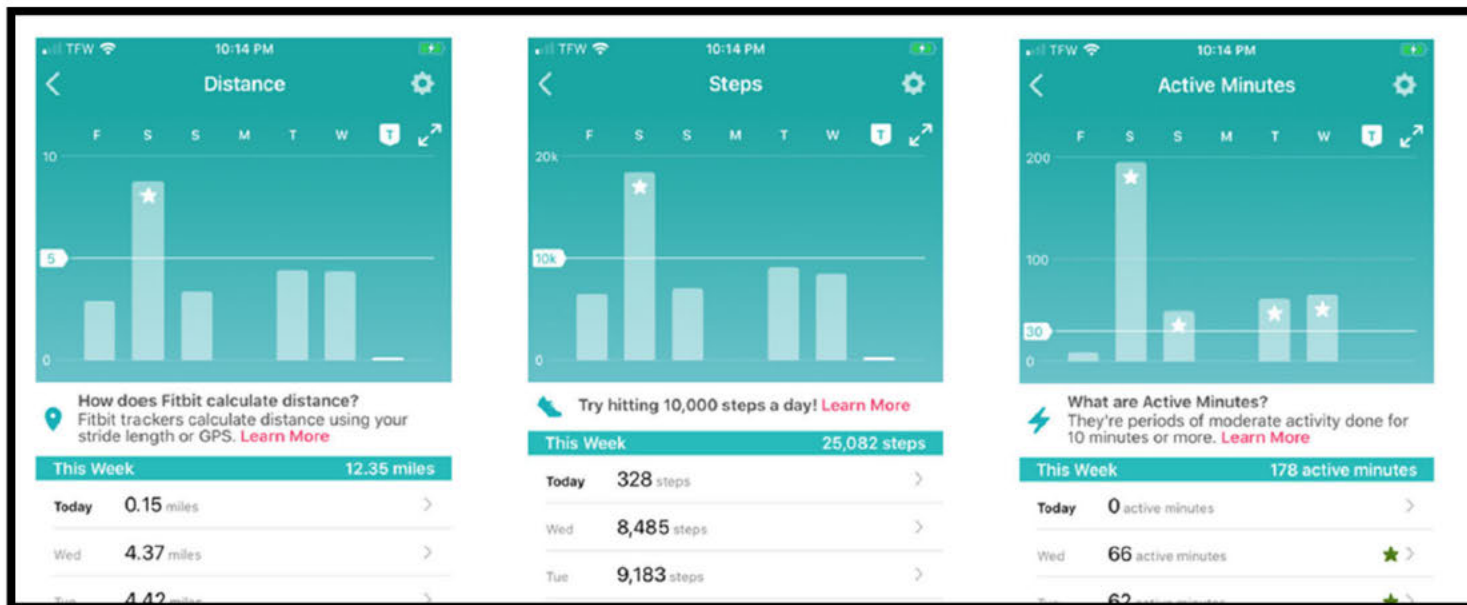

See e.g., Martin Opening Report (Dkt. 342-1) at ¶ 81

See generally Dkt. 340 at 5-7

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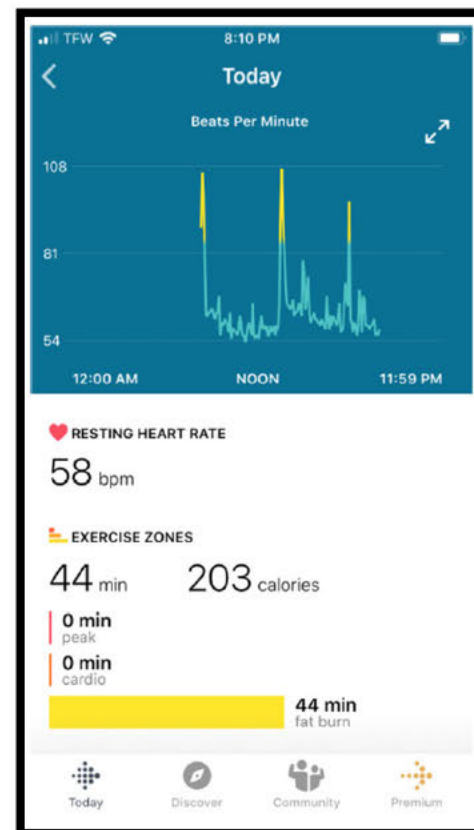
U.S. Patent No. 8,277,377 – 1 (e)

Limitation 1(e): *using the application, receiving data indicating an amount of exercise performed by the subject;*

- Every time a sync occurs, data indicating an amount of exercise performed by the subject (e.g., step, distance, and/or Active Minutes data) is received by the paired smartphone using the Fitbit App

See e.g., Martin Opening Report (Dkt. 342-1) at ¶ 85

See generally Dkt. 340 at 5-7

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U.S. Patent No. 8,277,377 – 1(f)

Limitation 1(f): *wherein at least one of the data indicating a physiologic status of a subject or the data indicating an amount of exercise performed by the subject is received from the device which provides exercise-related information, and wherein the data indicating a physiologic status of a subject is received at least partially while the subject is exercising;*

- Every time a sync occurs while the user is exercising, this limitation is met

See e.g., Fitbit advertising video (Dkt. 343-20) at 0:12-0:16; Syncs occur **every 15 minutes**. Dkt. 367 at ¶ 40.

See generally Dkt. 340 at 5-7

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U.S. Patent No. 8,277,377 – 1(g)

Limitation 1(g): *sending the exercise-related information to an internet server via a wireless network;*

- The exercise-related information is sent to Fitbit's servers every time a sync occurs

> ## When You Sync Your Device
>
> When you sync your device, data about your activity is transferred from your device to our servers. This data is stored and used to provide the Fitbit Service. Each time a sync occurs, we also log data about the transmission. Some examples of the log data are the sync time and date, device battery level, and the IP address used when syncing.
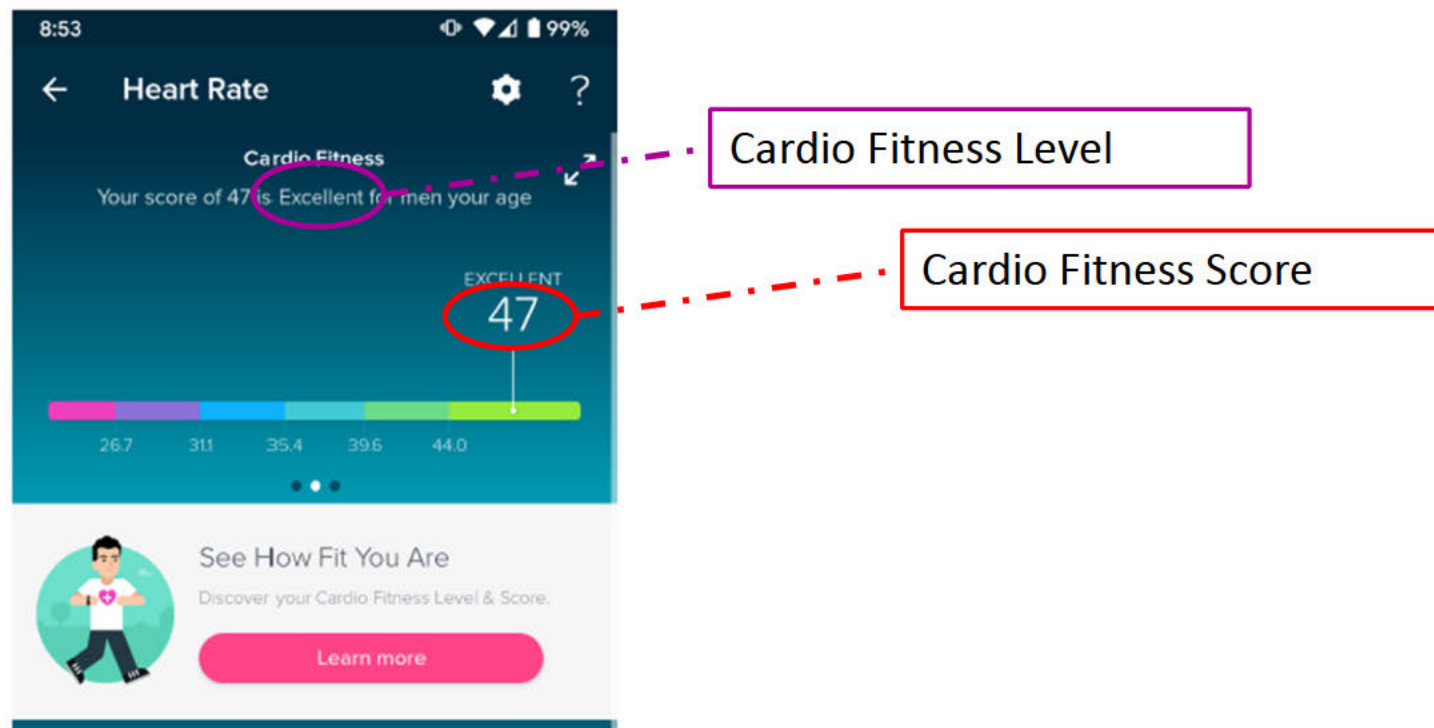
See e.g., Martin Opening Report (Dkt. 342-1) at ¶ 127 (reproducing excerpt from Fitbit's website (annotated))

- Syncs occur over wireless networks of Wi-Fi or cellular networks

See generally Dkt. 340 at 7-9, Dkt. 378 at 7-11

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U.S. Patent No. 8,277,377 – 1(h) and 1(i)

Limitations 1(h): *receiving a calculated response from the server, the response associated with a calculation performed by the server based on the exercise-related information; and*
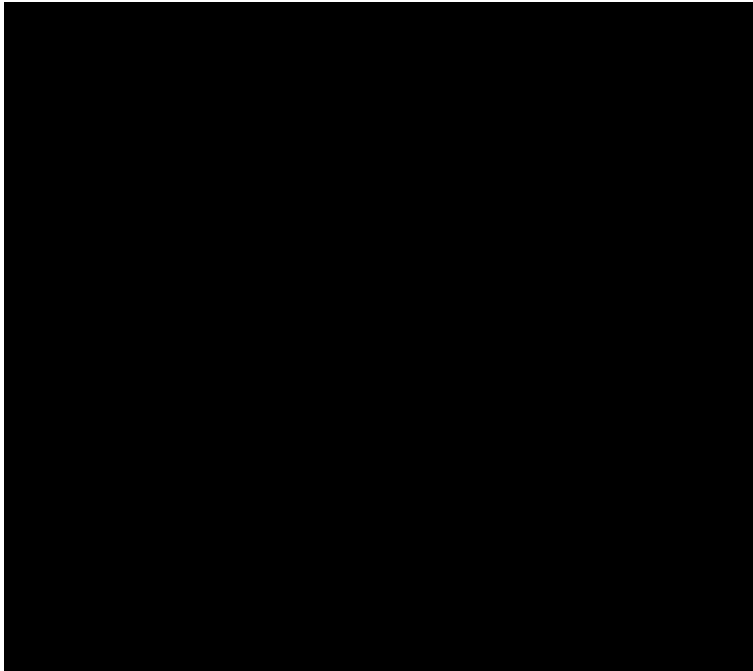
Limitation 1(i): *using the application, displaying the response*

See e.g., Martin Opening Report (Dkt. 342-1) at ¶ 163

See generally Dkt. 340 at 9-14

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Sending/Receiving – 1(g) and 1(h)

1. A method for interactive exercise monitoring, the method comprising the steps of:

  a. downloading an application to a web-enabled wireless phone directly from a remote server over the internet;

  b. coupling the a web-enabled wireless phone to a device which provides exercise-related information;

  c. rendering a user interface on the web-enabled wireless phone;

  d. using the application, receiving data indicating a physiologic status of a subject;

  e. using the application, receiving data indicating an amount of exercise performed by the subject;

  f. wherein at least one of the data indicating a physiologic status of a subject or the data indicating an amount of exercise performed by the subject is received from the device which provides exercise-related information, and wherein the data indicating a physiologic status of a subject is received at least partially while the subject is exercising;

  g. sending the exercise-related information to an internet server via a wireless network;

  h. receiving a calculated response from the server, the response associated with a calculation performed by the server based on the exercise-related information; and

  i. using the application, displaying the response.

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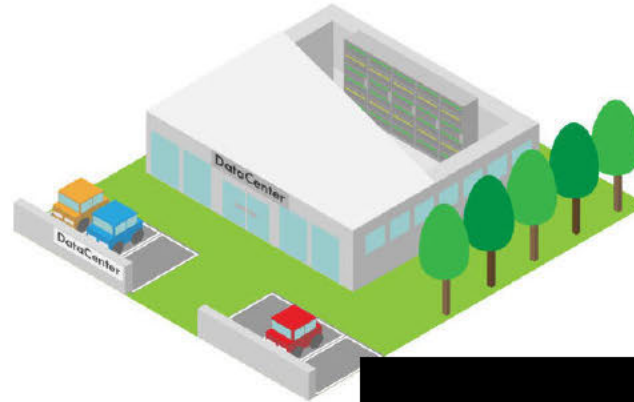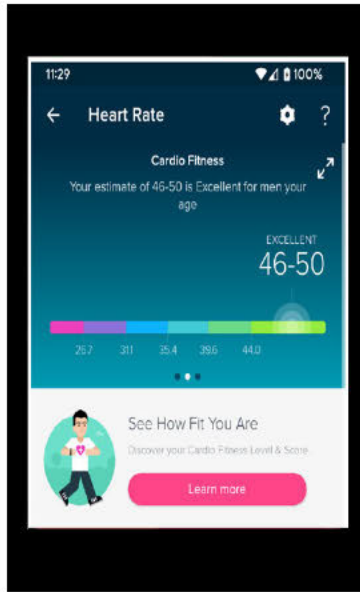*See generally* Dkt. 340 at 7-13, Dkt. 378 at 2-4; Dkt. 362 at 3-15

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Sending/Receiving – 1(g) and 1(h)

- **Fitbit admitted that "Cardio Fitness Levels include 'Excellent', 'Very Good', 'Good', 'Average', 'Fair', and 'Poor'." Dkt. 367 at ¶62**

- ████████████████████████████
████████████████████████████
████████████████████████████

- ████████████████████████████
████████████████████████████

- **Fitbit fails to offer any evidence contradicting that some of the data used "was gathered by an Accused Wearable." Only denied as to distance data. Dkt. 367 at ¶ 53.**

See generally Dkt. 340 at 7-13, Dkt. 378 at 2-4; Dkt. 362 at 3-15

1. A method for interactive exercise monitoring, the method comprising the steps of:

a. downloading an application to a web-enabled wireless phone directly from a remote server over the internet;

b. coupling the a web-enabled wireless phone to a device which provides exercise-related information;

c. rendering a user interface on the web-enabled wireless phone;

d. using the application, receiving data indicating a physiologic status of a subject;

e. using the application, receiving data indicating an amount of exercise performed by the subject;

f. wherein at least one of the data indicating a physiologic status of a subject or the data indicating an amount of exercise performed by the subject is received from the device which provides exercise-related information, and wherein the data indicating a physiologic status of a subject is received at least partially while the subject is exercising;

g. sending the exercise-related information to an internet server via a wireless network;

h. receiving a calculated response from the server, the response associated with a calculation performed by the server based on the exercise-related information; and

i. using the application, displaying the response.

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Sending/Receiving – 1(g) and 1(h)

Fitbit App running on cellphone and displaying Cardio Fitness Level of "Excellent" and Cardio Fitness Score of 46-50

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See generally Dkt. 340 at 7-13, Dkt. 378 at 2-4; Dkt. 362 at 3-15

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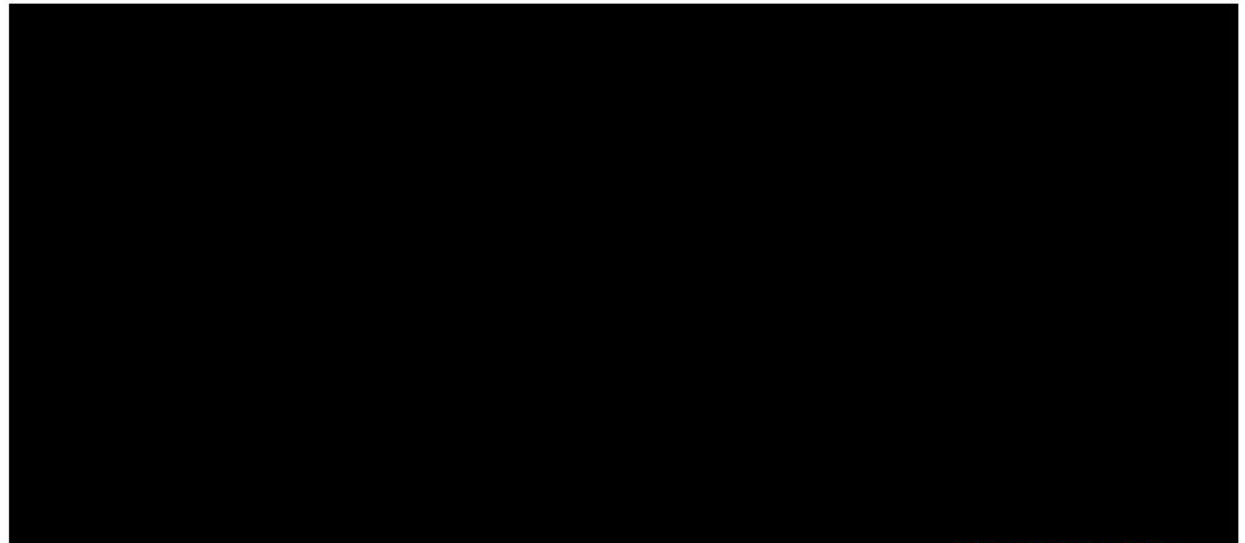
Summary Judgment Infringement of Quy '377 by Fitbit

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Fitbit Arguments Against Infringement

1. **Claim construction – same server – "a remote server" and "an internet server" 1(a) and 1(g).** See Dkt. 364 at 2; Dkt. 330 at 12-14.

2. **Claim construction – single server – "an internet server" 1(g) and 1(h).** See Dkt. 364 at 2; Dkt. 330 at 12-14.

3. **Claim construction – "calculated response … associated with a calculation …" 1(h).** See Dkt. 364 at 5-7; Dkt. 330 at 15-19.
   a. Resting Heart Rate not based on exercised related information

4. **Claim construction – "triggering" and "Wi-Fi."** See Dkt. 364 at 5-6.

5. **Performance of "coupling" and "rendering" 1(b) and 1(c).** See Dkt. 364 at 9-10; Dkt. 337 at 9-10.

6. **Evidence insufficient on performance of the method.** See Dkt. 364 at 10-18; Dkt. 332.
   1. Non-infringing alternatives

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Fitbit Arguments – Single Server 1(a) and 1(g)

- **Fitbit failed to raise this argument during *Markman***

- **The <u>antecedent references</u> and <u>different names</u> demonstrate that the "remote server" and the "internet server" may be different servers. *Bd. of Regents of the U. of Texas System v. BENQ Am. Corp.*, 533 F.3d 1362, 1371 (Fed. Cir. 2008) ("Different claim terms are presumed to have different meanings.")**

- **Fitbit offered no evidence to contradict the fact that "The Fitbit App must be downloaded from the Apple App Store for smartphones running iOS." *See e.g.*, Dkt. 367, ¶2 and ¶3 (for Android).**

1. A method for interactive exercise monitoring, the method comprising the steps of:
   a. downloading an application to a web-enabled wireless phone directly from ==a remote server== over the internet;
   b. coupling the a web-enabled wireless phone to a device which provides exercise-related information;
   c. rendering a user interface on the web-enabled wireless phone;
   d. using the application, receiving data indicating a physiologic status of a subject;
   e. using the application, receiving data indicating an amount of exercise performed by the subject;
   f. wherein at least one of the data indicating a physiologic status of a subject or the data indicating an amount of exercise performed by the subject is received from the device which provides exercise-related information, and wherein the data indicating a physiologic status of a subject is received at least partially while the subject is exercising;
   g. sending the exercise-related information to ==an internet server== via a wireless network;
   h. receiving a calculated response from the server, the response associated with a calculation performed by the server based on the exercise-related information; and
   i. using the application, displaying the response.

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See generally Dkt. 340 at 10-11; Dkt. 291 at 2-6

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Fitbit Arguments – Single Server 1(g) and 1(h)

- '377 specification explains that "server 22" resides on more than one physical server. Physical configuration not specified.
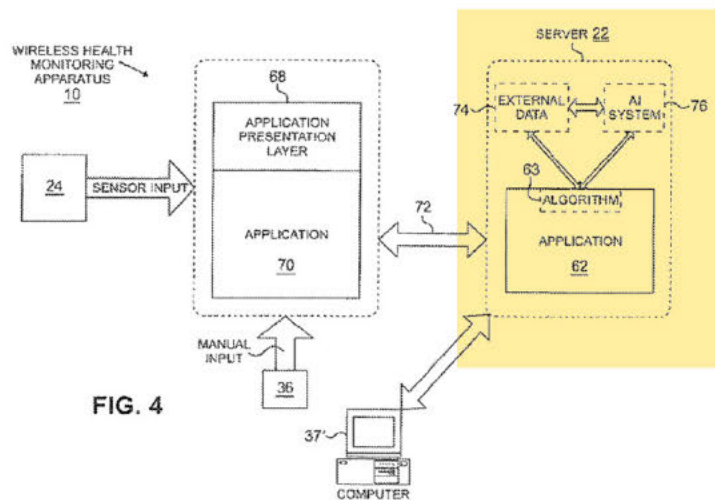

FIG. 4

It should also be noted that each of application **62**, algorithm **63**, external data source **74**, or AI system **76**, may physically reside on more than one server, e.g., on an array of servers for, e.g., storage or multiple processing purposes. Each of application **62**, algorithm **63**, external data source **74**, or AI system **76**, or combinations of each, may also respectively reside on different servers.

'377 at 8:45-51, Fig. 4

1. A method for interactive exercise monitoring, the method comprising the steps of:

a. downloading an application to a web-enabled wireless phone directly from a remote server over the internet;

b. coupling the a web-enabled wireless phone to a device which provides exercise-related information;

c. rendering a user interface on the web-enabled wireless phone;

d. using the application, receiving data indicating a physiologic status of a subject;

e. using the application, receiving data indicating an amount of exercise performed by the subject;

f. wherein at least one of the data indicating a physiologic status of a subject or the data indicating an amount of exercise performed by the subject is received from the device which provides exercise-related information, and wherein the data indicating a physiologic status of a subject is received at least partially while the subject is exercising;

g. sending the exercise-related information to an internet server via a wireless network;

h. receiving a calculated response from the server, the response associated with a calculation performed by the server based on the exercise-related information; and

i. using the application, displaying the response.

See generally Dkt. 340 at 11; Dkt. 362 at 7-10; Dkt. 378 at 2-4.

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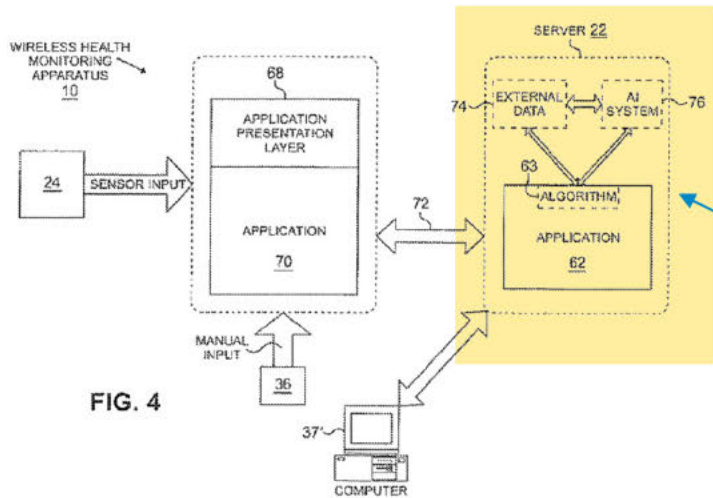
Fitbit Arguments – Single Server 1(g) and 1(h)

FIG. 4

Server **22** has a base server application **62** with which the same calculates or provides a response based at least in part on data from WHMA **10**. Application **62** may include an algorithm **63** for analyzing data from the HMD, and either application **62** or algorithm **63** may optionally access data from an external data source **74** and may further consult an artificial intelligence system **76**.

'377 at 8:14-20, Fig. 4

Broken/dotted line as opposed to solid lines; arrows show array communicating

It should also be noted that each of application **62**, algorithm **63**, external data source **74**, or AI system **76**, may physically reside on more than one server, e.g., on an array of servers for, e.g., storage or multiple processing purposes. Each of application **62**, algorithm **63**, external data source **74**, or AI system **76**, or combinations of each, may also respectively reside on different servers.

'377 at 8:45-51, Fig. 4

and so on. Accordingly, the scope of the invention is to be limited only by the claims appended hereto, and equivalents thereof. In these claims, a reference to an element in the singular is not intended to mean "one and only one" unless explicitly stated. Rather, the same is intended to mean "one or more". All structural and functional equivalents to the elements of the above-described preferred embodiment that are known or later come to be known to those of ordinary skill in the art are expressly incorporated herein by reference and are intended to be encompassed by the present claims. Moreover,

'377 at 13:3-6

See generally Dkt. 340 at 11; Dkt. 362 at 7-10; Dkt. 378 at 2-4.

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Fitbit Arguments – Single Server 1(g) and 1(h)

The indefinite article "an" means "one or more."

- *Baldwin Graphic Sys., Inc. v. Siebert, Inc.*, 512 F.3d 1338, 1342 (Fed Cir. 2008) (the Federal Circuit "has repeatedly emphasized that an indefinite article 'a' or 'an' in patent parlance carries the meaning of 'one or more' in open ended claims containing the transitional phrase 'comprising'" and "subsequent use of definite articles 'the' or 'said' in a claim to refer back to the same claim term does not change the general plural rule, but simply reinvokes that non-singular meaning.")
- *See e.g.,* Dkt. 291 at 3-6.
- Fitbit's *FotoMedia* case is inapposite relying on circumstance that "[the specification] does not suggest or teach the concept of a distributed system anywhere." *FotoMedia, LLC v. AOL, LLC*, 2009 WL 2175845, at *6 (E.D. Tex. July 21, 2009).

Dkt. 367 at ¶¶ 51 and 55.

See generally Dkt. 340 at 11; Dkt. 362 at 7-10; Dkt. 378 at 2-4.

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Fitbit Arguments – Single Server 1(g) and 1(h)

Fitbit failed to distinguish Philips cited cases explaining that, unless specified otherwise, transmissions can be "direct or indirect" <u>including through intermediates</u>:

- *SiRF Tech., Inc. v. I.T.C.*, **601 F.3d 1319, 1330 (Fed. Cir. 2010)**
  - "[I]f a claim for a method of making a telephone call included the limitation: 'placing a telephone call to a telephone at a second location,' the fact that the call **must first be routed through a switched telephone network**, and then eventually to the eventual recipient, would not prevent this claim limitation from being satisfied."
- *IGT v. Alliance Gaming Corp.*, **No. 2:04-cv-1676, 2008 WL 11451149, at *18-19 (D. Nev. Oct. 16, 2008)**
  - "to send . . . to a player tracking server" construed to encompass using an intermediary
- *AGIS Software Development LLC v. Huawei Device USA Inc.*, **No. 2:17-cv-513, 2018 WL 4908169, at *26-27 (E.D. Tex. Oct. 10, 2018)**
  - rejecting proposed construction of "receiving a message from a second device" that would require the message to be received "directly" and "without the use of a server"
- Additional cases Dkt. 362 at 11-12

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Fitbit "response associated with a calculation"

h. receiving a calculated response from the server, the response associated with a calculation performed by the server based on the exercise-related information; and
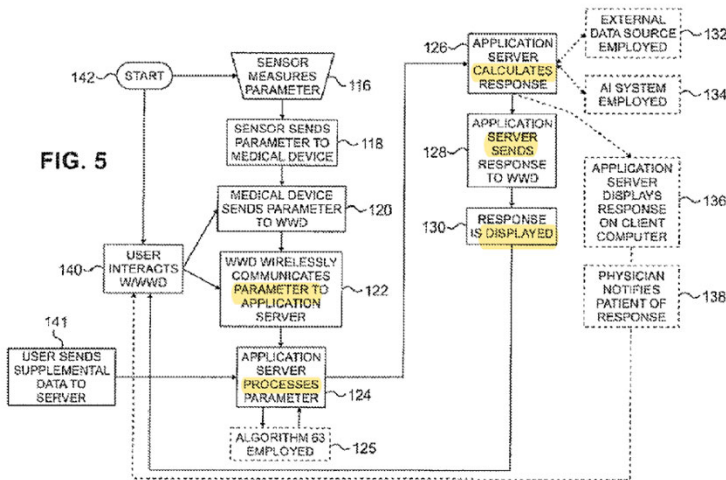
A "response associated with a calculation … based [entirely or at least in part] on the exercise-related information"

Server **22** has a base server application **62** with which the same calculates or provides a response based at least in part on data from WHMA **10**. Application **62** may include an algorithm **63** for analyzing data from the HMD, and either application **62** or algorithm **63** may optionally access data from an external data source **74** and may further consult an artificial intelligence system **76**.

'377 at 8:13-20

sends the parameter to the WWD (step **120**). The WWD then wirelessly communicates the parameter to the application server (step **122**), e.g., via the wireless web. The application server processes the parameter (step **124**), and calculates or provides a response (step **126**) based at least in part on the parameter. The application server may optionally employ algorithm **63** (step **125**), external data (step **132**) or an AI system (step **134**) in the calculation. The application server then sends the response to the WWD (step **128**), where the response is displayed (step **130**).

'377 at 9:35-44; see also 10:47-53.

FIG. 5

- 142 START
- 116 SENSOR MEASURES PARAMETER
- 118 SENSOR SENDS PARAMETER TO MEDICAL DEVICE
- 120 MEDICAL DEVICE SENDS PARAMETER TO WWD
- 140 USER INTERACTS W/WWD
- 122 WWD WIRELESSLY COMMUNICATES PARAMETER TO APPLICATION SERVER
- 141 USER SENDS SUPPLEMENTAL DATA TO SERVER
- 124 APPLICATION SERVER PROCESSES PARAMETER
- 125 ALGORITHM 63 EMPLOYED
- 126 APPLICATION SERVER CALCULATES RESPONSE
- 128 APPLICATION SERVER SENDS RESPONSE TO WWD
- 130 RESPONSE IS DISPLAYED
- 132 EXTERNAL DATA SOURCE EMPLOYED
- 134 AI SYSTEM EMPLOYED
- 136 APPLICATION SERVER DISPLAYS RESPONSE ON CLIENT COMPUTER
- 138 PHYSICIAN NOTIFIES PATIENT OF RESPONSE

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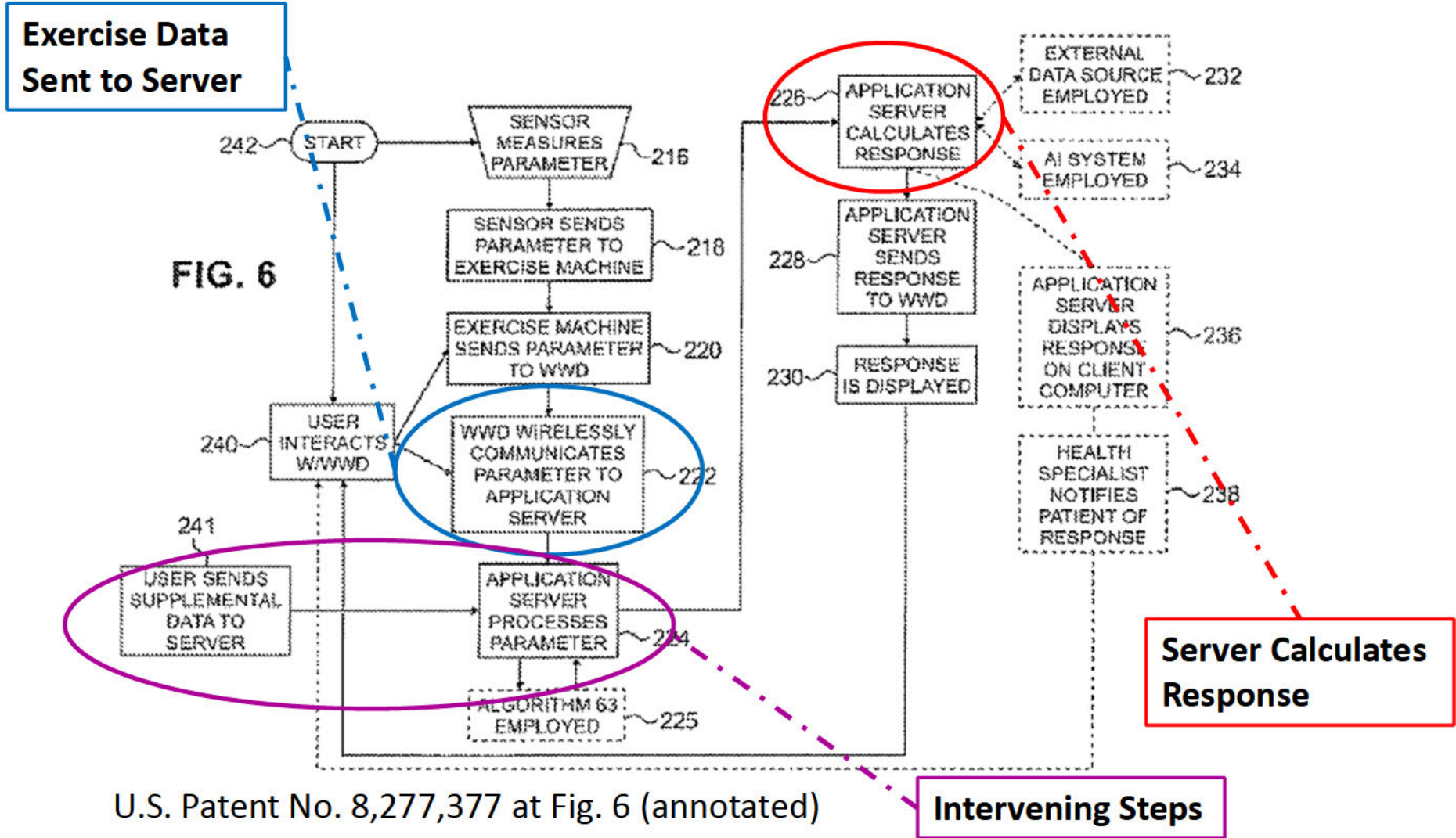# Fitbit Arguments – "triggering" and "WiFi"

- **Fitbit failed to raise this argument during *Markman*.**
- **No basis for Fitbit's argument that "triggering" is required in the claim. Dkt. 364 at 5-6. No requirement that receiving must be triggered by sending.**
- **Fitbit's argument is contrary to the specification. Philips' Reply Dkt. 378 at 5-6 (e.g., User Sends Supplemental Data to Server)**
- **WiFi is "wireless" connection in the claims and specification.**

5. The method of claim **4**, wherein the wireless connection includes an infrared connection or a radio frequency communication protocol including a short-range wireless transmission scheme.

6. The method of claim **5**, wherein the short-range wireless transmission scheme includes IEEE 802.11 protocol or short-wavelength radio transmission in the ISM band of 2400-2480 MHz.

1. A method for interactive exercise monitoring, the method comprising the steps of:
   a. downloading an application to a web-enabled wireless phone directly from a remote server over the internet;
   b. coupling the a web-enabled wireless phone to a device which provides exercise-related information;
   c. rendering a user interface on the web-enabled wireless phone;
   d. using the application, receiving data indicating a physiologic status of a subject;
   e. using the application, receiving data indicating an amount of exercise performed by the subject;
   f. wherein at least one of the data indicating a physiologic status of a subject or the data indicating an amount of exercise performed by the subject is received from the device which provides exercise-related information, and wherein the data indicating a physiologic status of a subject is received at least partially while the subject is exercising;
   g. sending the exercise-related information to an internet server via a wireless network;
   h. receiving a calculated response from the server, the response associated with a calculation performed by the server based on the exercise-related information; and
   i. using the application, displaying the response.

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PHILIPS

Fitbit Arguments – "triggering" and "WiFi"

U.S. Patent No. 8,277,377 at Fig. 6 (annotated)

See generally Dkt. 378 at 4-7.

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PHILIPS

Fitbit Arguments – "triggering" and "WiFi"

- Specification repeatedly refers to the IEE 802.11 protocol as "wireless"
- Prosecution history cited by Fitbit does not mention Wi-Fi let alone show a "clear and unmistakable disclaimer"

> As for **wireless techniques**, infrared (IR), microwaves, radio frequency (RF), e.g., Bluetooth® or **IEEE 802.11 protocols**, optical techniques including lasers, and other such techniques may be used. The patient or subject may also input

U.S. Patent No. 8,277,377 at 4:13-16 (highlighting added)

30

See generally Dkt. 378 at 7-12.

PHILIPS

Fitbit Arguments – "coupling" and "rendering"

- *Hilgraeve Corp. v. Symantec Corp.*, **265 F.3d 1336, 1342, n.2 (Fed. Cir. 2001)** ("While the parties, and the district court's decision, speak of the accused devices as infringing, more properly the allegation is that the operation of the devices directly infringes the method claims at issue . . . .")
- *Linear Tech. Corp. v. Impala Linear Corp.*, **379 F.3d 1311, 1326 (Fed. Cir. 2004)** (discussing "customers who use [accused devices] in a way that directly infringes the method claim")
- *Sentius Int'l, LLC v. Apple Inc.*, **2020 WL 2850286, at *4 (N.D. Cal. June 2, 2020)**("[T]he use of a method by a device creates liability for the party that controls the device . . . .")
- **Fitbit does not distinguish the cases and cites NO cases to the contrary**.

1. A method for interactive exercise monitoring, the method comprising the steps of:
   a. downloading an application to a web-enabled wireless phone directly from a remote server over the internet;
   b. **coupling** the a web-enabled wireless phone to a device which provides exercise-related information;
   c. **rendering** a user interface on the web-enabled wireless phone;
   d. using the application, receiving data indicating a physiologic status of a subject;
   e. using the application, receiving data indicating an amount of exercise performed by the subject;
   f. wherein at least one of the data indicating a physiologic status of a subject or the data indicating an amount of exercise performed by the subject is received from the device which provides exercise-related information, and wherein the data indicating a physiologic status of a subject is received at least partially while the subject is exercising;
   g. sending the exercise-related information to an internet server via a wireless network;
   h. receiving a calculated response from the server, the response associated with a calculation performed by the server based on the exercise-related information; and
   i. using the application, displaying the response.

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PHILIPS

Overwhelming Evidence of Infringing Use by Fitbit and its Customers

See generally Dkt. 363

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Case Law Supports Infringement

- *Toshiba Corp. v. Imation Corp.*, **681 F.3d 1358 (Fed. Cir. 2012)**
    - Reversed the district court grant of summary judgment of noninfringement.
    - The correct standard is whether there is sufficient circumstantial evidence to find that **"sometime during the relevant period … more likely than not one person somewhere in the United States"** [displayed Cardio Fitness on their phone where the phone had synced during exercise]. *Id*. at 1366. Only requires 1 in ▮▮▮▮▮▮ Fitbit users over a period of 4+ years.
    - "The district court erred as a matter of law. The existence of a substantial non-infringing use does not preclude a finding of inducement." *Id*. at 1364.
    - "Users may record data onto DVDs using either the disc-at-once mode [infringing] or multisession mode [non-infringing unless finalization employed]." *Id*.
    - "[W]hen the disc-at-once mode is used, the DVD necessarily infringes." *Id*.
    - "In the present case,[] recording DVDs in disc-at-once mode or multisession mode with finalization is not disabled by default, and Appellees go beyond describing the infringing mode; they recommend that customers use the infringing mode." *Id*. at 1365.

PHILIPS

Case Law Supports Infringement

- *Moleculon Research Corp. v. CBS, Inc.*, 793 F.2d 1261, 1272 (Fed. Cir. 1986)
  - "[E]vidence of extensive puzzle sales … and the availability of a solution booklet on how to solve the puzzle" was sufficient.

- *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1317-18 (Fed. Cir. 2009)
  - Involved use of the "data-picker tool".
  - "[T]he jury reviewed evidence relating to the extensive sales of Microsoft products and the dissemination of instruction manuals for the Microsoft products."

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PHILIPS

Fitbit Cases are Inapposite

- *ACCO Brands, Inc. v. ABA Locks Mfrs. Co., Ltd.***, 501 F.3d 1307 (Fed. Cir. 2007)**
  - Per the Federal Circuit in *Toshiba*, "The products in ACCO, however, were sold <u>only with instructions describing the non-infringing use</u>." *Toshiba Corp. v. Imation Corp.*, 681 F.3d 1358, 1366 (Fed. Cir. 2012)(emphasis added).

- *E-Pass Techs., Inc. v. 3Com Corp.***, 473 F.3d 1213 (Fed. Cir. 2007)**
  - "E-Pass has submitted <u>no</u> evidence that the patented method has ever been practiced." *Id.* at 1221 (emphasis original).
  - No deployment of contactless payment protocols.
  - Evidence failed to show that "any such [contactless payment] protocol was ever actually deployed." *Id*. at 1222.
  - Relied only on "a set of excerpts from the product manuals" for Palm PDAs *Id*.

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PHILIPS

Fitbit Cases are Inapposite

- ***Fujitsu Ltd. V. Netgear*, 620 F.3d 1321 (Fed. Cir. 2010)**
  - Federal Circuit has twice declined to extend *Fujitsu* beyond cases where infringing option <u>was disabled by default</u>. *See Toshiba Corp. v. Imation Corp.*, 681 F.3d 1358, 1365 (Fed. Cir. 2012); *see also Convolve, Inc. v. Compaq Comp. Corp.*, 527 Fed.Appx. 910, 929 (Fed. Cir. 2013) (unpublished and nonprecedential)

PHILIPS

Overwhelming Evidence of Infringing Use

Use by Fitbit and Its Customers.

- ██
  ███████. Dkt. 367 at ¶14.
- Evidence of extensive infringing use includes
  1. <u>Surveys</u> conducted by Fitbit that evidence use. *See e.g.,* Martin Opening Report (Dkt. 342-1) at ¶¶ 249-254; Dkt. 363 at 8.
  2. <u>Studies</u> conducted by Fitbit that evidence use. *See e.g.,* Martin Opening Report (Dkt. 342-1) at ¶¶ 255-258.
  3. <u>Testimonials</u> of use from Fitbit's website. *See e.g.,* Martin Opening Report (Dkt. 342-1) at ¶¶ 255-258.
  4. <u>Videos</u> that evidence use and encourage use. *See e.g.,* Martin Opening Report (Dkt. 342-1) at ¶¶ 227.
  5. ██
     ██
     ██
     ██
  6. <u>Advertisements</u> in which Fitbit advertised its Cardio Fitness Score/Level feature being displayed on the Fitbit App running on a smartphone. *See e.g.,* Dkt. 363 at 5-9.
  7. <u>User manuals and Help pages</u> from Fitbit's website instructing users on how to perform the claimed method. *See e.g.,* Dkt. 363 at 5-9.

PHILIPS

Fitbit's Response to Statement of Facts

Fitbit only denies that infringement happens every time -- Fitbit never denies infringement occurs sometimes (Dkt. 367):

- Limited denial that infringing operation is the **"only way."** See e.g., Fitbit Response to Fact Nos. 64, 65.
- Limited denial that Accused Devices **"may [or can] only be"** used to infringe. See e.g., Fitbit Response to Fact Nos. 12, 23, 25, 26, 27, 28, 32, 33, 34, 35, 38, 39, 44, 45, 63.
- Limited denial that **"every"** Accused Device infringes in every operation. See e.g., Fitbit Response to Fact Nos. 32, 33, 34, 35, 44, 51, 52, 53, 55, 56, 63, 64, 71.

In many instances, Fitbit **admits or fails to offer evidence** to generate a genuine issue of fact. See e.g., Fitbit Response to Fact Nos. 2, 3, 4, 5, 6, 7, 16, 17, 18, 19, 20, 21, 22, 25, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 43, 44, 45, 47, 49, 50, 54, 60, 62, 71, 72, 74, 75, 76, 77, 78, 79.

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PHILIPS

Syncing During Exercise

- Fitbit admits that if the threshold requirements are met and "All Day Sync" is turned on, syncs occur **every 15 minutes**. Dkt. 367 at Fitbit RSF 40.

- "All Day Sync" feature
    - Turned on by default. Dkt. 367 at Fitbit RSF 41.
    - Fitbit removed the option to turn off this feature in 2020. Martin Opening Report (Dkt. 342-1) at ¶¶ 103-104.

- Fitbit designed 5 features each of which **require** that user's paired smartphone be within range of Accused Wearables (as well as have Bluetooth enabled)
    - Connected GPS – GPS Runs
    - Music Control (music on phone)
    - Live Dash (dashboard on phone)
    - Notifications (calls, etc. from phone)
    - Quick Replies

PHILIPS

Cardio Fitness

FITBIT NEWS   AUGUST 29, 2016

Get a Clear Snapshot of Your Fitness with the New Fitbit Cardio Fitness Level

BY FITBIT STAFF

Fitbit automatically provides you with a Cardio Fitness Level in the app using your resting heart rate and user profile. You can obtain a more precise Cardio Fitness Score & Level by going for a run of at least 10 minutes on flat terrain at a comfortable pace with Connected GPS enabled. The

40   Martin Opening Report (Dkt. 342-1) at ¶¶ 228-237; Dkt. 342-25, PNA-FB0016580, 580-81.

PHILIPS
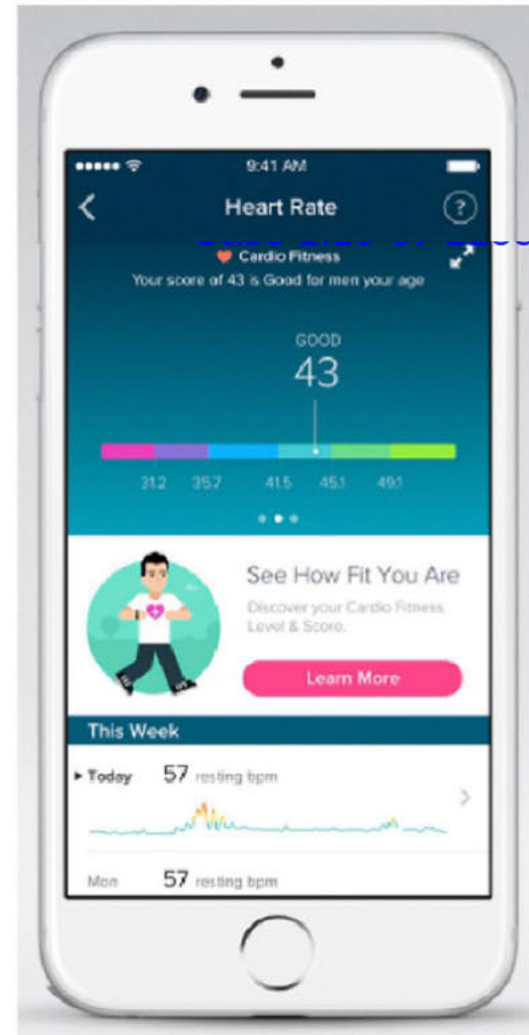
Syncing During Exercise and Cardio Fitness

Shown "in the [Fitbit] App"
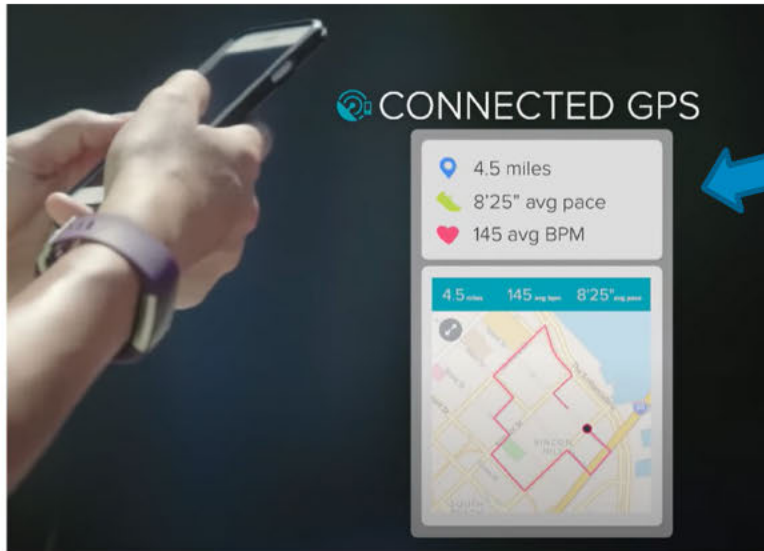
https://www.youtube.com/watch?v=PxpxRoWmjq8
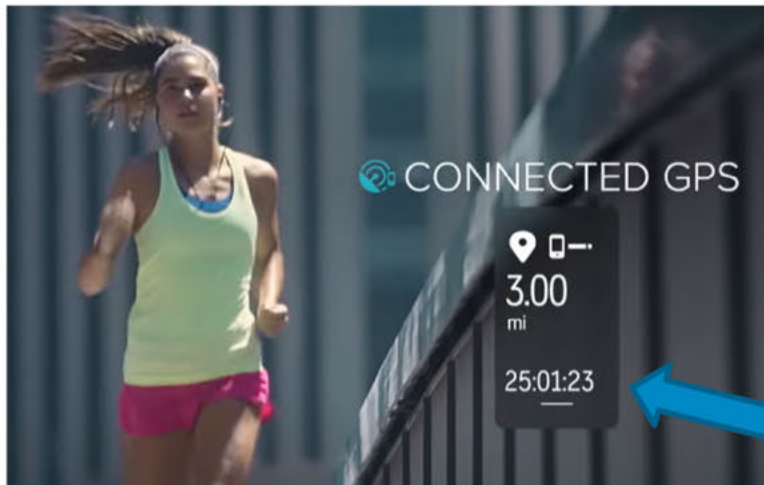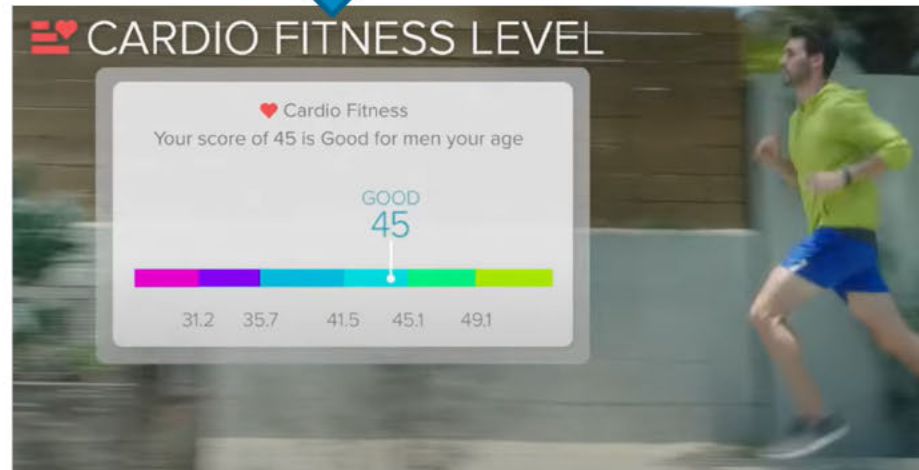
25 minutes running – phone sync every 15 minutes

Martin Opening Report (Dkt. 342-1) at ¶¶ 203-227; Dkt. 343-18 screenshots at 0:37 - 0:46.

PHILIPS

Syncing During Exercise

Accused Device
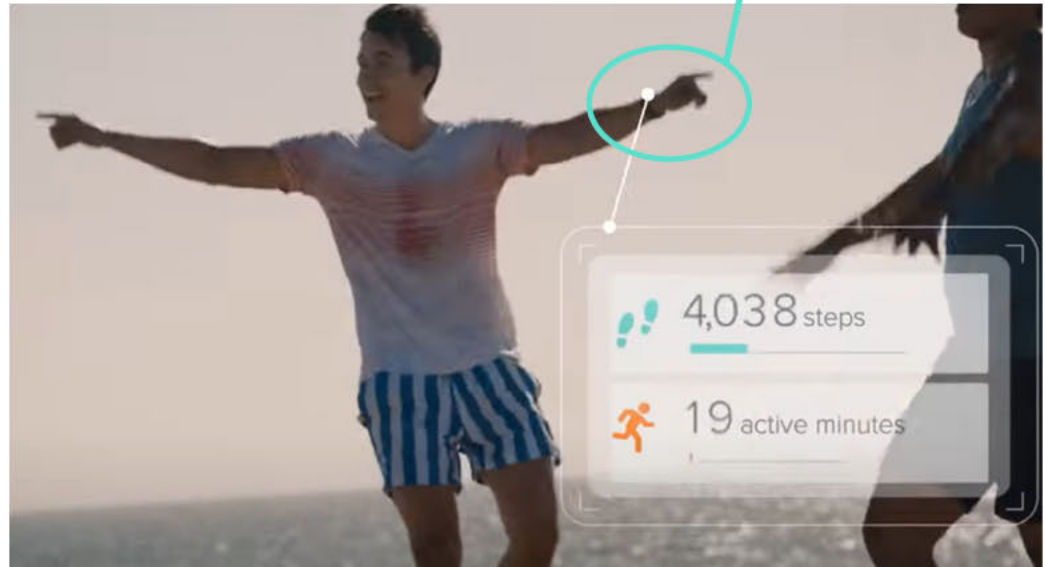
19 minutes active – phone sync every 15 minutes

https://www.youtube.com/watch?v=aunF4Sog_UQ

D.I. 343-20 at 0:12-0:16

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PHILIPS

Syncing During Exercise

- Fitbit advertises users exercising with paired smartphones in range

Accused Device
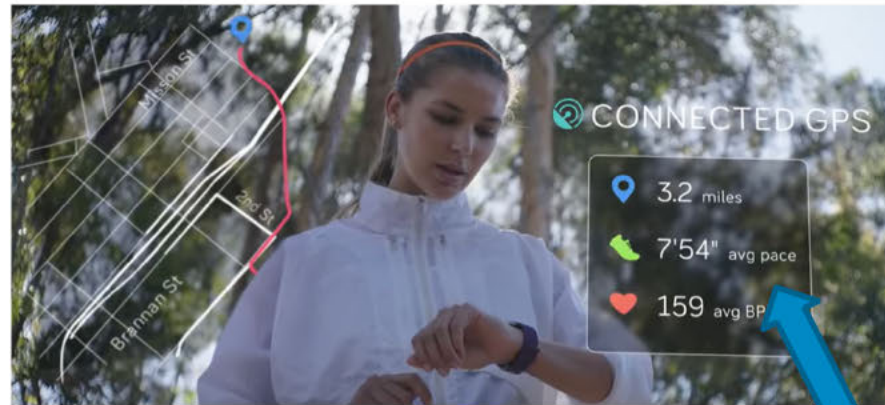
Smartphone

D.I. 343-17 at 0:26

D.I. 343-17 at 0:25

Over 20 minute run – phone sync every 15 minutes

https://www.youtube.com/watch?app=desktop&v=3k3DNT54NkA

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PHILIPS

Study of Use of Claimed Method by Fitbit Users

75. In the Klepin et al. study, 60 participants were given Charge 2 devices that were paired to the Fitbit App on smartphones and subjects completed at least three GPS runs of at least fifteen minutes.	Martin Opening Report at ¶ 256 PNA-FB0016672	75. Admitted.
76. In the Klepin et al. study, participants obtained a Cardio Fitness Score on the Fitbit App.	Martin Opening Report at ¶ 256 PNA-FB0016672	76. Admitted. Fitbit notes that Philips does not allege, and the cited evidence does not indicate, whether the study participants viewed their Cardio Fitness Score on the Fitbit app *on a phone*.

widespread adoption in free-living populations. Specifically, participants found both the device and smartphone application easy to use and potentially helpful in regard to motivating healthy levels of physical activity. If the results of this study

Dkt. 367 at ¶¶75, 76; Dkt. 343-13 (PNA-FB0016672 at 672.

PHILIPS

Testimonials/Instructions from Fitbit – GPS Run

fitbit | COMMUNITY

MarreFitbit

Fitbit Moderator

💬 38813 ✓ 3896

👍 11692

05-13-2018 22:50 - last edited on 09-08-2020 18:54 by **MatthewFitbit**   •••

This year I've been tracking my cardio fitness score and have watched it go up from good to the upper end of the very good / excellent section. In the last couple of months I have lost a lot of weight and done a lot more exercise but the score just shows that I register at 30 (average) and it hasn't moved from that at all for at least 8 weeks. It hasnt budged from 30 either (so hasn't gone lower or higher) which suggests to me it isn't working rather than it reflecting an accurate score. Why would that be?

We can provide a more precise estimate of your score using the relationship between pace and heart rate during your runs. This is because individuals with higher VO2 Max have a lower heart rate while running at the same pace compared to individuals with lower VO2 Max. If you're able to run at a comfortable pace for at least 10 minutes use multisport mode on your Charge 2 to track a run with GPS We recommend running on flat terrain as much as possible since only the flat sections of your run count towards your score estimate. You may need to go on several runs that are at least 10 minutes in length to affect your score.
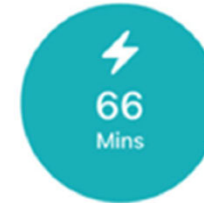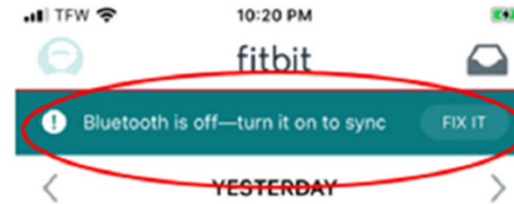
Dkt. 343-08 (PNA-FB0016665-67); *see also* Martin Opening Report (Dkt. 342-1) at ¶257.

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PHILIPS

Accused Devices are Paired With Smartphones

- Fitbit App (as designed by Fitbit) alerts users when phone not connected to Internet or Bluetooth turned off and instructs users to "Fix It" to sync
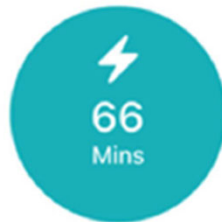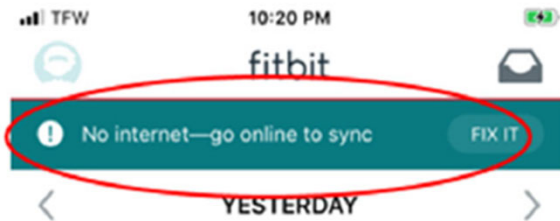
Martin Opening Report
(Dkt. 342-1) at ¶ 226

Martin Opening Report
(Dkt. 342-1) at ¶ 225

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PHILIPS

Accused Devices are Paired With Smartphones

- Fitbit admits that users pair their devices to smartphones running the Fitbit App
    - Fitbit admits that Accused Devices cannot be used without first pairing to a device running the Fitbit App. *See* Dkt. 367 at ¶ 12
    - Fitbit admits that ███████████████████████████████████ users in the U.S. first paired an Accused Wearable with an account in the Fitbit app (Android or IOS)" Dkt. 367 at ¶ 14
    - Fitbit admits that "most people have cell phones" and that "cell phones are ubiquitous". Dkt. 367 at ¶¶ 6-7
    - Fitbit admits that "at least one Fitbit user has downloaded the Fitbit App to a smartphone running iOS or Android". Dkt. 367 at ¶ 10

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PHILIPS

Direct Infringement by Fitbit

See generally Dkt. 363 at 12-13.

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Fitbit Reply

Fitbit asserted in reply that "Philips did not preserve the allegation that Fitbit directly infringes." Dkt. 376 at 11 (Fitbit Reply)
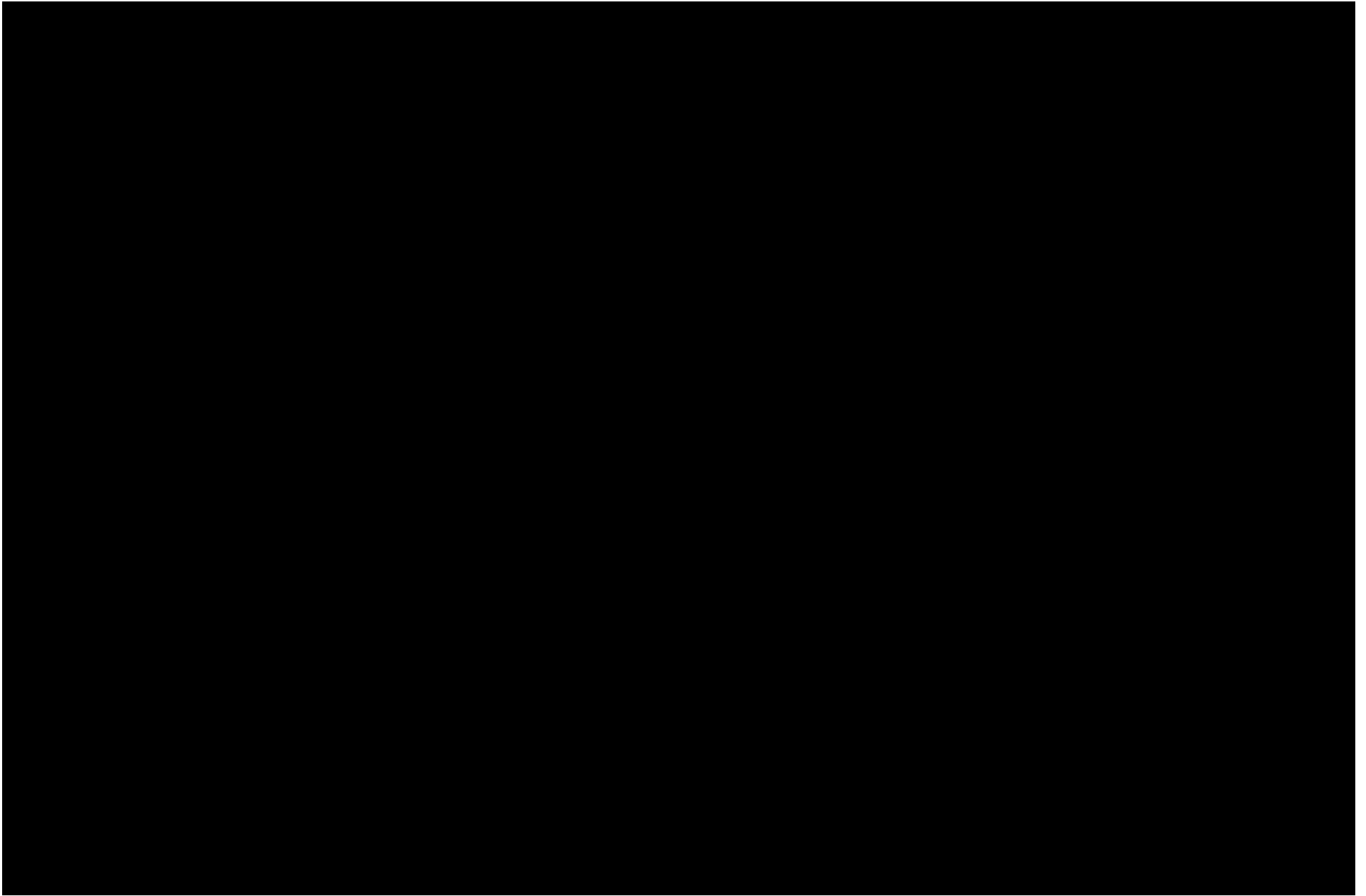
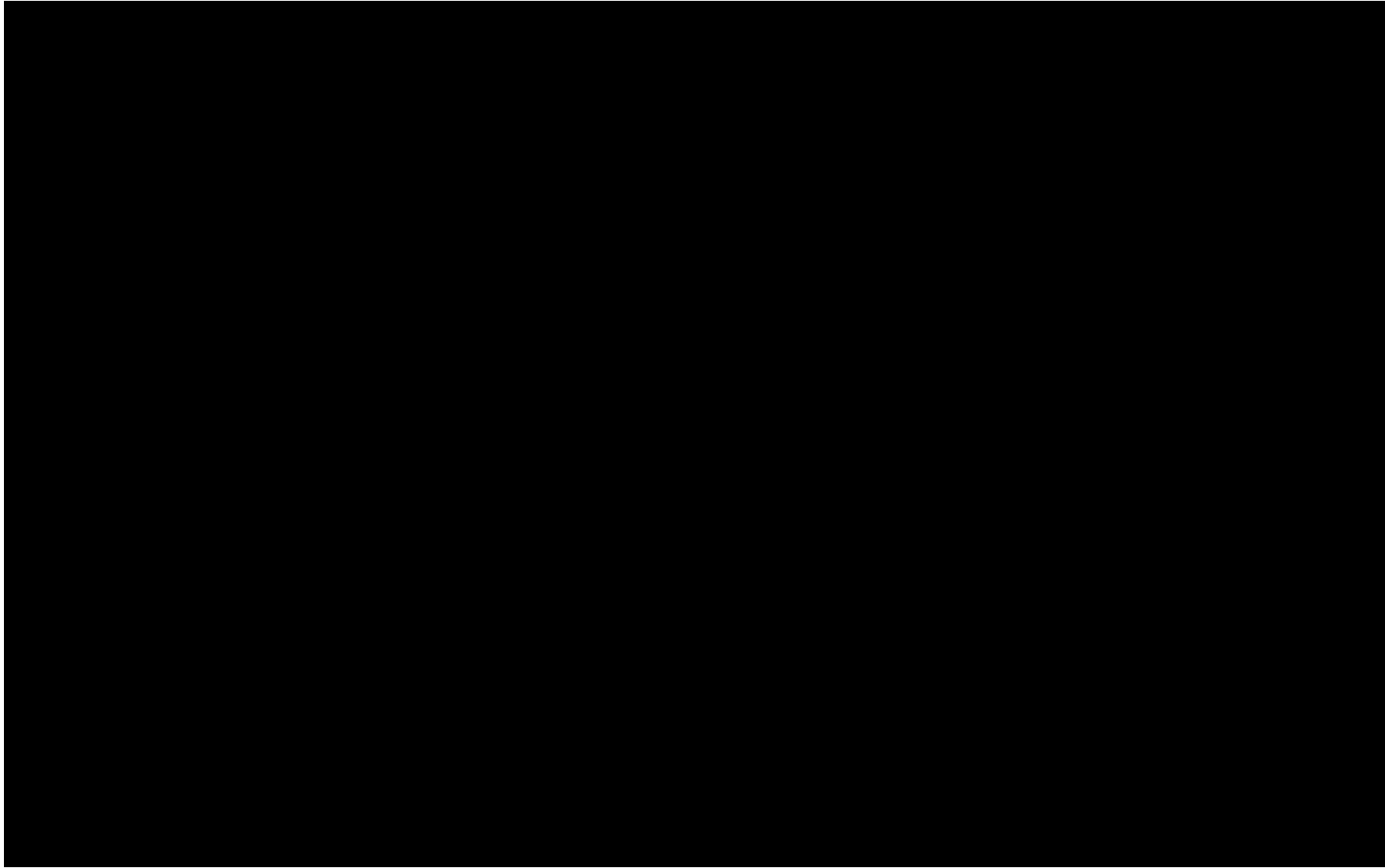March 17, 2020 Supplemental Disclosure, Dkt. 270-10.

1. Additional details concerning infringement and acts of multiple parties.

    i. Direct Infringement (35 U.S.C. § 271(a))

Fitbit has directly infringed the claims of the '377 by at least performing the claim methods (as charted), at least for the purposes of testing its products and services, demonstrating its products and services to others, etc.
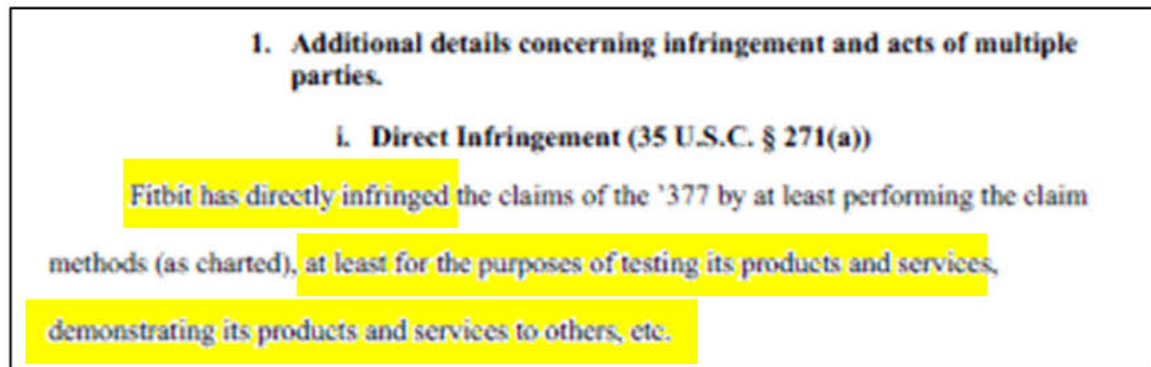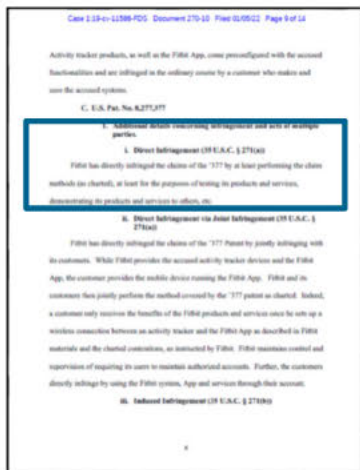
Dkt. 270-10 at 9

February 10, 2020 - Response to Interrogatory, Dkt. 270-3 at 4 of 5.

In addition to directly infringing through its development and use of the Accused Products, and/or by prototyping and testing functionality of the Accused Products that infringe one or more claims of the Patents-in-Suit, Fitbit jointly infringes with its customers and

Dkt. 270-3 at 4 of 5   **PHILIPS**

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PHILIPS

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PHILIPS

Joint Infringement

55
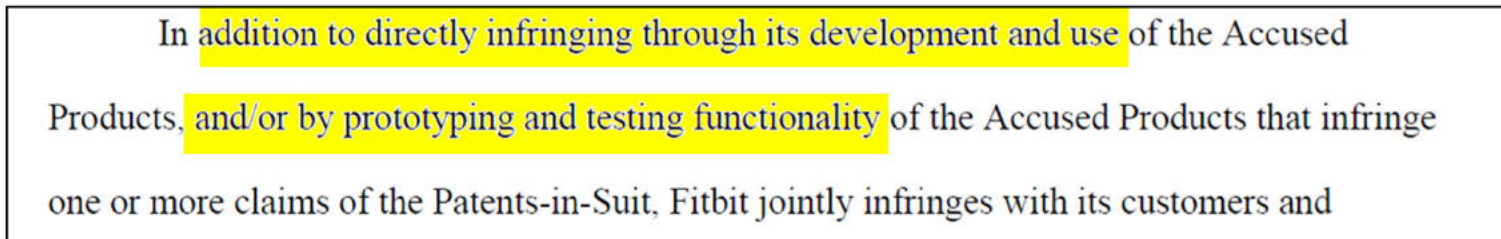
Joint infringement of the claims

- There is a genuine issue of disputed material fact 9:

> **11.   Fitbit Conditions Benefits on Practicing the '377 Patent**
>
> 259.   Fitbit conditions the benefit of using the Cardio Fitness feature of the '377 Products
> on the user downloading of the Fitbit App onto a smartphone, pairing a '377 Device to said
> smartphone, syncing exercise-related data to the smartphone using the Fitbit App, and opening the
> Cardio Fitness Score page on the Fitbit App.

Dkt. 342-01, at ¶259 (Martin Report); see also Dkt. 338-1 (Martin Dep. Tr.)
at 252:15-253:20

> 74:18-75:6. Additionally, Fitbit establishes the manner of this performance by providing hardware
> (in the form of the '377 Device), software (in the form of the Fitbit App), and services (in the form
> of running and mainting the Fitbit servers which receive the exercise-related data from the
> smartphone during syncs and send the smartphone the Cardio Fitness Score and Level calculated
> responses) that are required in order for the user to obtain the benefit of the Cardio Fitness Feature.

Dkt. 342-01, at ¶263 (Martin Report)

PHILIPS

Case law supports joint infringement by Fitbit

Nalco Co. v. Chem-Mod, LLC, 883 F.3d 1337 (Fed. Cir. 2018)

- "[L]iability under § 271(a) can also be found when an alleged infringer conditions <u>participation in an activity</u> or <u>receipt of a benefit</u> upon performance of a step or steps of a patented method and establishes the manner and timing of that performance." *Id.* at 1351 (quoting *Akamai*, emphasis added, citations omitted).
- "Our case law emphasizes the importance of correctly identifying the relevant <u>activity</u> or <u>benefit</u> that is being conditioned...." *Id.* at 1351 (emphasis added, internal quotation marks omitted).

- "Nalco alleges that the facility conducting the test engages in **a <u>specified activity—performing each step of the methods claimed</u>** . . . . [T]his performance is conditioned on obtaining monetary benefits . . . ." *Id.* at 1353 (emphasis added).

- Here the <u>participation in the activity</u> is the same: performance of the claimed method.
- The condition is that the customers must accept that Fitbit establishes and controls the manner of such performance.

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PHILIPS

Case law supports joint infringement by Fitbit

In *Akamai* –

conditioned use of content deliver network on performing steps of method. *Akamai Tech., Inc. v. Limelight Networsk, Inc.*, 797 F.3d 1020, 1024 (Fed. Cir. 2015)(*en banc*)("Limelight conditions its customers' use of its content delivery network upon its customers' performance of the tagging and serving steps")

In *Eli Lilly* –

conditioned premetrexed treatment on performing step of treatment method. *Travel Sentry, Inc. v. Tropp*, 877 F.3d 1370, 1379 (Fed. Cir. 2017)(describing *Eli Lilly v. Teva Parenteral Medicines*, 845 F.3d 1357, 1366 (Fed. Cir. 2017 as "physicians 'condition[ed]' premetrexed treatment on the administration of folic acid")

PHILIPS

Case law supports joint infringement by Fitbit

In *Travel Sentry*, the court referred to a "common thread" among the cases: "evidence that a third party **hoping to obtain access** to certain benefits can only do so if it performs certain steps identified by the defendant, and does so under the terms prescribed by the defendant." *Id*. at 1380.

The Federal Circuit in *Travel Sentry* reversed the trial court because "it misidentified the relevant 'activity' at issue [by] broadly defining it." *Id*. at 1381.

In *Travel Sentry*, the Federal Circuit found that:
- "**[T]he benefits TSA allegedly seeks flow directly from its performance of the final two claim steps. This is because the very activity in which TSA seeks to participate is the very activity identified in the claim steps**." *Id*. at 1384 (emphasis added).
- "[I]t is irrelevant that TSA can choose to accomplish its luggage screening mandate through other means." *Id*. at 1385.

PHILIPS

Fitbit fails to distinguish *Nalco* and *Travel Sentry*

Fitbit attempts to distinguish *Nalco* arguing that "the legal test would collapse on itself." Reply at 8. But Fitbit misapprehends that the benefit of the performance of a method as a whole can be conditioned on performance of the steps as explained in *Nalco*, *Travel Sentry, Eli Lilly* and *Akamai*.

Fitbit attempts to distinguish *Travel Sentry* because "there are other means of participating in the activity." Reply at 6. But, *Travel Sentry* found such arguments "irrelevant." As Travel Sentry explained, "the very activity in which [the customer] seeks to participate is the very activity identified in the claim steps."

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PHILIPS

Fitbit does not deny fundamental facts showing joint infringement

- Fitbit <u>does not contest</u> that
    - Fitbit's customers download the Fitbit App onto their smartphones and the Fitbit App displays Cardio Fitness Scores and Levels on the phones.
    - Fitbit conditions performance on controlling the Fitbit App and the related systems.

- Fitbit ignores the <u>relevant activity is the claimed method</u>. And that the case law recognizes the activity/benefit is the claimed method.

- The activity/benefit is more specific than just the information displayed. The activity/benefit is use of the claimed method including displaying Cardio Fitness on the users phone where the phone had synced during exercise.

- Fitbit attempts to recast Philips assertion of joint infringement to pertain to non-infringing alternatives that do not involve the fundamental claimed steps involving the phone, the Fitbit App, and the wearables.

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PHILIPS

Induced Infringement

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Fitbit's inducement position is legally flawed

- Fitbit argues that "Fitbit's users do not literally 'render[] a user interface'" and that "[a] Fitbit user does not process image data or draw the visual characteristics of a user interface." Dkt. 376 (Fitbit Reply) at 11.

- Fitbit invites this court to legal error – users that operate devices which perform the claimed method steps directly infringe the method claim.

- *Hilgraeve Corp. v. Symantec Corp.*, **265 F.3d 1336, 1342, n.2 (Fed. Cir. 2001)** ("While the parties, and the district court's decision, speak of the accused devices as infringing, more properly the allegation is that the operation of the devices directly infringes the method claims at issue . . . .")

- *Linear Tech. Corp. v. Impala Linear Corp.*, **379 F.3d 1311, 1325 (Fed. Cir. 2004)** (discussing "customers who use [accused devices] in a way that directly infringes the method claim")

- *Sentius Int'l, LLC v. Apple Inc.*, **2020 WL 2850286, at *4 (N.D. Cal. June 2, 2020)**("[T]he use of a method by a device creates liability for the party that controls the device . . . .")

- **Fitbit cites NO cases to the contrary and does not distinguish the cases.**

PHILIPS

iFit Prior Art

-Philips's Motion to Preclude Testimony of Dr. Paradiso (Dkt. 305)
-Philips's Motion for Partial Summary Judgment of No Invalidity (Dkt. 335)

Overview of Motions

- Motion to Preclude Testimony of Dr. Paradiso
  - Dr. Paradiso admitted that the user manuals he relied on did not actually describe sending heart rate data to the iFit.com servers

- Motion for Summary Judgment of No Invalidity
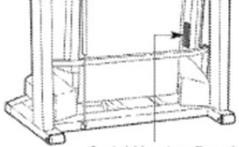 - There is no evidence that iFit.com servers made **calculated responses**

PHILIPS

iFit Systems

PHILIPS

Dr. Paradiso's Opening Report Maps iFit Prior Art to Limitation 1(h)

> (ix)   *[h] receiving a calculated response from the server, the response associated with a* ==calculation performed by the server== ==based on the exercise related-information==
>
> 959.   iFit discloses this limitation.

Paradiso Opening Report (308-1), ¶ 959 (highlighting added)

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Dr. Paradiso's Opening Report Maps iFit Prior Art to Limitation 1(h)
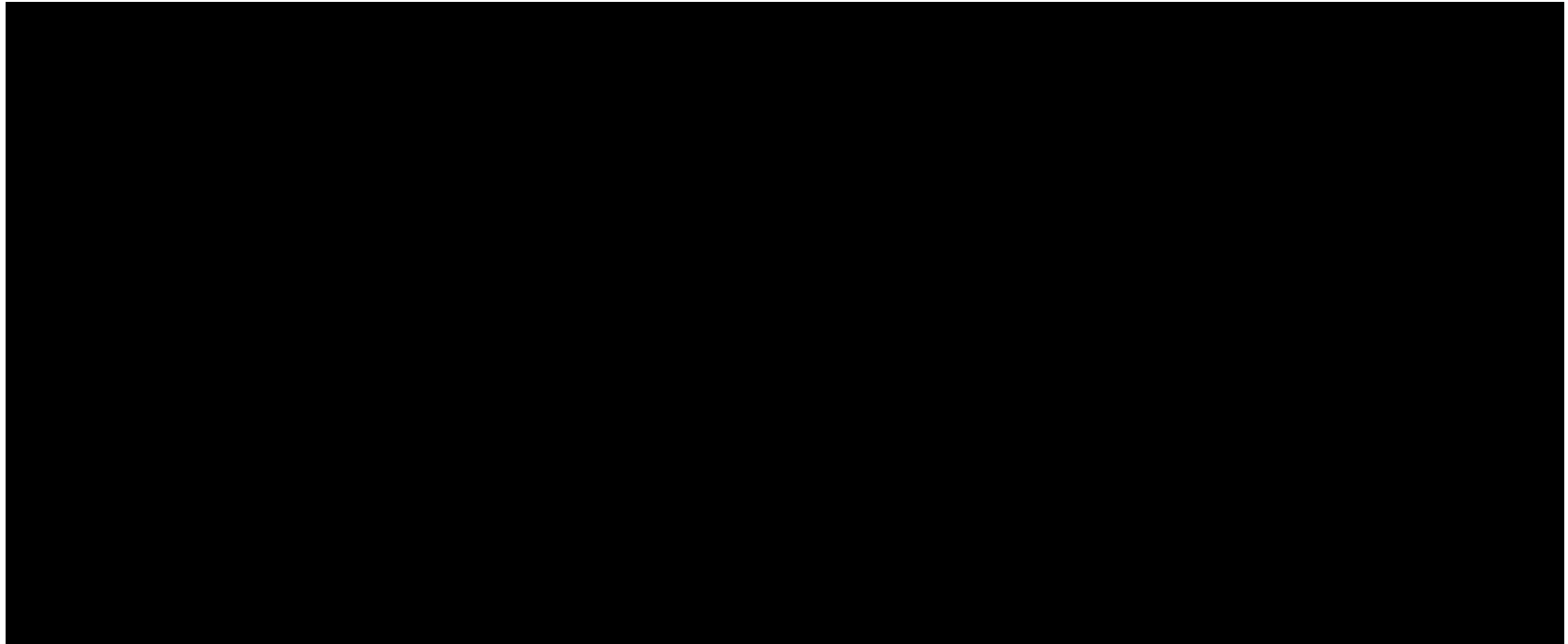
Paradiso Opening Report (308-1), ¶ 961

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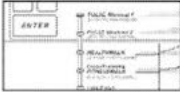
User Manuals

HOW TO USE THE PULSE PROGRAMS

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Note: The pulse programs can be used only when the optional chest pulse sensor is worn. See page 20 for information about the chest pulse sensor.

1 Insert the key into the console.
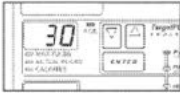
See HOW TO TURN ON THE POWER on page 10.

2 Put on the chest pulse sensor.

You must wear the chest pulse sensor in order to use a pulse program. To put on the chest pulse sensor, follow the instructions included with the chest pulse sensor.

3 Select one of the two pulse programs.

When the key is inserted, the manual mode will be selected and the manual indicator will light. To select one of the pulse programs, press the Select Workout button repeatedly *until one of the two* pulse program indicators lights.

The profiles on the console show how the target heart rate will change during the programs. The Time/Segment Time display will show how long the selected program will last.

4 Enter your age.

When a pulse program is selected, an age setting will begin to flash in the CALORIES/ PULSE display. If you have already entered your age, simply press the Enter button. To enter your age, press the △ and ▽ buttons. The buttons can be held down to enter your age quickly. When your age is shown, press the Enter button.

4 Enter a maximum heart rate setting.

After you have entered your age, another number will begin to flash in the CALORIES/ PULSE display. This number is the *maximum heart rate setting* for the program. If Pulse program 1 is selected, the maximum heart rate setting can be from 65% to 85% of your *maximum possible heart rate* (your maximum possible heart rate is 220 minus your age); if Pulse program 2 is selected, the maximum heart rate setting can be from 65% to 80% of your maximum possible heart rate. Note: Your maximum possible heart rate is an estimate only.
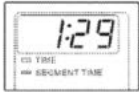
For example, if you are 30 years old, your maximum possible heart rate is 190 (220 minus 30 equals 190). Therefore, if Pulse program 1 is selected, the maximum heart rate setting can be from 123 to 161 (65% of 190 is 123; 85% of 190 is 161).

If you want to change the maximum heart rate setting, press the △ and ▽ buttons. The buttons can be held down to change the setting quickly. When the desired setting is shown, press the Enter button.

5 Press the Start button or the Speed △ button to start the program.

A moment after the button is pressed, the treadmill will automatically adjust to the first speed and incline settings for the program. Hold the handrails and begin walking.

Each program is divided into several time segments of different lengths. The Time/ Segment Time display will show both the time remaining in the program and the time remaining in the current segment. One target heart rate setting is programmed for each segment. When only three seconds remain in the first segment of the program, a series of tones will sound and the next segment will begin. As you exercise, the speed and/or incline of the treadmill will automatically change as needed to keep your heart rate near the current target heart rate setting.

The program will continue until the Time/Segment Time display counts down to zero. The walking belt will then slow to a stop.

If your heart rate is not detected during the program, the speed and incline of the treadmill may automatically decrease until your heart rate is detected. If this happens, see the instructions included with the chest pulse sensor.

If the speed or incline setting for the current segment is too high or too low, you can adjust the setting with the Speed or Incline buttons. However, if you *decrease* the speed, the incline will automatically *increase*; if you *increase* the speed, the incline will *decrease*. If you *increase* the incline, the speed will *decrease*; if you *decrease* the incline, the speed will *increase*. The treadmill will always attempt to keep your heart rate near the target heart rate setting for the current segment. Note: When the incline reaches the lowest setting, the speed cannot be increased any further. When the incline reaches the highest setting, the speed cannot be decreased any further.

To stop the program temporarily, press one of the Stop buttons. All displays will pause and the Time/ Segment Time display will begin to flash. To restart the program, press the Start button or the Speed △ button. To end the program, press a Stop button, remove the key, and then reinsert the key.

6 Follow your progress with the four displays.

Refer to step 5 on page 11.

7 When the program has ended, remove the key.

Step onto the foot rails and make sure that the incline of the treadmill is at 1.5%. **The incline must be at 1.5% when the treadmill is raised to the storage position.** Next, remove the key from the console and put it in a safe place. **Note: If the displays and indicators on the console remain lit after the key is removed, the console is in the "demo" mode. Refer to page 20 and turn off the demo mode.**

When you are finished using the treadmill, move the on/off switch near the power cord to the off position and unplug the power cord.

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User Manuals

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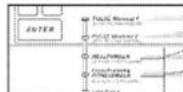**1** Insert the key into the console.

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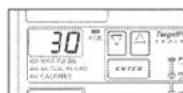
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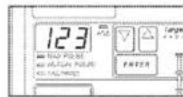
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Dr. Paradiso and Fitbit Admitted the iFit User Manuals Do Not Disclose This Functionality

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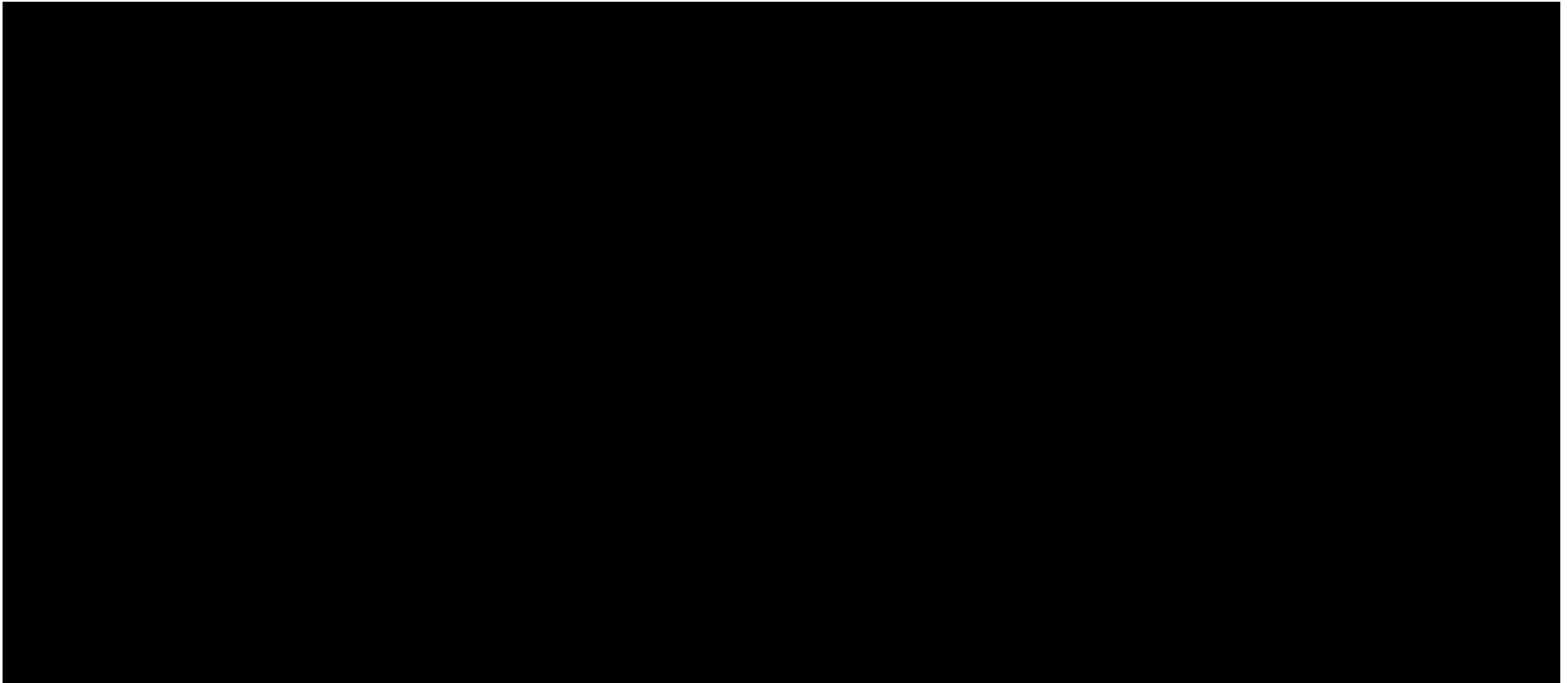
Fitbit's "Evidence" that iFit system functioned as Fitbit claims
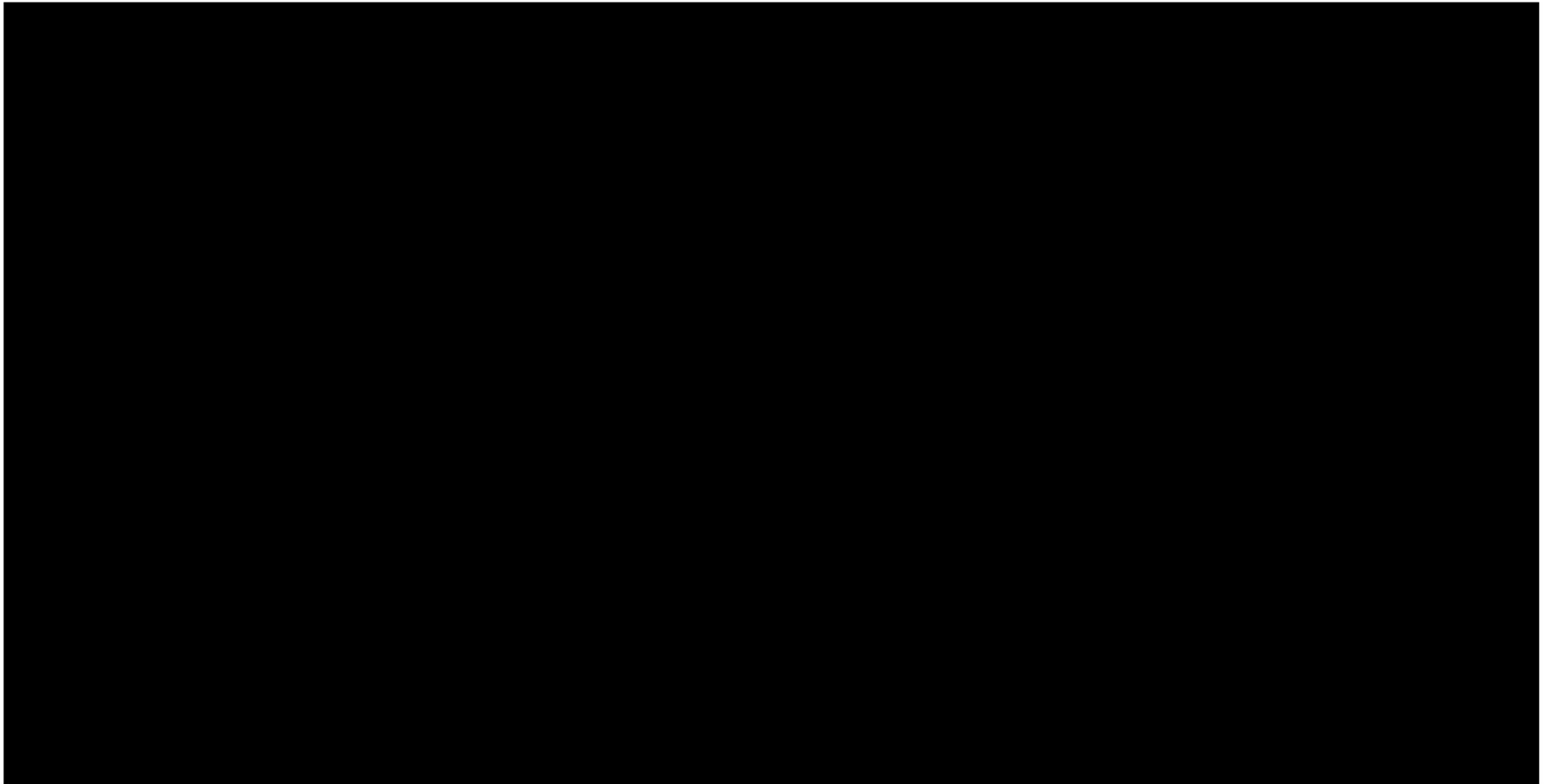
Fitbit's Response to Statement of Facts, Dkt. 367 at ¶¶ 124-127

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Logan Testimony

- Fitbit's briefs only point to the following testimony from Ms. Logan's deposition
  - 53:19-54:2
  - 61:21-63:7
  - 98:7-100:4
  - 113:7-114:10
  - 119:120:16
- At best, this testimony only describes *sending* data to iFit.com servers
- No discussion of iFit's servers performing calculation based on that data

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Logan Testimony Was Uncorroborated

- *Finnigan Corp. v. Int'l Trade Comm'n*, 180 F.3d 1354, 1367-70 (Fed. Cir. 1999)
    - "In any event, corroboration is required of any witness whose testimony alone is asserted to invalidate a patent, regardless of his or her level of interest."

- Undated RFP cannot corroborate as it did not disclose calculation by server
    - "The Jefferts' article simply does not corroborate his testimony because, as we have noted, **that article is ambiguous at best concerning the claimed use** of nonresonance ejection." *Finnigan*, 180 F.3d at 1369.

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Patent Eligibility of Quy '377

Fitbit's Motion for Summary Judgment of Invalidity - D.I. 340

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The Court Has Recognized that Issues of Fact Preclude Dismissal Under § 101

This Court has already recognized—despite the purported conventionality of individual claim elements—at least one "inventive concept" attributable to the invention of '377 Patent as a whole:

- "[T]he patent appears—at least on its face—to result in a technological advancement over prior art, allowing for expanded range and 'full back-end server functionality with which to provide a wide range of interactive communication with the patient." (Dkt. 219 at 13.)

- **"[T]he allegations in the complaint here are tied to the claims and specification and identify how the specific techniques recited in the claims are inventive**." (Dkt. 219 at 13-14 (emphasis added))

- The Court went on to suggest that facts developed in discovery may further bear on the inventive concept inquiry. *See* Dkt. 219 at 13-1.

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Fitbit Relies on Dr. Quy's (Unsurprising) Testimony About Individual Elements (Rather than Combination)

9   Q And you did not invent servers that were

10   accessible or are accessible over the internet?

11   A No.

Quy Dep. Tr. (Dkt. 338-13) at 195:9-11

18   Q You didn't invent internet servers, right?

19   A Correct.

20   Q You didn't invent wireless network?

21   A Correct.

22   Q You did not invent sending information to

23   an internet server?

24   A Correct.

25   Q You did not invent sending information to

1   an internet server over a wireless network?

2   A Correct.

3   Q You did not invent the concept of mobile

4   devices sending information to an internet server

5   over a wireless network?

6   A Correct.

7   Q You did not invent back end servers?

8   A Correct.

9   Q You did not invent servers that perform

10   calculations?

11   A Correct.

12   Q You did not invent servers that send

13   responses of calculations to mobile devices?

14   A Correct.

15   Q And you did not invent servers that

16   communicate with mobile devices over a network?

17   A Correct.

Quy Dep. Tr. (Dkt. 338-13) at 215:18-216:17

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Dr. Martin's Opinions Evidence the Inventive Concepts of the '377 Patent

- "Importantly, **the limitations of technology in 1999 underscore the advantages of the '377 Patent**, particularly at that time... Based on my experience, I agree with the '377 Patent specification's characterization that the relatively small amount of memory and processing capability provided on a wireless phone in 1999, as compared to the present time, significantly limited the functionality of applications running on the wireless phone, especially in terms of computing capacity, processing power, and user interface..." (Dkt. 342-01 at ¶ 271)

- "To the extent an individual had a wireless phone, **the functionality was quite limited to the pre-set programming of the wireless phone**." D.I. 338-09 at ¶203.
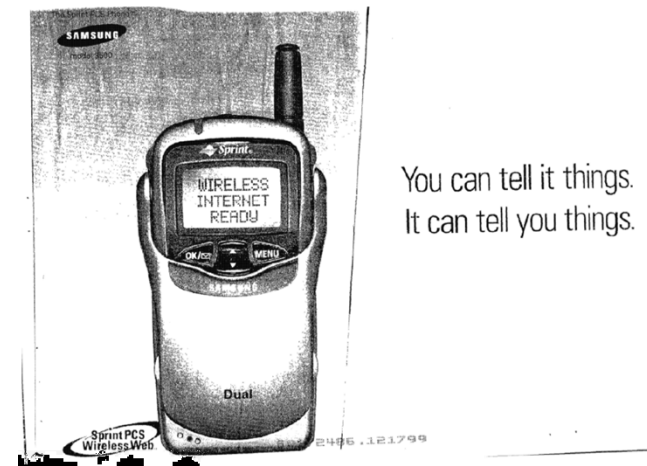
D.I. 338-09 at ¶203 (reproducing image from provisional application to the ' 337 Patent)

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Dr. Martin's Opinions Evidence the Inventive Concepts of the '377 Patent

B.   Utilizing a Back-End Server for Application Operation Allowed for Interactive Processing of Exercise-Related Data Without Location Based Restraints

- "I agree with the statement in the '377 Patent that one of the advantages of the '377 Patent over the prior art includes providing 'significant application functionality on [a] back-end [server]," which freed up memory and processing capabilities on the front-end (the web-enabled wireless phone)... The '377 Patent provided the inventive concept of offloading the data analysis to a server in wireless communication with a web-enabled wireless phone. By providing significant application functionality on the back end, less memory and processing capabilities became necessary on the WWD (i.e. on the 'front-end'). " (Dkt. 342-01 ¶ 272)

- "I also agree with the '377 Patent Specification that by eliminating the location-based restraints of prior art systems by arranging the data processing components such that the data analysis was offloaded to a server that was in wireless communication with a wireless web device, the '377 patent also allowed for 'wireless access to and from a wide variety of present medical or health related instruments and devices, while maintaining the capability of connecting to future such devices.' ... [T]his inventive concept allowed for 'wireless health-monitoring to the level of accuracy previously achieved only by desktop so-called 'wired' computer systems.' Having a wireless system was a major advantage over the prior art as this invention allowed for subjects to be monitored as they moved about freely without the constrain of being tethered by a wire." (*Id.* ¶¶ 273-274)

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Dr. Martin's Opinions Evidence the Inventive Concepts of the '377 Patent

C. **Downloading an Application to a WWD from the Back-End Server Improved Functionality of the WWD**

- "[A]nother advantage of the '377 Patent included downloading an application to a wireless web-enabled phone from a server. ... [T]he asserted claims allowed for the downloading of applications to the WWD in connection with health monitoring devices to perform improved data capture, sharing, and analysis functions without the need for complex connections or expensive additional components." (Dkt. 342-01 ¶ 275)

- "[T]he prosecution history of the '377 Patent further demonstrates that downloading an application directly from a remote server to a web-enabled wireless phone was an inventive concept. Following a final rejection, claim 1 of the '377 Patent was amended to require that the application be downloaded directly from a remote server ... These amendments led to the claims being allowed, and in the reasons for allowance, the examiner specifically noted that the prior art .... failed to teach a direct connection with a remote server for downloading the application." (Dkt. 342-01 ¶ 276-277)

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Dr. Martin's Further Rebuts Dr. Paradiso's Myriad Assertions with Respect to "Conventionality"

- Using web-enabled wireless phones for interactive exercise monitoring. *See* D.I. 338-09 at ¶¶ 212-232
- Downloading an application for interactive exercise monitoring from a remote server to a web-enabled wireless phone. *See* D.I. 338-09 at ¶¶ 233-245
- Using an application on a web-enabled wireless phone to gather exercise and physiologic status data while a subject is exercising. *See* D.I. 338-09 at ¶¶ 253-263
- Coupling a web-enabled wireless phone to an exercise data gathering device using either wired connections or short-range wireless communications including infrared and RF communication protocols. *See* D.I. 338-09 at ¶¶ 264-278
- Sending data over the internet to back-end servers for further processing and receiving and displaying calculated responses from such servers using an application. *See* D.I. 338-09 at ¶¶ 279-284.

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C.D. Cal. Denied Summary Judgment on § 101 of '377 Patent Because of Genuine Issues of Fact

- ***Philips v. Garmin*, No. CV 19-06301-AB (C.D. Cal. June 8, 2022)**

    - "The Court finds that there is a genuine dispute of material fact whether Claim 1 recites an inventive concept..." *Id.*, at 25 (emphasis added).

    - **"Dr. Martin's testimony further supports that Claim 1 of the '377 Patent recites an inventive concept."** *Id.* (emphasis added).

    - "[I]t is undisputed that Quy did not invent many of the components of the ordered combination, including several combinations of those elements. Nevertheless, that evidence at most creates a triable issue of material fact whether the entire ordered combination is an inventive concept rather than routine and conventional components and activity." *Id.* at 25-26 (internal citations omitted)

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