

In The Matter Of:

Philips v.

Fitbit

Thomas Martin, PH.D.

June 18, 2020



Min-U-Script® with Word Index

Page 1

1 UNITED STATES DISTRICT COURT
 2 FOR THE DISTRICT OF MASSACHUSETTS
 3
 4
 5 PHILIPS NORTH AMERICA LLC,) Case No. 1:19-cv-11586-IT
 6 Plaintiff,)
 7 v.)
 8 FITBIT, INC.,)
 9 Defendant.)
 10 _____)
 11
 12
 13
 14 REMOTE VIDEOTAPED DEPOSITION OF
 15 THOMAS L. MARTIN, PH.D.
 16 June 18, 2020
 17 10:02 a.m. Eastern Standard Time
 18 Blacksburg, Virginia
 19
 20
 21
 22
 23 REPORTED BY:
 24 Kristi Caruthers
 25 CLR, CSR No. 10560

Page 2

1
 2
 3 Blacksburg, Virginia
 4 June 18, 2020
 5
 6
 7
 8 REMOTE VIDEOTAPED DEPOSITION OF THOMAS L.
 9 MARTIN, PH.D., located in Blacksburg, Virginia,
 10 pursuant to agreement before Kristi Caruthers, a
 11 California Shorthand Reporter of the State of
 12 California.
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

Page 3

1 APPEARANCES:
 2
 3 For Plaintiff:
 4 FOLEY & LARDNER LLP
 5 BY: RUBEN J. RODRIGUES, ESQ.
 6 111 Huntington Avenue
 7 Suite 2500
 8 Boston, Massachusetts 02199-7610
 9 617.342.4000
 10 rrodrigues@foley.com
 11
 12 For Defendant:
 13 PAUL HASTINGS LLP
 14 BY: CHAD PETERMAN, ESQ.
 15 200 Park Avenue
 16 New York, New York 10166
 17 212.318.6797
 18 chadpeterman@paulhastings.com
 19
 20 ALSO PRESENT:
 21 Christian Ruiz, Videographer
 22
 23
 24
 25

Page 4

1 INDEX TO EXAMINATION
 2 WITNESS: THOMAS L. MARTIN, PH.D
 3
 4 EXAMINATION PAGE
 5 By Mr. Peterman 8, 165
 6 (AFTERNOON SESSION) 103
 7 By Mr. Rodrigues 161, 167
 8
 9
 10
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

Page 17

1 (Whereupon, Martin Exhibit 1 was
2 marked for identification by the
3 deposition reporter and is attached
4 hereto.)
5 BY MR. PETERMAN:
6 Q. So you have Exhibit 1 there.
7 Can you just tell me: Do you recognize
8 Exhibit 1?
9 A. Yes, I do.
10 Q. And Exhibit 1 is titled "Expert Disclosure
11 of Dr. Thomas L. Martin, Ph.D.," dated June 5th,
12 2020; correct?
13 A. Yes, that's correct.
14 Q. It may be self-evident, but can you just
15 tell me what Exhibit 1 is?
16 A. It's the expert disclosure that I've
17 written for this matter.
18 Q. Did your counsel discuss Exhibit 1 with
19 you at any point before this deposition?
20 MR. RODRIGUES: Objection to form.
21 I'll instruct you not to answer with
22 respect to the details of any discussions with
23 counsel.
24 BY MR. PETERMAN:
25 Q. You can answer "yes" or "no" as to whether

Page 18

1 or not you ever discussed Exhibit 1 with your
2 counsel.
3 A. Yes.
4 Q. How much time do you estimate that you
5 took to prepare Exhibit 1?
6 A. I'd have to look back in my records to be
7 sure of the exact time, but probably between 10 and
8 15 hours.
9 Q. How was Exhibit 1 prepared?
10 MR. RODRIGUES: Again, instruct you not to
11 get into the details of the drafting of the expert
12 report from any communications with counsel.
13 BY MR. PETERMAN:
14 Q. Can you answer that question about how
15 Exhibit 1 was prepared?
16 A. Sorry. Since this is my first deposition,
17 he's instructed me not -- my -- Ruben's instructed
18 me not to answer with respect to the details.
19 MR. RODRIGUES: Yeah. And if you can't
20 answer without violating my instruction, then I
21 think you don't provide an answer.
22 BY MR. PETERMAN:
23 Q. Do you believe you can answer without
24 violating Mr. Rodrigues's instructions?
25 A. Would you ask the question again, Chad,

Page 19

1 please?
2 Q. I'll -- I'll take a different track here.
3 Did you draft the document that's
4 presented here as Exhibit 1?
5 A. I was given an initial draft from counsel
6 and then worked on it myself.
7 Q. And did you review Exhibit 1 before
8 signing it?
9 A. Yes, I did.
10 Q. And did you agree with the statements that
11 you made in Exhibit 1 at the time you signed it?
12 A. Yes, I did.
13 Q. And since the time that you signed it, are
14 there any corrections that you wish to make with
15 respect to Exhibit 1?
16 A. There was a place that was highlighted
17 that should have been noted as being -- there was a
18 quote where the emphasis was not in the original
19 quote, and I should have noted that there was some
20 highlighting there. I'd have to look through it to
21 find it.
22 Q. Other than, I guess, a typographical font
23 type error, is there anything else that you noticed
24 that's incorrect about Exhibit 1?
25 A. Off the top of my head, no.

Page 20

1 Q. Beyond the opinions that are expressed in
2 Exhibit 1, are you planning to express any other
3 opinions in this litigation?
4 A. Yes. You know, I was asked to provide the
5 opinions that are -- on the matters that are in the
6 disclosure, but I'd be happy to -- to look at other
7 aspects of this case and provide opinions for those.
8 Q. So what additional opinions are you
9 planning to provide in connection with this
10 litigation?
11 MR. RODRIGUES: Objection to form, lacks
12 foundation, calls for speculation.
13 BY MR. PETERMAN:
14 Q. You may answer the question.
15 A. I'm not planning on providing any -- like,
16 there aren't particular things I've been asked to
17 provide an opinion on beyond those that are in the
18 disclosure.
19 Q. Are you planning to testify at the claim
20 construction hearing in this matter?
21 MR. RODRIGUES: Calls for -- objection;
22 calls for speculation, lacks foundation.
23 THE WITNESS: If I'm asked to, I will.
24 BY MR. PETERMAN:
25 Q. At this point, have you been asked to

Page 129

1 in the -- spread around the network.
 2 Q. So the paragraph beginning at Line 26 of
 3 Column 13 is about limiting access at various points
 4 around the network, including the possibility of a
 5 bystander being part of the network?
 6 A. Including the possibility of.
 7 MR. RODRIGUES: Objection to form.
 8 BY MR. PETERMAN:
 9 Q. Then at the end of that paragraph, it
 10 states:
 11 "The following are possible
 12 embodiments of security and not
 13 meant to be exclusive."
 14 Do you see that?
 15 MR. RODRIGUES: Objection to form.
 16 THE WITNESS: Yes, I see that.
 17 BY MR. PETERMAN:
 18 Q. Then as we discussed before, following
 19 that, there are four different possible embodiments
 20 of security that are listed from Column 13, Line 43,
 21 down to Line 54.
 22 Do you see that?
 23 A. I see those four paragraphs, but, again,
 24 the paragraph just before them says they're not
 25 meant to be exclusive.

Page 130

1 Q. So what do you take the term "not meant to
 2 be exclusive" to mean?
 3 A. It -- it means that there could be other
 4 alternatives that aren't spelled out. They're just
 5 giving primary examples.
 6 Q. And one of the primary examples that is
 7 given, in fact, the first example, is encryption.
 8 MR. RODRIGUES: Objection to form.
 9 THE WITNESS: I'm sorry, but you're taking
 10 that in isolation because, you know, it talks about
 11 security arrangements, you know -- sorry.
 12 So the opening paragraph of the section
 13 back up at Line 26 talks about various types of
 14 security arrangements, and different security
 15 arrangements are meant to address different types of
 16 potential attacks. And so this is just giving an
 17 example of a -- of a particular arrangement, but not
 18 necessarily one that addresses all possible security
 19 attacks or security flaws.
 20 BY MR. PETERMAN:
 21 Q. So is it your testimony, then, that
 22 Claim 1 is designed for only one particular type of
 23 security flaw?
 24 MR. RODRIGUES: Objection to form.
 25 THE WITNESS: No, that's not my opinion,

Page 131

1 because looking back at the claims, there are
 2 what -- the following claims after Claim 1 talk
 3 about different types of security mechanisms that
 4 that -- that that security mechanism in Claim 1
 5 could be.
 6 BY MR. PETERMAN:
 7 Q. And so, in your opinion, could encryption
 8 be part of a security mechanism that is disclaimed
 9 in 1(c)?
 10 MR. RODRIGUES: Objection to form.
 11 THE WITNESS: It could be a part, but it
 12 may not necessarily be the totality of it.
 13 BY MR. PETERMAN:
 14 Q. And what other parts could be included
 15 within 1(c)?
 16 MR. RODRIGUES: Objection to form.
 17 THE WITNESS: When you say "what other
 18 parts," do you mean what other parts besides
 19 encryption?
 20 BY MR. PETERMAN:
 21 Q. Correct.
 22 A. So there could be -- (a) there could be
 23 multiple levels of encryption, so -- which is not
 24 uncommon, so -- and then there could be layers of
 25 authentication.

Page 132

1 There could be -- I'm trying to think
 2 of -- and so there might be a mechanism for
 3 non-repudiation, which would be, you know, trying to
 4 deny something after the fact.
 5 Q. So I'm trying to understand your written
 6 opinion with what you're testifying to today, but is
 7 it your testimony that governing information
 8 transmitted between the first personal device and
 9 the second device could include encryption?
 10 MR. RODRIGUES: Objection to form.
 11 THE WITNESS: Again, it could include
 12 encryption, but it might -- might be more.
 13 BY MR. PETERMAN:
 14 Q. I understand that it could include
 15 encryption but it might be more, but could it
 16 include only encryption?
 17 MR. RODRIGUES: Objection to form.
 18 THE WITNESS: Sorry. I'm trying to think
 19 of situations where you would want to have only
 20 encryption, and it would -- encryption, but only by
 21 the ability to keep unwanted people from seeing the
 22 information, from being able to tell whatever
 23 information's contained.
 24 BY MR. PETERMAN:
 25 Q. So does the Claim 1(c) of the '233 patent

Page 133

1 as written allow the security mechanism to only
 2 include encryption?
 3 MR. RODRIGUES: Objection to form, vague.
 4 THE WITNESS: It could only be encryption.
 5 BY MR. PETERMAN:
 6 Q. So I want to go back to the distinction
 7 that you were drawing where we were talking about
 8 between controlling the transmission of information
 9 and controlling the information transmitted.
 10 Is there an actual distinction, or do you
 11 think it's just cleaner English to use your
 12 formulation of it?
 13 MR. RODRIGUES: Objection to form.
 14 THE WITNESS: That formulation does seem
 15 to -- to make more clear the cases where you're also
 16 trying to control the access to the information.
 17 BY MR. PETERMAN:
 18 Q. So you think your formulation is perhaps
 19 broader than just saying "controlling the
 20 information transmitted"?
 21 MR. RODRIGUES: Objection to form,
 22 mischaracterizes prior testimony.
 23 THE WITNESS: I mean off the top of my
 24 head, if you had one of these devices where you just
 25 wanted to prevent somebody from sniffing the

Page 134

1 information, from eavesdropping on it, and that was
 2 the only security thing that you were worried about,
 3 you just didn't want somebody to eavesdrop on the
 4 information that was being transmitted, then, you
 5 know, the information is being transmitted by --
 6 somebody generally see the encrypted version of it.
 7 So they're still receiving it. It's just encrypted.
 8 If you're making a system that that's the
 9 only security flaw that you're -- the security
 10 attack that you're worried about, then the
 11 encryption might be the only thing you'd do.
 12 But it seems to me that the way this is
 13 described, you're also -- the patent's also talking
 14 about controlling the access to the device, and in
 15 that case, encryption would be a part of -- would
 16 likely be a part of what you're doing, but it
 17 wouldn't be enough to provide access.
 18 And so controlling that -- if you didn't
 19 want that information to be received at all, perhaps
 20 there's information that you don't want to be
 21 transmitted at all, then encryption wouldn't be
 22 enough to prevent that.
 23 BY MR. PETERMAN:
 24 Q. Okay. So now you're describing a system
 25 where you don't want the information to be

Page 135

1 transmitted at all, and you think that your
 2 formulation of the words "transmission of
 3 information" captures that better?
 4 A. Yeah, "controlling the transmission of
 5 information."
 6 Q. So what is the basis that you are using as
 7 a person of ordinary skill in the art to rewrite
 8 what the inventor said governing information
 9 transmitted into governing or controlling the
 10 transmission of information? What makes you know --
 11 MR. RODRIGUES: Objection --
 12 BY MR. PETERMAN:
 13 Q. -- that better than themselves?
 14 MR. RODRIGUES: Objection to form.
 15 THE WITNESS: Well, as I said before, I
 16 was not the one who rewrote the -- the phrasing. So
 17 if you're asking me why I rewrote it, then I can't
 18 answer that question. But if you mean in general --
 19 do you mean in general?
 20 BY MR. PETERMAN:
 21 Q. Well, I'm looking at an expert declaration
 22 that you signed in support of Philips's claim
 23 construction.
 24 And so, you know, if you didn't think
 25 about it, that's fine. I'll accept that as an

Page 136

1 answer. But, you know, you signed this declaration
 2 which changes the wording of the claim language, and
 3 I want to know why that's correct as opposed to what
 4 the inventors actually wrote in their patent?
 5 MR. RODRIGUES: Objection to form,
 6 mischaracterizes the record.
 7 THE WITNESS: Again, restating what I've
 8 said before and, you know, I just think that's a
 9 more clear formulation, more clear wording that
 10 captures the nuances of the -- of the other aspects
 11 in the claims.
 12 BY MR. PETERMAN:
 13 Q. And you think you understand the nuances
 14 better than the inventors of the '233 patent?
 15 MR. RODRIGUES: Objection to form.
 16 THE WITNESS: I wouldn't say that I
 17 understand it better.
 18 BY MR. PETERMAN:
 19 Q. Did you speak with the inventors in coming
 20 up with your claim construction positions?
 21 A. I did not speak with the inventors.
 22 Q. And I take it the attorneys didn't explain
 23 to you why they changed the order of the words in
 24 this claim?
 25 MR. RODRIGUES: Objection to form,