

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

LOGANTREE LP,

Plaintiff,

v.

FITBIT, INC.,

Defendant.

Case No. 2:15-cv-01575-JRG

**DEFENDANT FITBIT, INC.'S REPLY MEMORANDUM IN SUPPORT OF ITS
MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(B)(6) OR,
ALTERNATIVELY, MOTION FOR A MORE DEFINITE STATEMENT**

LoganTree's opposition to Fitbit's motion to dismiss makes three arguments – each of which is demonstrably incorrect.

First, LoganTree argues that Fitbit's motion is a “needless litigation tactic” because “[n]o substantive rights are impacted in any material way” by LoganTree's failure to comply with *Twombly* and *Iqbal*. D.I. 14 at 4. More specifically, LoganTree asserts that – because Fitbit will get more detailed information about LoganTree's allegations when LoganTree makes its L.R. 3-1 disclosures – the current motion serves no purpose.

Not so. As Fitbit noted in its opening motion, the patent in suit has one-hundred and eighty five claims. *See* D.I. 6 at 1. All of those claims contain numerous phrases that are simply not addressed by the Complaint. For example, all of the claims require a movement sensor that “measures the angle and velocity of ... movement.” From a reading of the Complaint, however, it is impossible to know what LoganTree thinks this means (*e.g.* all angles must be measured relative to *something* and do not exist in the abstract as the claim seems to imply) or what instrumentality supposedly meets this limitation.

Without any meaningful information about how LoganTree is reading the claims it is effectively impossible for Fitbit to prepare an IPR.¹ Given the one year time limitation for filing such a reexamination, LoganTree's failure to provide the required specificity is prejudicing Fitbit right now. Nor will the L.R. 3-1 disclosures – even if detailed – obviate this harm. And plaintiffs do not always provide specific L.R. 3-1 disclosures and often argue (instead) that they need to take discovery before identifying specific instrumentalities. Indeed, if LoganTree is allowed to avoid its pleading obligations and then provides vague L.R. 3-1 contentions, Fitbit's time for filing an IPR could be virtually gone by the time it is told what is being accused. Thus, Fitbit's motion is

¹ Fitbit made this point in its opening brief (*see* D.I. 6 at 6) but LoganTree ignores the issue.

motivated by substantive prejudice that Fitbit is suffering *right now*.

The same cannot be said for LoganTree's opposition. As noted in the opening papers, Fitbit asked LoganTree if it would amend its claims before filing this motion. LoganTree never responded – even to decline. The question is *why*. Presumably, LoganTree complied with its obligations, performed a pre-filing investigation and therefore *can* identify which functions in Fitbit's products allegedly meet each of the claim limitations. So why spend money to file an opposition rather than simply amend the Complaint to disclose that information? The answer is that LoganTree *knows* that by withholding the information it effectively shortens the time Fitbit has to search for prior art and to file an IPR. Put differently, it is LoganTree's opposition (not Fitbit's motion) that has been filed for the tactical purpose of delay. Indeed, under the Court's rules Fitbit's motion does not delay any aspect of the case schedule.

Second, LoganTree is wrong that it has complied with the requirements of *Twombly* and *Iqbal*. LoganTree's argument is that parroting of the claim language is sufficient to create a set of factual allegations that show infringement. As LoganTree puts it “the fact that the recitation of the accused functionality closely tracks the elements of claim 1 only reinforces the strength of LoganTree's infringement claim.” D.I. 14 at 6.

This reasoning is flawed. In the first place, even if the allegations were factual they would not give rise to a “showing” of infringement. As Fitbit documented in its opening papers, the allegations ignore most of the limitations of claim 1. And the allegations in the complaint are *not* factual, but are instead simply a verbatim recitation of *limited portions* of the claim language. To call such verbatim and conclusory recitations factual allegations would completely undo the teachings of *Twombly* and *Iqbal*.

Indeed, courts repeatedly have rejected that same argument in connection with claims of

indirect infringement. For example, in *Core Wireless Licensing S.A.R.L. v. Apple Inc.*, No. 6:14-CV-752-JRG-JDL, 2015 WL 4910427, at *2 (E.D. Tex. Aug. 14, 2015) (Gilstrap, J.) the Court began by citing *Iqbal* for the proposition that “[i]t is well settled that ‘[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.’” *Id.* Although the plaintiff’s opposition “argues that the complaint includes factual allegations about Apple’s specific intent to induce infringement because the complaint alleges that Apple provides instructive materials and information concerning operation and use of the accused products” the Court found that this was inadequate. In particular it held that “that Core Wireless’s failure to allege any facts identifying, even at a basic level, which functionalities of the accused products are at issue, or how the instructions direct customers to use those products in an infringing manner, falls short of satisfying Rule 8’s notice requirement.” *Id.* Notably, the Core Wireless complaint contained *more* in the way of factual material than the complaint at issue here, because Core Wireless contained *one* fact (*i.e.* that Apple provides instructions) while the present the present complaint provides none.

For example, while the Complaint reflects the claim language insofar as it says that Fitbit’s Accused Products are ones in “in which a user defined event can be detected” they never say *which* allegedly user-defined event is accused of meeting both this and the other claim limitations. And the problem is made worse by the fact that the sole asserted claim (Claim 1) does not talk in terms of capability (*i.e.* “can be detected”) but instead requires actually “detecting a first user defined event.” There is no way Fitbit can infer from a non-specific statement about the devices’ alleged theoretical *capabilities* which actual *events* LoganTree is accusing of infringement. Put differently, LoganTree alleges only that Fitbit’s accused devices are *capable* of infringing. That is not even a statement that the device *does* infringe, nevermind an identification of the accused

instrumentality *within* the product.

Third, LoganTree is wrong when it asserts that the current version of the Federal Rules of Civil Procedure do not apply to this motion. LoganTree argues that “the new rules properly should apply to litigation events going forward (*i.e. after* the date of enactment) but should not apply retroactively to undo event that already have transpired.” D.I. at 74. This is wrong in at least two ways.

In the first place, the current motion was filed after the change to the Federal Rules took effect. Thus, even if LoganTree’s premise were correct, its conclusion would be wrong because the current motion is a “litigation event” that occurred after the rule change. It would be one thing if the pleadings were settled and Fitbit were attempting to go back and *redo* a phase of the litigation that had already been resolved. But Fitbit seeks no such thing. Instead Fitbit asks the Court to evaluate Fitbit’s motion pursuant to the version of the Federal Rules that were in place at the time the motion was filed.

Both the Supreme Court’s amendment to the Federal Rules and Fifth Circuit law make it clear that Fitbit’s approach is the correct one. The Supreme Court’s amendment says that the new version of the Rules should be applied to “all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.”² And the Fifth Circuit has found that such amendments “should be given retroactive application” to the “maximum extent possible.” *Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 823 (former 5th Cir. 1967).

LoganTree offers no substantive argument for why applying the current rules to this motion would be unjust, impracticable or not “possible.” Instead it asserts that the new version of the Federal Rules should not apply if doing so would force a party to have to “re-do” a pleading

² [http://www.supremecourt.gov/orders/courtorders/frcv15\(update\)_1823.pdf](http://www.supremecourt.gov/orders/courtorders/frcv15(update)_1823.pdf), at 3.

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