

REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED

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12  
 13 **UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
 14 **SAN FRANCISCO DIVISION**

15 SMART WEARABLE TECHNOLOGIES  
 16 INC.,

17 Plaintiff,

18 v.

19 FITBIT, INC.

20 Defendant.

Case No. 3:17-cv-05068-VC

**OPPOSITION TO RENEWED MOTION  
 FOR RULE 11 SANCTIONS**

Date: May 10, 2018  
 Time: 10:00 a.m.  
 Ctrm: 4, 17th Floor

Hon. Vince Chhabria

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## REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED

1 **I. INTRODUCTION**

2 The summary judgment proceeding in this case was a contest between circumstantial  
3 evidence and purported direct evidence. It was reasonable for Plaintiff Smart Wearable  
4 Technologies, Inc. (“SWT”) to believe Fitbit’s own product literature and advertising. It was  
5 reasonable for SWT not to immediately change “gyroscope” to “magnetometer” to describe the  
6 second sensor in the Blaze when it was revealed that Fitbit’s public statements were wrong. It  
7 was reasonable for SWT to infer that Fitbit used the sensors in its products and would not have  
8 included non-functional components. It was reasonable for SWT to be suspicious of Fitbit’s  
9 protestations of innocence, particularly when Fitbit was resisting production of basic technical  
10 documents. It was reasonable for SWT to dispute the declaration testimony of Fitbit’s witness  
11 after, at his deposition, he admitted a lack of personal knowledge, recanted several mistaken  
12 assertions, and confessed he had not reviewed all relevant code.

13 SWT’s efforts were unsuccessful. But they were by no means frivolous.

14 Fitbit makes two arguments about the merits. First, it repeats its summary judgment  
15 argument that its products are not capable of infringing because they do not collect information  
16 with six degrees of freedom. We do not intend here to relitigate the Court’s decision on summary  
17 judgment. But we respectfully suggest that it was not the only decision that the Court could have  
18 reached. Fitbit was not as open (or as accurate) in its representations to SWT or the Court as it  
19 now suggests. From the available information, SWT formed reasonable inferences that Fitbit’s  
20 Surge and Blaze practiced the claim limitations at issue on summary judgment.

21 Regarding the Surge:

- 22 • Fitbit’s grounds for claiming that it does not calculate the claimed 6-DOF information  
23 required the Court to accept that neither of two sensor chips, and none of the four sensors  
24 on these two chips, ever gets activated. The assertion is implausible for a mass-produced  
25 consumer product. (Declaration of Bryan Bergeron filed herewith ¶ 39.)
- 26 • Under cross-examination, Fitbit’s sole employee-witness (Logan Niehaus) *retracted* the  
27 *only* reason his summary judgment declaration gave for stating that Fitbit’s 3-axis  
28 gyroscope chip never gives data to the processor – calling his own declaration [REDACTED]

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1 [REDACTED] on this issue. (Declaration of Robert Greenspoon filed herewith Ex.  
2 A, at 142:12-154:12.)

- 3 • Fitbit’s own Surge marketing and product literature named to consumers the 3-axis  
4 gyroscope as an included part, and Fitbit never showed those materials (as to the Surge)  
5 to be inaccurate. (Greenspoon Decl. Ex. B, at 12 (PICs reproducing manual page).)

6 Regarding the Blaze:

- 7 • Fitbit’s grounds for noninfringement required the Court to accept that a 3-axis  
8 magnetometer chip never gets activated. (Greenspoon Decl. Ex. A, at 61:2-17.)
- 9 • Under cross-examination, Mr. Niehaus confirmed that his testimony about sensor  
10 interactions in the Blaze source code was [REDACTED]

11 [REDACTED]  
12 [REDACTED] – *i.e.*, he acted as an employee-expert to consider otherwise-unfamiliar  
13 materials and render testimonial opinions about what he concluded from them.  
14 (Greenspoon Decl. Ex. A, at 138:5-24; 196:13-197:9.) Mr. Niehaus’s knowledge gaps  
15 substantially lowered his credibility to do this.

- 16 • Mr. Niehaus could not fathom why the Blaze (or the Surge) [REDACTED]  
17 [REDACTED]. (Greenspoon Decl. Ex. A, at 136:13-137:6; 139:14-24.)

18 Second, Fitbit argues for the first time in its sanctions motion that its products do not  
19 meet limitation (g) of claim 8, which Fitbit construes as requiring a very specific type of  
20 information display inconsistent with the patent’s preferred embodiment. This issue has not been  
21 litigated. SWT’s position on these issues is by no means frivolous. The Court should deny  
22 Fitbit’s motion for Rule 11 sanctions.

23 **II. FITBIT’S MOTION FOR SANCTIONS SHOULD BE DENIED**

24 **A. RULE 11 IS NOT INTENDED TO PUNISH PARTIES FOR LOSING**

25 In considering Rule 11 sanctions in patent cases, the Court “should ‘avoid using the  
26 wisdom of hindsight and should test the signer’s conduct by inquiring what was reasonable to  
27 believe at the time the pleading, motion, or other paper was submitted.’” *Creagi, Inc. v.*

28 *Pinnaclife, Inc.*, No. 11-CV-6635-LHK, 2014 U.S. Dist. LEXIS 77484, at \*13 (N.D. Cal. June 3,

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1 2014) (citing Fed. R. Civ. P. 11 Advisory Committee Notes (1993 Amendments)). The test for  
2 patent cases brought in the 9th Circuit is whether the paper is “frivolous” or “filed with the court  
3 for an improper purpose.” *Id.* at \*14. A “nonfrivolous claim is never filed for an improper  
4 purpose.” *C.W. v. Capistrano Unified Sch. Dist.*, 784 F.3d 1237, 1248-49 (9th Cir. 2015)  
5 (citation omitted) (defining “improper purpose” as “tested by objective standards,” and found  
6 where a paper other than a complaint is filed “in the context of a persistent pattern of clearly  
7 abusive litigation activity.”)<sup>1</sup> The Rule 11 standard “is not a high one;” a claim that has some  
8 plausible basis, even a weak one, is sufficient to avoid sanctions. *Benedict v. Hewlett-Packard*  
9 *Co.*, No. 13-CV-00119-LHK, 2014 U.S. Dist. LEXIS 7323, at \*18 (N.D. Cal. Jan. 21, 2014)  
10 (citations omitted). “Further, circumstantial evidence, and the reasonable inferences drawn from  
11 that evidence, are treated as evidentiary support for purposes of Rule 11.” *Id.* at \*18-19 (citations  
12 and internal quotation omitted).

13 A claim is “frivolous” only when it is “*both* baseless, *and* brought without a reasonable  
14 and competent inquiry.” *Creagi, Inc.*, 2014 U.S. Dist. LEXIS 77484, at \*14-15 (citation  
15 omitted). Courts deny sanctions if a complaint was *either* not baseless from an objective  
16 perspective, *or* was based on a reasonable and competent inquiry before filing. *Id.* at \*15. A  
17 proper pre-filing patent investigation, in turn, requires “at a minimum, that an attorney interpret  
18 the asserted patent claims and compare the accused device with those claims before filing a  
19 claim alleging infringement.” *Id.* (quoting *Q-Pharma, Inc. v. Andrew Jergens Co.*, 360 F.3d  
20 1295, 1300 (Fed. Cir. 2004)). A pre-filing investigation is adequate where it includes reviewing  
21 the defendant’s advertising and comparing claims of the patent with the accused product, even if  
22 there had been no scientific analysis of the product itself. *Id.* at \*23-27 (citing the holding of *Q-*  
23 *Pharma*, after reviewing and harmonizing the “two leading cases on pre-filing inquiry” – *Q-*  
24 *Pharma* and *View Eng’g, Inc. v. Robotic Vision Sys., Inc.*, 208 F.3d 981 (Fed. Cir. 2000)).

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26 <sup>1</sup> Fitbit’s “improper purpose” argument merely rehashes its “frivolousness” argument,  
27 insisting *ipse dixit* that SWT’s motive was improper because, in Fitbit’s self-serving view, there  
28 was no basis for the claim. (ECF No. 130, at 19.) As discussed below, SWT had a reasonable  
basis for its challenged pleadings and thus did not act for an improper purpose.



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1 If claim interpretation is at issue, the Court does not assess whether the plaintiff was  
2 “correct,” but only whether its position was nonfrivolous. *Creagi, Inc.*, 2014 U.S. Dist. LEXIS  
3 77484, at \*15-16 (noting from *Q-Pharma* that “[c]laim interpretation is not always an exact  
4 science, and it is not unusual for parties to offer competing definitions of even the simplest claim  
5 language.”). A claim interpretation is nonfrivolous, even where wrong, if it was based on  
6 intrinsic evidence and the canons of claim construction. *iLOR, LLC v. Google, Inc.*, 631 F.3d  
7 1372, 1379 (Fed. Cir. 2011); *see also ERBE Elektromedizin GmbH v. Canady Technology LLC*,  
8 629 F.3d 1278, 1284, 1292 (Fed. Cir. 2010) (finding claim construction not frivolous even  
9 though wrong, when based on arguments for ordinary and customary meaning, the doctrine of  
10 claim differentiation, the impropriety of assuming disclaimers, and the impropriety of importing  
11 qualitative limitations). One such canon (relied upon by SWT) is that a claim interpretation that  
12 excludes the preferred embodiment (like Fitbit’s) is rarely, if ever, correct. *See Kaneka Corp. v.*  
13 *Xiamen Kingdomway Group Co.*, 790 F.3d 1298, 1304 (Fed. Cir. 2015).

**B. SWT’S COMPLAINTS COMPLIED WITH RULE 11**

14  
15 Fitbit argues that SWT violated Rule 11 by filing the Complaint on November 14, 2016,  
16 and the First Amended Complaint on April 18, 2017. Its arguments about both filings are the  
17 same: Fitbit contends that SWT conducted an inadequate pre-filing investigation, that the accused  
18 devices cannot collect 6-DOF information, and that the accused devices do not display  
19 synchronized information under Fitbit’s interpretation of limitation (g) of Claim 8 (an issue first  
20 raised in Fitbit’s Rule 11 motion). These arguments have no merit.

**1. SWT’s Pre-Suit Investigation Was Reasonable**

21  
22 SWT’s pre-filing investigation took place over an eleven-month period and included  
23 several discussions with a named inventor of U.S. Patent No. 6,997,882 (the “’882 Patent”).  
24 SWT and its attorneys reviewed the disclosure and claims of the ’882 Patent along with its  
25 prosecution history. The intrinsic evidence informed the constructions of the terms within the  
26 asserted claim of the ’882 Patent. Counsel then applied these constructions as part of a  
27 limitation-by-limitation comparison of claim 8 of the ’882 Patent to the fitness tracker products  
28 offered by Fitbit, including the Surge and Blaze products along with other fitness trackers that

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1 SWT ultimately did not include in its Complaint. (Declaration of Corby Vowell filed herewith ¶¶  
2 5-9.)

3 SWT and its attorneys reviewed publicly available product literature relating to the  
4 components, features, and functionality of all Fitbit products as well as the Fitbit App, which is  
5 configured for use with the accused products. The documentation reviewed included product  
6 specifications, user manuals, product descriptions, and marketing materials describing Fitbit's  
7 products. These materials indicated that some Fitbit products, namely the Surge and Blaze,  
8 included component configurations accommodating collection of movement data from which 6-  
9 DOF data may be derived. (Vowell Decl. ¶¶ 5-9.) Further, the documentation supplied a  
10 reasonable inference that the accused products use this data, along with sensed physiological  
11 data, as part of their calculating and reporting various health metrics and fitness tracking  
12 summary information to users such as, for example, calories burned. (Bergeron Decl. ¶¶ 27-34.)  
13 Although Fitbit contends that a pre-suit acquisition and teardown of the accused products would  
14 have led to the discovery of noninfringement, Fitbit overlooks that SWT would have discovered  
15 only confirmatory information: *i.e.*, that each device contains a second 3-axis sensor (in one case  
16 not a gyroscope) capable of 6-DOF detection.<sup>2</sup>

17 **2. SWT was not required to assume Fitbit's literature was inaccurate**

18 It is a commonplace, nonfrivolous, and accepted practice to rely on advertising and other  
19 public statements in lieu of physical product analysis – even as to products that might be easily  
20 obtained. *See iLOR, LLC*, 631 F.3d at 1379; *Q-Pharma*, 360 F.3d at 1302-03; *Syneron Med. Ltd.*  
21 *v. Viora Ltd.*, No. 2:14-cv-00639, 2014 U.S. Dist. LEXIS 172015, at \*13-15 (E.D. Tex. Dec. 12,  
22 2014) (denying Rule 11 sanctions over pre-filing investigation reviewing advertising and public  
23 statements). Fitbit suggests that easy obtainability of a product creates a *per se* rule against  
24

---

25 <sup>2</sup> Even accepting that a teardown and testing of the Surge might indicate that the nine-axis  
26 sensor is inactive, there remains a second accelerometer capable with proper programming, in  
27 conjunction with the primary accelerometer, of calculating the claimed 6-DOF information.  
28 (ECF No. 95-1, at ¶ 13; ECF No. 80-54, at ¶ 5). Moreover, a \$30,000 teardown is a poor  
substitute for the actual technical documents which are not prone to reverse engineering errors.  
(Bergeron Decl. ¶¶ 21, 25.)

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1 reliance on public statements, and requires some sort of physical product analysis. (ECF No. 130,  
2 at 12:13-15.) The Federal Circuit’s *Q-Pharma* decision renders this argument plainly wrong. In  
3 *Q-Pharma*, the plaintiff had the accused product before suit but did not chemically analyze it,  
4 instead proceeding on the basis of the defendant’s public statements, and the absence of any  
5 expectation that testing would reveal anything different. The Federal Circuit rejected Fitbit’s  
6 argument, holding that no pre-suit chemical test was required because *Q-Pharma* relied on  
7 Jergen’s advertising and labeling of the accused product. *Q-Pharma*, 360 F.3d at 1302-03.

8 *Q-Pharma*’s rejection of Fitbit’s argument also finds support in the law governing what  
9 types of information constitute evidence of infringement. A company’s own marketing and  
10 product literature constitutes evidence of product structure and operation. *PharmaStem*  
11 *Therapeutics, Inc. v. ViaCell, Inc.*, 491 F.3d 1342, 1351 (Fed. Cir. 2007) (“[T]here is no  
12 prohibition against using the admissions of a party, whether in the form of marketing materials or  
13 otherwise, as evidence in an infringement action; such admissions are entitled to weight along  
14 with all other evidence of infringement.”); *CollegeNet, Inc. v. ApplyYourself, Inc.*, 418 F.3d  
15 1225, 1233 (Fed. Cir. 2005) (marketing materials that touted the capability of the allegedly  
16 infringing systems supported the jury’s verdict of infringement); *Alco Standard Corp. v.*  
17 *Tennessee Valley Auth.*, 808 F.2d 1490, 1502-03 (Fed. Cir. 1986) (marketing materials supported  
18 a finding of infringement, describing aspects of the allegedly infringing device in terms almost  
19 identical to the patent claim language). This is not surprising. Litigation risks associated with  
20 publishing misleading or untrue statements make published vendor statements inherently reliable  
21 and accurate descriptions, until proven otherwise through the adversarial process.

22 Fitbit’s cited decisions are not to the contrary. In *View Engineering*, the Federal Circuit  
23 held that the attorney’s failure to compare construed claims with the accused product embodied  
24 the Rule 11 violation – not the reliance on advertising statements. *Creagi, Inc.*, 2014 U.S. Dist.  
25 LEXIS 77484, at \*23-27. In *Judin v. United States*, 110 F.3d 780, 784 (Fed. Cir. 1997), the  
26 Federal Circuit held that the sanctionable aspect was the attorney’s ignorance at relevant times of  
27 the accused product’s “actual design and functioning,” plus his failure to compare construed  
28 claim limitations against it. The Federal Circuit said nothing that would rule out advertising and

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1 product literature providing adequate knowledge of a product’s “design and functioning.” *Id.*

2 There is nothing frivolous about assuming that Fitbit correctly described its own product.  
3 *Q-Pharma*, 360 F.3d at 1302-03; *Benedict*, 2014 U.S. Dist. LEXIS 7323 at \*18-19.

4 **3. SWT developed a good faith basis for its complaints**

5 Prior to drafting its Complaint, SWT and its attorneys created claim charts for the Surge  
6 and Blaze products, submitted previously to the Court. (Vowell Decl. ¶¶ 9, 15-16 and Exs. A, B.)  
7 The charts show the result of SWT’s pre-filing investigation. The charts compare information  
8 obtained for each product to the limitations of the asserted claim. Because direct Fitbit  
9 statements, and reasonable inferences from them, permitted SWT and its counsel to find each  
10 and every limitation of claim 8 in the products, the result of the investigation showed  
11 infringement of the asserted claim.

12 Regarding the 6-DOF limitation, an objective basis existed to form the conclusions that  
13 SWT and its attorneys reached. The post-judgment expert declaration of Dr. Bryan Bergeron  
14 shows that this is so. Dr. Bergeron is the author of *Teardowns*, and is an expert in reverse  
15 engineering consumer electronic products, source code reviews, and health devices and  
16 wearables. (Bergeron Decl. ¶¶ 1-10.) Dr. Bergeron considered the facts revealed in materials  
17 available to SWT before filing suit – namely the advertised presence of both a 3-axis  
18 accelerometer and a 3-axis gyroscope in the Surge and Blaze. (Bergeron Decl. ¶¶ 27-30.)

19 Dr. Bergeron concluded that it is reasonable to infer that a consumer product company  
20 would not install a particular sensor chip in a mass produced device if it did not use it, and would  
21 not advertise its presence to the public if it were not there or were unused. (Bergeron Decl. ¶¶  
22 31-33 (citing cost and other considerations).) In the context of how the Surge and Blaze operate,  
23 it was also reasonable to infer that the advertised 3-axis gyroscope sensors provide data that gets  
24 used with the 3-axis data of the other sensor, to perform basic 6-DOF functions and calculations  
25 of the device, such as step counting, calorie burn, etc. (Bergeron Decl. ¶ 34.) That said, Dr.  
26 Bergeron recognized that opposite conclusions were not impossible – just implausible based on  
27 the combination of information available to SWT’s attorneys. (Bergeron Decl. ¶¶ 35-37.)  
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1 As for the “synchronized display” limitation, Fitbit first mentioned this issue in its  
2 original Rule 11 motion. (ECF No. 102.) Fitbit did not raise it in its May 26, 2017 letter (ECF  
3 No. 130-10), in its portion of the joint CMC statement (ECF No. 68), or in its motion for  
4 summary judgment (ECF No. 80). The parties never exchanged proposed claim constructions  
5 because Fitbit instead moved for an early summary judgment.

6 SWT’s preliminary infringement contentions (“PICs”), served April 7, 2017, identified  
7 (with red underlining) that display of calorie burn information embodied the synchronized 6-  
8 DOF data that infringed the relevant limitation. (Greenspoon Dec. Ex. B, at 21; Ex. C, at 21.)  
9 Contrary to Fitbit’s arguments, this claim construction and claim-application contention never  
10 changed. There was no reason it should – Fitbit’s apparent “synchronized display” (calorie burn)  
11 is precisely the same as the ’882 Patent’s preferred embodiment’s “synchronized display”  
12 (calorie burn, aka “energy expenditure”).

13 Specifically, the ’882 Patent includes Fig. 9, which is a graphical representation of “the  
14 actual and predicted *energy expenditure* (based on data collected in 15 subjects) as determined  
15 by the method of the invention.” (Greenspoon Dec. Ex. D, at 6:36-38, emphasis added.) The  
16 ’882 Patent confirms that “energy expenditure” is calorie burn. (Greenspoon Dec. Ex. D, at 4:25-  
17 26, 27:28-39, 28:50-54.) One of the objects of the invention mentions calculating “energy  
18 expenditure,” derived from “6-DOF data” utilized “in combination with physiological data,  
19 particularly heart rate” – wording that matches the two inputs that get transformed for the single  
20 output of the “synchronized display” claim limitation. (Greenspoon Dec. Ex. D, at 5:64-67.)

21 “Energy expenditure” is indisputably the preferred embodiment’s displayed  
22 “synchronized” information, as confirmed in the detailed description. It states that the “*display* is  
23 useful for displaying information about the device, such as low battery levels, or data processed  
24 by the microprocessor, such as heart rate and/or *energy expenditure*.” (Greenspoon Dec. Ex. D,  
25 at 11:30-33, emphasis added.) The detailed description also states, “[i]nformation derived wholly  
26 *or partly* from the 6-DOF data (*e.g., energy expenditure*) may be *displayed* locally or  
27 transmitted to the remote unit for further processing, storage, and/or display.” (Greenspoon Dec.  
28 Ex. D, at 13:57-60.) The whole purpose of such “synchronization” is “to monitor the physical

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1 and physiological activity of subjects” (Greenspoon Dec. Ex. D, at 4:12-15) – a purpose in  
2 harmony with showing a user her calorie burn, derived from heart rate and 6-DOF information.

3 The ’882 Patent does describe “alternatively” using 6-DOF to calculate a “virtual pelvis,”  
4 and then synchronizing with physiological information to show “time referenced causal  
5 relationships, such as hypotensive events preceding falls.” (Greenspoon Dec. Ex. D, at 14:42-  
6 49.) Yet Fitbit offers no reason to conclude that this “alternative” embodiment somehow limits  
7 the claim so that the preferred embodiment (“synchronized display” embodied as display of  
8 calorie burn) no longer falls within its scope.

9 Fitbit argues that SWT’s infringement allegations with respect to limitation (g)  
10 (“synchronized display”) are baseless because “Fitbit products do not display any 6-DOF  
11 information for a user’s wrist relative to an inertial reference frame.” (ECF No. 130, at 13:21-  
12 14:2.) Fitbit’s argument is nonsensical because it does not correspond to what claim 8 actually  
13 says. Step (f) of claim 8 uses two inputs and transforms them into one: it synchronizes 6-DOF  
14 body-segment movement information “*with*” physiological information “*to obtain*” the  
15 “synchronized 6-DOF body-segment movement information and physiological information.”  
16 (Greenspoon Dec. Ex. D, at claim limitation 8(f).) Step (g), in turn, then displays this calculation  
17 result in a “format comprehensible to humans.” (Greenspoon Dec. Ex. D, at claim limitation  
18 8(g).) This broad language does not require display of the originally-calculated 6-DOF  
19 information – only one of the two inputs into whatever information does get displayed.

20 Resolution of this dispute would, of course, require a full *Markman* hearing that never  
21 occurred here. A sanctions motion should not generate a detour into satellite litigation just to add  
22 another ground for seeking fees. Fitbit’s presentation of its own untested interpretation of the  
23 patent’s claims does not demonstrate that SWT’s interpretation was frivolous. *iLOR*, 631 F.3d at  
24 1379; *Creagi, Inc.*, 2014 U.S. Dist. LEXIS 77484, at \*15-16.

25 SWT thus had a good faith, non-frivolous basis for the allegations made in its Complaint  
26 and First Amended Complaint. Neither pleading violated Rule 11.

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**C. SWT'S SIGNATURE ON THE JOINT CASE MANAGEMENT CONFERENCE STATEMENT COMPLIED WITH RULE 11**

1  
2 Fitbit next argues that SWT violated Rule 11 on September 26, 2017 when it  
3 “represented to the Court . . . that additional discovery was necessary.” (ECF No. 130, at 4:10-  
4 15.) Fitbit presents itself as having attempted to avoid this litigation by candidly and openly  
5 providing SWT with complete proof of its non-infringement. That is simply not the case. Fitbit  
6 merely offered curated evidence it believed would support it, while resisting reasonable efforts to  
7 obtain related corroborating or impeaching evidence.

8 Shortly after SWT served the PICs, Fitbit’s counsel asked to meet and confer on alleged  
9 deficiencies. At that April 12, 2017 meet-and-confer, Fitbit asked for clarification of the position  
10 with respect to the terms “anatomical reference frame” and “inertial reference frame,” and asked  
11 for supplementation about evidence of infringement. Counsel does not recall Fitbit making  
12 statements about the lack of a gyroscope in the Blaze, or that sensors are not initialized on either  
13 product. (Vowell Decl. ¶ 10.) SWT provided the requested supplementation by April 21, 2017.  
14 (*Id.*)

15 Fitbit’s motion relies heavily on a May 26, 2017 letter sent to SWT along with a  
16 declaration of Logan Niehaus. (ECF No. 130-10.) Fitbit insists that by offering the Niehaus  
17 declaration and an inspection of source code “at a mutually satisfactory time,” it somehow  
18 removed any reasonable basis for SWT’s positions. Fitbit also insists that SWT was too slow in  
19 reviewing the source code. Fitbit only tells half of the story.

20 First, Fitbit’s letter did not explain why Mr. Niehaus suddenly materialized as a  
21 knowledgeable witness. He was not included in (nor ever amended into) Fitbit’s Rule 26(a)(1)  
22 initial disclosures, which named a different person, Sheldon Yuen, as knowledgeable about how  
23 the products work. (Vowell Decl. Ex. C.)

24 Second, at the time of the May 26 letter, Fitbit had not produced *any* documents to SWT.  
25 (Vowell Decl. ¶ 19, Ex. E.) SWT was reasonable to believe that it needed documents in order for  
26 a source code review to be meaningful. (Bergeron Decl. ¶¶ 11-26.) During a meet-and-confer on  
27 June 5, 2017, SWT counsel discussed the letter and the declaration, and explained the need for  
28 documents from Fitbit in order to be able to understand and review the source code to evaluate

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1 Fitbit's position. (Vowell Decl. ¶ 20, Ex. F (June 5, 2017 Fitbit email acknowledging  
2 disagreement over "an appropriate path for verifying the statements made in our letter.")  
3 Instead of demonstrating that its documentation also supported its assertion of non-infringement,  
4 Fitbit refused, insisting that no such documents were needed, and that the source code was self-  
5 explanatory. (Vowell Decl. ¶ 21, Ex. G (July 24, 2017 email recounting Fitbit's position that  
6 "access to the requested documents is not necessary prior to our reviewing source code.")

7 As explained by Dr. Bergeron, SWT's desire for additional material was reasonable.  
8 (Bergeron Decl. ¶¶ 11-26.) The best practice for source code review concerning a consumer  
9 wearable embedded device demands the ability to consult at least electrical schematics.  
10 (Bergeron Decl. ¶ 14.) Best practices also ideally include the ability to consult non-source code  
11 algorithm documentation (*e.g.*, company "wiki's" or other internal specifications explaining in  
12 plain English what the algorithms do and how they work). (Bergeron Decl. ¶ 16.) This is to  
13 ensure that source code review is efficient and accurate, particularly in a case where, as an  
14 outsider, one cannot know the full extent of the task before beginning the actual inspection.

15 At the same time, the parties were litigating whether this case would remain in Virginia.  
16 Even during briefing on a co-pending transfer motion (eventually granted), the parties exchanged  
17 several emails related to SWT's continuing need for documents from Fitbit. (*E.g.*, Vowell Decl.  
18 Exs. E-H.) To the extent the Court later questioned why SWT could not "walk and chew gum"  
19 (ECF No. 132-4, at 20:6-12), *i.e.*, address discovery issues while briefing the transfer motion, the  
20 record shows that SWT chewed gum while walking. Proceeding too slowly is not, in any event, a  
21 ground for Rule 11 sanctions.

22 On July 10, 2017, SWT's persistence led to results. Three months after service of SWT's  
23 document requests, Fitbit produced documents. They consisted primarily of user manuals and  
24 other publicly available information, but still no electrical schematics or other internal  
25 documents (such as relevant algorithm-wiki's). (Vowell Decl. Ex. G.) While the production  
26 included some technical presentations, it did not include the key items necessary to perform a  
27 meaningful code analysis. What Fitbit did produce turned out to have inaccuracies. For example,  
28



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1 an important specification sheet for the Blaze [REDACTED]  
2 [REDACTED] (Greenspoon Decl. Ex. A, at 162:3-163:3.)

3 After a two-week review of these documents, SWT identified deficiencies to Fitbit by a  
4 communication dated July 24, 2017. Fitbit maintained that it did not need to produce additional  
5 information, and again stated (incorrectly, per Dr. Bergeron) that SWT only needed source code  
6 for SWT's analysis. (Vowell Decl. Ex. G.) On August 8, 2017, SWT wrote again, with a detailed  
7 explanation of why it needed further documentation to commence the source code review.  
8 (Vowell Decl. Ex. H) The August 8 letter also demonstrated that SWT was not causing any  
9 delay, contrary to a growing drumbeat of self-serving Fitbit statements that SWT was somehow  
10 improperly delaying things.<sup>3</sup> (ECF Nos. 130-12, 130-13.)

11 The Western District of Virginia granted transfer on August 29, 2017. Fitbit finally  
12 produced some, but still not all, electrical schematics on September 15, 2017.<sup>4</sup> (ECF No. 130-  
13 14.) It was not apparent to counsel what this meant at the time, and was not explained until Mr.  
14 Niehaus's later deposition, but every Blaze schematic had the label "NFF." (Vowell Decl. ¶ 12.)  
15 This turned out to mean "non-form factor" – a term that indicates some sort of test or quality  
16 control board, but not a mass-production device board. (Greenspoon Decl. Ex. A, at 72:2-12,  
17 160:13-20.) Thus, Fitbit never produced schematics for the Blaze as sold. Ironically, Fitbit would  
18 use the fact of its *non*-production of Blaze device schematics against SWT, when SWT later  
19 pointed to NFF schematics in summary judgment papers to demonstrate to the Court the  
20 (undisputed) fact that they show a second 3-axis accelerometer. (*E.g.*, Dkt. No. 100, at 4:12-15,  
21 7:23-25, 8:7-27, 13:9-13, Reply criticizing SWT for pointing to the only Blaze schematics Fitbit  
22 ever produced.)

23 The September 15, 2017 production of schematics revealed to SWT that the Surge  
24 contained three sensor chips – two of them being 3-axis accelerometers, and a third being an

25 \_\_\_\_\_  
26 <sup>3</sup> It remains suspicious how reluctant Fitbit is to provide full internal documentation on the  
27 accused devices. Why is Fitbit insisting that information be reverse engineered when its own pre-  
28 dispute documents should presumably and authoritatively provide that information?

<sup>4</sup> Fitbit has never offered an explanation for why it could not have simply produced these  
documents months earlier.

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1 InvenSense MPU9250. The MPU9250 is a nine-axis device, containing a 3-axis accelerometer, a  
2 3-axis gyroscope and a 3-axis magnetometer. Knowing this fact turned out to be extremely  
3 helpful in the source code review, which revealed [REDACTED]  
4 [REDACTED] (Greenspoon Decl. Ex. A, at 151:8-13.) Since the September 15, 2017 production  
5 continued to reveal (consistently) that each of the Surge and the Blaze contained enough sensor  
6 chips to calculate the claimed 6-DOF information, their production objectively bolstered the  
7 infringement inferences already reached.

8 This is the point in time when SWT informed the Court that more discovery was needed.  
9 That statement was not frivolous; it was true. At a minimum, SWT needed (1) to review the  
10 source-code and (2) to depose Mr. Niehaus. (Bergeron Decl. ¶¶ 11-26.) SWT also reasonably  
11 believed that it needed more documentation to fill in gaps so far. While the Court ultimately  
12 disagreed,<sup>5</sup> clearly SWT's desire for more discovery was not frivolous. SWT did not violate Rule  
13 11 when it told the Court on September 26, 2017 that more discovery was needed.

**D. SWT'S OPPOSITION TO SUMMARY JUDGMENT COMPLIED WITH RULE 11**

14  
15 Fitbit lastly argues that SWT violated Rule 11 when it filed its opposition to summary  
16 judgment on November 17, 2017. While this is unquestionably a point in time when SWT had  
17 more information than during the prior challenged actions, SWT still maintained a reasonable,  
18 non-frivolous basis for resisting summary judgment.

**1. SWT was not required simply to accept Fitbit's "evidence" as true**

19  
20 Fitbit's motion implies that SWT was required to simply accept whatever "proof" Fitbit  
21 provided by declaration, even in the face of Fitbit's refusal to produce documents. That is not the  
22 law. In multiple contexts, courts and parties properly give no weight to untested written sworn  
23 statements. *Hussey v. Chase Manhattan Bank*, No. 02-7099, 2004 U.S. Dist. LEXIS 1150, at \*6-  
24 7 (E.D. Pa. Jan. 13, 2004) (affidavit from plaintiff not competent to testify live because of health  
25 stricken, based on "the many possible deficiencies, suppressions, sources of error and

26  
27 <sup>5</sup> The Court denied a letter request to compel production of additional discoverable  
28 material that SWT still believed to be missing, over Fitbit's arguments that the technical material  
was not germane to the summary judgment issues. (ECF Nos. 86, 88.)

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1 untrustworthiness, which lie underneath the bare untested assertion of a witness, [that] may be  
2 best brought to light and exposed by the test of cross-examination”); *see also United States v.*  
3 *Phillippos*, 849 F.3d 464, 469 (1st Cir. 2017) (calling “untested” affidavit “illusory” and not  
4 entitling affiant to a preliminary hearing); *Glycobiosciences, Inc. v. Innocutis Holdings, LLC*,  
5 146 F. Supp. 3d 221, 239 (D.D.C. 2015) (“declin[ing] to credit” “untested” declaration stating  
6 expert opinion on patent claim construction); *Vodak v. City of Chicago*, No. 03 C 2463, 2004  
7 U.S. Dist. LEXIS 18070, at \*12 (N.D. Ill. Sept. 9, 2004) (plaintiff “not required to take [adverse  
8 witness’s] word for it when he claims that his opinion was not based on [particular information].  
9 . . . Rather, plaintiffs are entitled to . . . cross-examination regarding his statements”); *ID Sec.*  
10 *Sys. Can., Inc. v. Checkpoint Sys.*, 198 F. Supp. 2d 598, 625-26 (E.D. Pa. 2002) (holding  
11 “untrustworthy” under the residual hearsay exception an affidavit of a witness “never tested on  
12 the crucible of cross examination” because he was employed by a party); *Merritt Forbes Co. v.*  
13 *Newman Inv. Sec., Inc.*, 604 F. Supp. 943, 952-53 (S.D.N.Y. 1985) (applying principle that  
14 “[a]ffidavits are so obviously incapable of [] thorough testing and inspection and, therefore,  
15 should not be dispositive of central issues of fact”); *cf. Daubert v. Merrell Dow Pharms., Inc.*, 509  
16 U.S. 579, 595 (1993) (“Vigorous cross-examination, presentation of contrary evidence, and  
17 careful instruction on the burden of proof are the traditional and appropriate means of attacking  
18 shaky but admissible evidence.”).

19 Here, Mr. Niehaus’s May 26, 2017 affidavit simply established a need for cross-  
20 examination. And that cross-examination needed to commence *after* Fitbit set the stage for an  
21 efficient and meaningful source code review by producing schematics and other internal  
22 technical documents. The calendar of events shows that things happened within a reasonable  
23 time period, especially in light of Fitbit’s first production of schematics on September 15, 2017.

24 **2. Discovery after the CMC Statement made the facts less certain, not**  
25 **more**

26 With the late production of electrical schematics, it was now a “mutually satisfactory  
27 time” to inspect the source code (a timing trigger Fitbit expressly proposed on May 26), albeit  
28 not an ideal time. Fitbit continued not to produce specifications or relevant wiki’s. (Vowell Decl.

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1 ¶ 12.) Less than two weeks after the schematic production, on September 28, 2017, SWT counsel  
2 traveled across the country to conduct the first of two source code inspections at Fitbit counsel's  
3 offices. (Vowell Decl. ¶ 13.) This inspection made available only one version of code for each  
4 product. (Vowell Decl. Ex. D.) It was not known until later that there had been [REDACTED]  
5 [REDACTED] (Greenspoon Decl. Ex. A, at 32:20-  
6 35:11.)

7 That inspection revealed that the Surge code had [REDACTED]  
8 [REDACTED] and that the Blaze code included [REDACTED]  
9 [REDACTED]. (Greenspoon Decl. Ex. A, at 102:25-112:13.) Fitbit did not make available  
10 any company personnel or subject area experts to walk SWT through the code on an informal  
11 basis, or answer any questions. (Vowell Decl. ¶ 14.) On October 2, 2017, a second SWT lawyer  
12 conducted SWT's second review of the same code. (Vowell Decl. ¶ 13.)

13 Fitbit suggests – citing no authority – a *per se* rule that retained experts were necessary  
14 for code review. (ECF No. 130, at 16:16-18.) Yet Fitbit overlooks that SWT counsel who  
15 inspected the code included one with a computer science degree, another with a strong technical  
16 degree that included code writing, and many combined years of experience in this type of code  
17 review. (Vowell Decl. ¶ 3.) Fitbit, of course, had never demanded in its May 26, 2017 letter that  
18 SWT bring along a retained expert – instead asking for *counsel* to verify its implausible  
19 statements with a source code review.

20 Before SWT could complete its investigation, Fitbit filed its summary judgment motion  
21 on October 17, 2017. The motion sought to establish as the definitive fact precluding  
22 infringement that Fitbit's products are "incapable" of calculating the claimed 6-DOF  
23 information, for lack of "active" second 3-axis sensors. (ECF No. 80, at 9:12-14.) The moving  
24 papers included a new Niehaus declaration to address the second sensors. This declaration  
25 contained material inaccuracies (to be discussed later). Also included was a declaration from  
26 "TechPats" (Mr. Demarest), who performed a "teardown" of the Surge and Blaze. The scant  
27 discussion of Mr. Demarest's "teardown" as to the Surge product was unreliable. It revealed  
28 nothing of the methodology he applied to conclude that the main processor never communicates

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1 with the MPU9250. (Bergeron Decl. ¶¶ 39-44.) Mr. Niehaus, in fact, testified at his deposition to  
2 the contrary (discussed later in detail), confirming that [REDACTED]  
3 [REDACTED] – a fact that runs counter to Mr.  
4 Demarest’s statement. (Greenspoon Decl. Ex. A, at 153:5-13.)

5 SWT took Mr. Niehaus’s deposition on October 27, 2017. He confirmed that [REDACTED]  
6 [REDACTED]. (Greenspoon Decl.  
7 Ex. A, at 32:20-35:11.) He also revealed that he made a “mistake” in his declaration regarding  
8 [REDACTED]. (Greenspoon  
9 Decl. Ex. A, at 153:21-154:3.) This “mistake” was material, since it negated the sole fact Mr.  
10 Niehaus used to contend Surge noninfringement. (See ECF No. 80-54 ¶ 7, the retracted  
11 testimony.)

12 Mr. Niehaus further explained that [REDACTED]  
13 [REDACTED]  
14 [REDACTED]. (Greenspoon Decl. Ex. A, at 14:2-15:9; 138:5-24; 196:13-  
15 197:9.) He admitted to being [REDACTED]  
16 [REDACTED], and did not know whether [REDACTED]  
17 [REDACTED] (Greenspoon Decl. Ex. A, at 74:20-22; 80:23-81:2.) Finally, Mr. Niehaus had no  
18 idea [REDACTED]  
19 [REDACTED] (Greenspoon Decl. Ex. A, at 136:13-137:6; 139:14-24.) In effect, Fitbit offered Mr.  
20 Niehaus as an employee-expert, tasked with reviewing otherwise-unfamiliar information and  
21 reporting inferences and opinions that he formed. Those opinions rested on a thin basis, at best.  
22 Mr. Niehaus did not appear credible to SWT, as SWT later reported in its summary judgment  
23 opposition. Although the Court disagreed, this was a reasonable assessment given the deposition,  
24 not sanctionable conduct.

25 Before lodging its opposition to summary judgment, SWT also hired one of the co-  
26 inventors as an independent expert (with no stake in the outcome) – Jeffrey Monaco. Mr.  
27 Monaco confirmed that the commercial Surge and Blaze devices had sufficient components  
28 necessary to calculate the claimed 6-DOF information. This confirmed the previous bases for

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1 reasonable inferences that SWT and counsel had formed. It also confronted and rebutted the  
2 main factual ground urged by Fitbit – supposedly “incapability.”

3       Though SWT presented the bases for its reasonable inferences of infringement to the  
4 Court, and provided a sufficient showing (it believed) to demonstrate that Fitbit had not  
5 competently rebutted these inferences with credible admissible evidence, the Court granted  
6 summary judgment. This brief does not challenge that decision; however, losing summary  
7 judgment does not mean the claim was frivolous. SWT believed, and still believes, it had a  
8 sufficient basis for its claim as described above. SWT’s litigation conduct was that of a party  
9 trying to win, not trying to harass or burden an opponent for any improper purpose.

10                   **3.       Inconsistencies between the initial PICs and the accused devices do**  
11                   **not demonstrate that the underlying claim of infringement was**  
12                   **frivolous**

13       Fitbit points out that SWT’s PICs stated that the Blaze uses a 3-axis gyroscope instead of  
14 more generically a 3-axis sensor. As it turned out, Fitbit public statements were wrong, and the  
15 Blaze does not have a gyroscope. It does have another 3-axis sensor (a magnetometer) that could  
16 combine with the 3-axis accelerometer to allow 6-DOF calculations. Both Fitbit and the Court  
17 were critical of SWT for not amending its Blaze PICs prior to opposing summary judgment.

18       Amending the Blaze PICs earlier might have made it easier to oppose summary  
19 judgment, but SWT respectfully suggests that delay in doing so does not render the underlying  
20 claims frivolous. SWT made its PICs on publicly available information from Fitbit. Notably,  
21 there were no patent local rules in the Western District of Virginia (the case’s initial forum), but  
22 the parties agreed to exchange contentions and claim construction disclosures as part of the  
23 scheduling order without reference to any particular district’s local rules.<sup>6</sup>

24 <sup>6</sup>       As it turns out, Fitbit’s own early invalidity contentions would have been deemed  
25 noncompliant under Northern District of California rules, as they omit any charts. Northern  
26 District of California Patent Local Rule 3-3(c). Fitbit never amended them. Fitbit never provided  
27 initial invalidity contentions in chart form, as would comply with Northern District of California  
28 Patent Local Rules. Those would have been due on December 1, 2017 (*i.e.*, 45 days after SWT’s  
PICs might ostensibly have become SWT’s Northern District of California LPR PICs). If Fitbit  
believed that Northern District of California LPRs were in force despite the *de facto* stay, along  
with their contention-amendment protocols, it would have served chart-form invalidity  
contentions by December 1, 2017.

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1 The October 3, 2017 CMC would have ordinarily have been a trigger event starting a 14-  
2 day clock for a plaintiff's initial service of PICs. Northern District of California Patent Local  
3 Rule 3-1. But Fitbit's prior CMC statement suggested permitting an early summary judgment  
4 motion "before discovery proceeds any further" (ECF No. 68, at 4:20-22), which the Court  
5 endorsed at the CMC, stating that "it seemed to make sense to proceed *as the defendant was*  
6 *proposing*, by teeing up an early summary judgment motion." (ECF No. 130-24, at 2:18-22.)  
7 This appeared to approve a *de facto* stay of discovery, other than whatever Fitbit might  
8 unilaterally choose to provide to support its summary judgment position. The Court later denied  
9 SWT's request to compel otherwise-discoverable information, over Fitbit's objection that the  
10 material was not germane to the specific summary judgment issues. (ECF Nos. 86, 88.)

11 At no time did this Court order the parties to comply with the Northern District patent  
12 rules or set deadlines for converting the PICs made in Virginia into ones compliant with this  
13 Court's rules. Yet even if that had happened, at most SWT was late (but still within the discovery  
14 period) when correcting its Blaze PICs (disclosing the corrected claims in its motion-opposition  
15 papers).<sup>7</sup> While Fitbit raised this as a technical defect, it made no pretense of being unaware that  
16 SWT made the same contention about the other sensors present in the devices. A party has no  
17 obligation to supplement contention discovery when it has "otherwise [] made [a contention]  
18 known to the other parties *during the discovery process or in writing*." Fed. R. Civ. P.  
19 26(e)(1)(A) (emphasis added). At least SWT's opposition brief to the early summary judgment  
20 motion satisfied both criteria of updating SWT's Blaze contentions "during the discovery  
21 process" and "in writing."<sup>8</sup> *Tritek Techs., Inc. v. United States*, 63 Fed. Cl. 740, 746-47 (Fed. Cl.  
22 2005) (under Rule 26(e) allowing non-infringement theory revealed only in pre-*Markman*  
23 summary judgment motion and not in formal contention interrogatory answers).

24  
25  
26 <sup>7</sup> Fitbit does not argue that the PICs themselves violated Rule 11; nor could it, as Rule 11  
does not apply to discovery exchanges amongst the parties.

27 <sup>8</sup> Any interpretation or application of the Patent Local Rules inconsistent with Rule 26(e)  
28 would not be valid. *O2 Micro Int'l, Ltd. v. Monolithic Power Sys.*, 467 F.3d 1355, 1365 (Fed.  
Cir. 2006).

## REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED

1 Even if the “otherwise made known” carveout from Rule 26(e)(1)(A) did not apply, that  
2 would not support Fitbit’s Rule 11 motion. The Court concluded that SWT could not defeat  
3 summary judgment by changing its contentions, but a timing issue does not make the substantive  
4 claims frivolous. “The fact that [a patentee’s] claim-construction theories changed over the  
5 course of the litigation does not make its initial or subsequent constructions unreasonable in light  
6 of the information available at the time. Such changes are common as litigation proceeds . . . .”  
7 *PrinterOn Inc. v. Breezyprint Corp.*, 93 F. Supp. 3d 658, 711 (S.D. Tex. 2015) (citing *Lava*  
8 *Trading Co. v. Sonic Trading Mngmt., LLC*, 445 F.3d 1348, 1353 (Fed. Cir. 2006)).

9 SWT also made no inconsistent claim construction argument in the relevant Patent Office  
10 paper. The paper Fitbit quotes out of context shows explicitly that SWT was not taking a position  
11 on claim construction of the “synchronized display” element within that tribunal. (ECF No. 130-  
12 16, at 10, “Patent Owner elects not to offer a proposed construction in this response . . . .”)  
13 Rather, SWT simply held up opponent Tom-Tom’s construction for scrutiny, and showed that it  
14 resulted in a contradiction with the specification. (ECF No. 130-16, at 8-10.) Fitbit’s gross  
15 misunderstanding of the “synchronized display” limitation and SWT’s positions regarding it  
16 should not lead to any conclusion of frivolousness.

#### 17 4. SWT’s opposition to summary judgment was not frivolous

18 The Court rejected SWT’s arguments in opposition to summary judgment. That does not,  
19 however, make them frivolous.<sup>9</sup>

20 In its summary judgment papers, Fitbit never submitted its source code, relying solely on  
21 Mr. Niehaus to tell the Court how the code performed. SWT impeached Mr. Niehaus. SWT  
22 caused him to recant the factual premise of his declaration testimony as to the Surge. This  
23 supported the reasonableness of SWT’s decision not to nonsuit Fitbit after summary judgment.

24 At least as to the Surge, and the implausible contention that a particular sensor is never  
25 used (the InvenSense MPU9250), SWT negated that testimony. Nothing remained of any

---

26 <sup>9</sup> The summary judgment motion did not address Fitbit’s new “displaying” limitation  
27 argument, and thus *a fortiori* nothing in the opposition spoke to that argument. On summary  
28 judgment, the non-movant’s burden is to respond to the motion, not address issues not raised in  
it. *See Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000).



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1 contention that the software does not initialize the MPU9250, and therefore of the stated ground  
2 Mr. Niehaus offered for summary judgment. Again, this is not to relitigate the merits. But rather,  
3 impeachment of the only employee testimony offered to support implausible assertions about  
4 software lends significant weight to the reasonableness of declining to nonsuit Fitbit.

5 As to the Surge and the MPU9250, Mr. Niehaus’s summary judgment declaration offered  
6 only one reasoned ground regarding noninfringement and the MPU9250 sensor chip – [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED] (ECF No. 80-54, at ¶ 7.)

11 Under cross-examination, Mr. Niehaus retracted this statement. Mr. Niehaus first  
12 confirmed that [REDACTED]

13 [REDACTED]

14 [REDACTED] (Greenspoon Decl. Ex.

15 A, at 138:5-24; 196:13-197:9.) Mr. Niehaus [REDACTED]

16 [REDACTED] (Greenspoon Decl. Ex. A, at 142:12-154:12.)

17 Fitbit dismisses this retraction as an “inconsequential error” that was “immaterial to his  
18 conclusions.” (ECF No. 130, at 18:12-14.) Fitbit is wrong. The first retraction led to a second  
19 one – that Mr. Niehaus [REDACTED]

20 [REDACTED]

21 O. And now let me borrow that back from you and I’ll point you to another

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

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[REDACTED]

(Greenspoon Decl. Ex. A, at 152:18-154:12 (emphasis added).)

Fitbit’s basis for moving for summary judgment was “incorrect” and a “mistake.” SWT was entitled to oppose the motion and argue these points. *See Kinetic Concepts, Inc. v. Blue Sky Med. Group, Inc.*, 554 F.3d 1010, 1024 (Fed. Cir. 2009) (jury entitled to disbelieve a party’s expert if it chooses); *Rohm & Haas Co. v. Brotech Corp.*, 127 F.3d 1089, 1092 (Fed. Cir. 1997) (court not required to accept unsupported expert assertions). Mr. Niehaus testified about [REDACTED]

[REDACTED] (Greenspoon Decl. Ex. A, at 138:5-24; 196:13-197:9.) Nor could he fathom any reason why [REDACTED]

[REDACTED]. (Greenspoon Decl. Ex. A, at 136:13-137:6; 139:14-24.) Mr. Niehaus also was [REDACTED] (Greenspoon Decl. Ex. A, at 74:20-22; 80:23-81:2.)

Fitbit’s other direct evidence about the Surge also appeared unreliable. Mr. Demarest testified that a particular pin always stays high in the MPU9250, thus precluding any processor-sensor communications. Not only does Mr. Niehaus’s admission about [REDACTED]

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1 [REDACTED] contradict this (*i.e.*, [REDACTED])  
 2 [REDACTED]). The Demarest testimony did not disclose the methodology for the testing.  
 3 (Bergeron Decl. ¶¶ 39-44 (noting among other things that bench testing while the device was still  
 4 would not be representative of device operation).) At the very least, Fitbit's May 2017 deletion  
 5 from Surge product literature of its *true* statement that the Surge had a second 3-axis sensor (a  
 6 gyroscope) underscores that the pre-deletion literature implied that the product uses that chip.  
 7 Despite the deletion, the prior product literature still carries weight as a party admission. Fitbit  
 8 deleted a true statement from Surge product literature that it *has* a 3-axis gyroscope, showing  
 9 that Fitbit wanted to distance itself from an admission that it *uses* the gyroscope.

10 As to either the Surge or the Blaze, it was nowhere near a foreordained conclusion that  
 11 this Court would find Mr. Niehaus's testimony credible enough to refute SWT's circumstantial  
 12 evidence that both the Surge and the Blaze calculate 6-DOF as claimed. This was not solely  
 13 because of the undisputed fact that both products contain sufficient hardware to calculate 6-DOF  
 14 as claimed. The cross-examination at deposition also established that as to both products, code  
 15 existed [REDACTED].

16 Rule 11 allowed SWT to oppose summary judgment and press forward seeking full  
 17 discovery to prove its claims. SWT did not violate Rule 11 by opposing summary judgment.

18 **III. TO THE EXTENT ANY SANCTIONS ARE WARRANTED, FITBIT HAS**  
 19 **FAILED TO PROVIDE A SUFFICIENT RECORD TO AWARD THEM**

20 **A. FITBIT'S ARGUMENTS FOR "MATERIAL" SANCTIONS ARE BASELESS**

21 Fitbit asks the Court to impose "a very material sanction" based on four cursory  
 22 arguments. None of them adds any heft to Fitbit's motion.

23 First, Fitbit argues that heavy sanctions are justified because SWT is owned by Wi-LAN,  
 24 Inc. No authority is cited for the undoubtedly unconstitutional assertion that a sanction against  
 25 SWT may be based on who owns the company. Rule 11 certainly does not authorize the Court to  
 26 base its sanction on the ownership of a party.

27 Second, Fitbit argues that SWT's counsel have prosecuted other lawsuits on the same  
 28 patent against other company's products. It offers no evidence that any such suit was ever found

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1 sanctionable or frivolous and, indeed, provides no information about any of those suits. SWT has  
2 a constitutional right to petition, and Fitbit likewise presents no authority that allows the Court to  
3 punish SWT for pursuing its patent rights against other parties. Rule 11 certainly provides no  
4 such authority. *See Glob. Touch Sols., LLC v. Toshiba Corp.*, 109 F. Supp. 3d 882, 887 (E.D. Va.  
5 2015) (observing that, as a result of the joinder provision of the America Invents Act, “it appears  
6 that the serial filing of separate patent infringement actions in the same court, on or about the  
7 same date, against different corporate defendants, has become the new normal in patent  
8 infringement litigation”); *Phillips Petroleum Co. v. Esso Standard Oil Co.*, 91 F. Supp. 215, 217-  
9 18 (D. Md. 1950) (successful defendant in patent infringement case was not entitled to attorney’s  
10 fees even though losing patentee brought other actions involving similar issues based on same  
11 patent in other forums including one resulting in a judgment of invalidity and noninfringement;  
12 fees were only appropriate if vexatious and unjustified litigation was clearly shown); *compare*  
13 *Doering v. Union Cty. Bd. of Chosen Freeholders*, 857 F.2d 191, 197 n.6 (3d Cir. 1988) (the  
14 “district court may consider ... the attorney’s history of filing frivolous actions or alternatively,  
15 his or her good reputation.”).

16 Third, Fitbit argues that SWT and its counsel were warned not to pursue this case. As  
17 discussed in detail above, the information provided with Fitbit’s “warning” was incomplete and  
18 inaccurate, and SWT was entitled to dig deeper. Again, Fitbit cites no authority that “failing” to  
19 capitulate to Fitbit’s threats justifies increasing any sanction.

20 Finally, Fitbit argues that this Court has sanctioned other litigants, as if the identity of the  
21 specific District Judge hearing the matter had some bearing on what, if any, sanctions are  
22 appropriate. It does not.

23 SWT’s counsel are experienced patent litigators who have never been subject to a Rule  
24 11 sanction. (Declaration of Jonathan Suder filed herewith ¶¶ 4-21; Vowell Decl. ¶ 3.) They  
25 have tried and won numerous cases. In scenarios where an opponent claims to hold case  
26 dispositive internal information, they request it early so that they may act upon it promptly in  
27 consultation with the client to nonsuit, if that is actually appropriate. (Suder Decl. ¶ 15.) Neither  
28 SWT nor its counsel need any incentive to avoid unsuccessful, much less frivolous, cases.

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1 SWT has explained in detail why it believed its conduct was appropriate at each  
2 challenged stage. Neither SWT nor its counsel are being “unrepentant,” and Fitbit has not  
3 demonstrated any facts that would justify any sanction, much less a material one.<sup>10</sup>

4 **B. FITBIT HAS PROVIDED THE COURT WITH NO WAY TO CALCULATE ITS FEES**  
5 **WITH REFERENCE TO EACH CHALLENGED PLEADING**

6 As discussed above, no sanction should be awarded. In the event, however, that the Court  
7 determines to award some sanction, Fitbit has provided no sufficient evidentiary basis to base  
8 that sanction on Fitbit’s attorneys’ fees and costs because Fitbit’s declaration concerning fees  
9 and costs fails to break them down based on when they were incurred.

10 The only information provided by Fitbit concerning its fees and costs is in the  
11 Declaration of Eugene Novikov (ECF 132-1). Mr. Novikov does not provide any  
12 contemporaneous billing statements, nor any summaries describing when time was incurred.  
13 Instead, his declaration presents a hearsay report of the time records from himself and others at  
14 his firm for twelve “task categories”: (1) analysis and investigation, (2) pleadings and motion to  
15 dismiss, (3) CMCs and other procedural matters, (4) written discovery, (5) motion to transfer, (6)  
16 motion for summary judgment, (7) settlement, (8) rule 11 motion, (9) case management, (10)  
17 claim construction, (11) document collection, review, and production, and (12) fees motion.

18 No information is provided as to when any of this work was done in relation to the four  
19 challenged pleadings for which Fitbit seeks Rule 11 sanctions. Nor is any provided to separate  
20 time spent on a product-by-product basis (*i.e.*, Surge versus Blaze). It is not possible based on the  
21 record before the Court, for example, for the Court to distinguish time spent after the opposition  
22 to summary judgment from time spent before it. Even if the Court were to determine that SWT  
23 should have dismissed the case at some point, Fitbit has not provided enough information for  
24 either SWT or the Court to analyze what, if any, fees were caused by continuing past that point.

25 Nor is it possible for the Court to analyze any of the time to see whether it was  
26 reasonable. We note, for example, that Fitbit’s two fee motions account for 174.6 attorney and

27 <sup>10</sup> In its conclusion, and without any authority, Fitbit asks the Court to impose a “scarlet  
28 letter” on SWT by not only sanctioning it, but also requiring it to provide the sanctions order to  
all other courts it appears before.

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64.5 paralegal hours, more than any other “task code” during the entire case except for summary judgment. Spending 20% of the overall time on the case seeking sanctions seems neither reasonable nor consistent with Fitbit’s argument that the case was frivolous. “[A]n award of fees is limited to fees ‘reasonably’ expended as a result of an unwarranted filing.” *Hunt v. PNC Bank*, No. SACV 16-02093 JVS (JCGx), 2017 U.S. Dist. LEXIS 171841, at \*3 (C.D. Cal. Mar. 23, 2017). The Court would encourage a cottage industry in fee motions – a true “moral hazard” – if it endorsed runaway billings for “fees on fees.”

In all events, Rule 11 “is not a fee-shifting measure.” *Cooney v. Casady*, 735 F.3d 514, 523 (7th Cir. 2013); *Miltier v. Downes*, 935 F.2d 660, 665 (4th Cir. 1991). “The central purpose of Rule 11 sanctions is ‘to deter baseless filings in District Court,’ but courts must also be sensitive to the dangers of chilling vigorous advocacy.” *Sharnese v. California*, 547 F. App’x 820, 824 (9th Cir. 2013) (citations omitted). As the rule itself specifies, “[a] sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated.” Fed. R. Civ. Proc. 11(c)(4).

**IV. CONCLUSION**

For the reasons set forth above, the Court should deny Fitbit’s renewed motion for Rule 11 sanctions.

Dated: March 28, 2018

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on March 28, 2018, I caused a true and correct copy of the foregoing document to be sent *via* the Court’s ECF system to counsel of record.

*/s/ Robert P. Greenspoon*

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