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Litigators of the Week: Gibson Dunn and Alston & Bird Team to Fend Off an Import Ban on Fitness Trackers

After an all-remote bench trial, Gibson Dunn, working for Fitbit, and Alston & Bird, representing Garmin, this week scored a ruling at the U.S. International Trade Commission finding the companies didn't infringe a rival's patent.

By Ross Todd

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The rapid-fire, high-stakes patent litigation that unfolds at the U.S. International Trade Commission can be stressful under normal circumstances. With the potential for tariffs or full-on import bans in cases where infringement is found, the venue can be something of a highwire sprint for defense counsel.

This week's Litigators of the Week, **Josh Krevitt** and **Stuart Rosenberg** from **Gibson, Dunn & Crutcher** and **Scott Stevens** from **Alston & Bird**, have dealt with all that and then some since January. Their clients, Fitbit and Garmin respectively, were hit with claims at the ITC early last year by rival Philips accusing them of infringing patents covering technology related to smartwatch and fitness tracker functions such as motion tracking and alarm reporting. The joint defense team prepared for an October bench trial remotely as the pandemic took hold and opted to try the case from separate locations.

That move was evidently effective. Administrative Law Judge Dee Lord last week issued an opinion siding with Fitbit and Garmin finding no infringement of the Philips patents.

Lit Daily: Who were your clients and what was at stake at the ITC?

Josh Krevitt of **Gibson Dunn**: We represent Fitbit, an amazing company responsible for developing incredibly sophisticated, innovative, award-winning smartwatches and wearable trackers. Philips brought a series of patent cases against Fitbit, including this one in the ITC accusing virtually all Fitbit devices on the market of infringement. The stakes were high because Philips sought an exclusion order banning Fitbit from importing—or selling after importation—its smartwatches and trackers anywhere in the United States for the life of the patents. We



Josh Krevitt and Stuart Rosenberg from Gibson Dunn and Scott Stevens from Alston & Bird.

(Photo: Courtesy Photo)

defeated all three of the patents asserted against Fitbit, at summary determination and following trial—in other words, a complete victory for Fitbit.

Scott Stevens of **Alston & Bird**: Alston & Bird is proud to represent Garmin. For more than 30 years, Garmin has pioneered wireless and navigation technologies designed for people who live an active lifestyle. Garmin's global, multimarket brand includes products for the fitness, outdoor, aviation, automotive, and marine markets. This ITC action involved nearly all of Garmin's wearables and smartwatches. Philips sought an exclusion order barring Garmin from importing and selling any of these products in the United States, and we worked very hard to ensure that would not happen.

Who all was on your defense teams and how did you divvy up the work both before and during the trial?

Stevens: **Kirk Bradley** and I led our team at Alston & Bird, working closely with two stellar associates, **Ravi Fernando** and **Karlee Wroblewski**, and Garmin's in-house team, **Dave Ayres**, **Sam Korte**, and **Mo Ali**. We intentionally kept our team small and focused. Because the pandemic inhibited our usual in-person collaboration, it was important to have a small team of deeply involved

lawyers. Through our good pre-trial work, we successfully narrowed the case from four patents to just two patents for trial. While all team members were involved in all aspects of the case, at trial Karlee and I had primary responsibility for one patent, and Kirk and Ravi had primary responsibility for the other. And each team member was responsible for at least one witness at trial, so everyone got to meaningfully participate.

Krevitt: I was very lucky and grateful to have been surrounded by a team of remarkably talented lawyers—both at Gibson Dunn and in-house at Fitbit. My colleagues **Stuart Rosenberg, Wayne Barsky, Ernie Hsin, Jennifer Rho, and Ray LaMagna** are all brilliant lawyers and vital members of the team throughout. At trial, Stuart defended Fitbit's witnesses, while Wayne and I cross-examined Philips's fact and expert witnesses. Trial is a real team sport, though, and we all worked together across all issues to build and ultimately present a winning case. The exceptionally smart and engaged lawyers at Fitbit—**Andy Missan, Gloria Lee, and Matt Hollander**—were also critical members of the team throughout and a big part of why we were so successful. We were also pleased to work with Scott and the Alston team—we have real respect for them, having worked together successfully in other cases. Bottom line, a real team effort by an extraordinary team.

This went from filing to trial in just 10 months during a pandemic. What complications did that present for your team?

Rosenberg: We were about two months into the case when California issued the first statewide stay-at-home order, and we realized immediately that we couldn't keep the case on track under the ITC's schedule unless we committed to using remote technology across the board. Some things were harder than others, for example accessing source code stored on a thumb drive in a locked drawer in a closed office—I won't give away our secret on that one—and waking up to take depositions starting at 4 a.m. California time for witnesses in Europe. But we enjoyed the challenge and made it work, which ultimately allowed us to get to a favorable result for our clients quickly.

Stevens: We viewed litigating during the pandemic as more of an opportunity to innovate than as a complication. We held multiple video-conference meetings each week, allowing everyone to coordinate and to know exactly what was required of them. We did not want the physical distance between us to create a knowledge bar-

rier. And Garmin made its engineers and other personnel readily available to us, which, in certain ways, gave us more access to them than we might otherwise have had. Also, we spent a great deal of time planning every detail of trial, both in substance and in technical logistics. We practiced again and again. And we tested again and again. Every lawyer and every witness had practiced while using the exact technology we had installed for trial.

How were you able to narrow the number of patents in the case pretrial?

Rosenberg: We succeeded in narrowing the number of patents by showing the ALJ in simple and clear terms that the Fitbit (and Garmin) products simply don't use two of the patented inventions, and so don't infringe those two patents. For example, one of the patents talks about getting more accurate heart rate measurements by avoiding noise in the measurements. We showed that Fitbit doesn't use that patent and that Fitbit has a much more sophisticated approach that can handle and work through noise and still give you great results. By showing that there was no dispute about how the Fitbit products work, and that they work dramatically differently from the patents, we won summary determination of noninfringement.

How did the case you presented remotely via a bench trial before the ALJ differ from what you would have presented in person? How did your preparations differ?

Stevens: If you believe, as I do, that "keep it simple" is a sound trial strategy, then remote trials require doubling down on that approach. When defending a patent case, one of the toughest aspects is deciding which defenses to pursue and which should hit the cutting-room floor despite having merit. In our case, being remote meant presenting evidence over video and doing so with less allotted time. We knew this would challenge our ability to present nuanced theories since, for example, the Judge could not as easily read witnesses' body language and demeanor. And so we picked the strongest, simplest arguments, presenting them with vigor and conviction, and we are very pleased that the judge agreed with us.

Rosenberg: We made the same intensive preparations that we would have made for a live trial in the ALJ's courtroom, and presented the key substance that we would have presented live. But we also knew that this was the ALJ's first experience holding a trial like this remotely, so we constantly evaluated ourselves to make sure that the substance was coming across as we expected over the

remote hearing platform and was being properly preserved for the record. For example, making sure the ALJ could see our graphics clearly, and watching the live transcript to correct any important errors on the spot.

You chose to limit your cross-examination of your opponent's technical expert to only his invalidity opinions and not his infringement opinions on one of the patents. What was the strategic reason for that decision?

Krevitt: Yes, at trial, we chose not to cross Philips's expert on infringement issues at all. That was a tough decision, but the right call under the circumstances. In a jury trial, effective cross-examination of a patentee's infringement expert is critical—and a lot of fun, often making the difference in a case. But in this case at the ITC, direct testimony was presented in writing in advance, so live testimony starts with cross. So when their infringement expert took the stand, his direct testimony—the testimony on which they heavily based their case—was already locked in. And, in our view, it didn't prove infringement. We knew we had the better of the evidence and the arguments, and we just needed our own witnesses to be firm, clear, and truthful, which they were. So by not crossing Philips's expert, we didn't give him a chance to change the record. It was a tough decision because we would have had a very effective cross, rebutting the points he did make. But, it was the right judgment call in the end.

You tried this case remotely from your homes and offices spread out across the country while your opponents gathered together in one space more like a more traditional trial setting. Why did you go that route?

Rosenberg: We took a distributed approach on the Gibson Dunn team because we knew it would work for us. Our team has tons of experience being together in person, in war rooms and courtrooms from before the pandemic, but also working by video and phone etc. across our offices. So we knew we could bring the intensity and mind-melding focus of our normal in-person trial routine to this case, even from our positions fanned out across the country. It would have been great to see each other in person, of course, and we look forward to doing that again soon!

How did you function as a trial team while in separate spaces?

Rosenberg: A lot of what we did during the trial felt surprisingly normal and like we were in the courtroom, even

though it was one of the first remote ITC trials. One thing was different—to stay connected between the Alston team and the Gibson team, we used a dedicated channel in addition to all of the usual phone, video, and email communications, so that everyone would see important points immediately. For example, when we had to get a quick consensus about how to respond to questions from the ALJ, or if someone had a flash of brilliance to share before the next question to a witness.

What will you remember most about this matter?

Krevitt: Like all trials, there are lots of things to remember and appreciate. We had a great team and a great client—and I will remember most working together to get to the right result. Trying the case remotely was challenging, and one thing I'll remember is that just as I was about to start my cross-examination of the very first witness at the trial—Philips's senior executive—he simply disappeared from the screen. A technical glitch, of course—I'm not that intimidating—and we resolved it quickly and I got right into my questions. Just a small example of how we all had to roll with the punches throughout the remote trial, and the whole case, and stay focused through uncharted waters, on the things that mattered.

Rosenberg: I'll remember working with Fitbit's CEO, lead engineers, and in-house counsel to get ready for depositions and trial. Fitbit has such a strong record of creating accessible technology that meaningfully improves people's lives, and it was exciting to dig into the details of how the technology works and then help the people who created it explain it to the Administrative Law Judge and ITC Staff.

Stevens: Being selected as counsel for Garmin was one of the highest compliments of my and Kirk's professional careers. We both had experience being adverse to Garmin in prior litigations, and they thought highly enough of our work to entrust us with this very important case. The Alston & Bird team could not be prouder or more excited to deliver the fine folks at Garmin this victory!

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