

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

**In the Matter of**

**CERTAIN ACTIVITY TRACKING  
DEVICES, SYSTEMS, AND  
COMPONENTS THEREOF**

**Inv. No. 337-TA-963**

**ORDER NO. 16: GRANTING IN PART AND DENYING IN PART  
COMPLAINANTS' MOTION TO COMPEL RESPONSES TO  
CERTAIN DISCOVERY REQUESTS TO RESPONDENTS FITBIT  
AND FLEXTRONICS**

(December 30, 2015)

On October 29, 2015, Complainants AliphCom d/b/a Jawbone and BodyMedia, Inc. (collectively, "Jawbone") moved to compel Respondents Fitbit, Inc. ("Fitbit") and Flextronics International Ltd. and Flextronics Sales & Marketing (collectively, "Flextronics") "to provide all non-privileged information responsive to the following discovery requests: Interrogatories 2-6, 12-15, 28, 33-34, 39, and 66-74 to Fitbit, Interrogatories 1, 4, 6-18, 33-34, 54, 57, and 69 to Flextronics[,] . . . the corresponding Requests for Production for each Respondent and Requests for Admission 1-222 to Flextronics" (Mot. No. 963-009). Mot. to Compel at 1. On November 6, Jawbone and Flextronics jointly moved to extend the deadline for Flextronics' response to the motion from November 9 to November 18 (Mot. No. 963-011). The motion was granted on November 9. Order No. 10. On the same day, Fitbit filed its opposition to Jawbone's motion. On November 17, Jawbone and Flextronics jointly moved to extend Flextronics' response deadline a second time from November 18 to November 20 (Mot. No. 963-013). The motion was granted on November 18. Order No. 12. On November 20, Flextronics filed its opposition to the motion to compel.

On December 4, 2015, noting movants' obligation under Ground Rule 3.5 to notify the Administrative Law Judge if issues raised in a discovery-related motion become moot, I ordered Jawbone to file a reply brief "addressing the responses filed by the Respondents and the current state of discovery." Order No. 15 at 1. On December 9, Jawbone filed its reply, in which it indicated that its motion had been rendered moot with respect to Interrogatory Nos. 73 and 74 to Fitbit, Requests for Admission 1-222 to Flextronics, and Interrogatory Nos. 1, 6, 8, 10-14, 18, 33, and 34 to Flextronics. Reply at 3. On December 11, Fitbit filed a motion for leave to file a sur-reply (Mot. No. 963-016), which motion Jawbone opposed on December 14. In its opposition, Jawbone indicated that a stipulation between it and Fitbit rendered its motion to compel moot with respect to Interrogatory No. 39. Jawbone Opp. at 4, fn. 2.

For the reasons set forth below, Fitbit's motion for leave to file a sur-reply is denied and Jawbone's motion to compel is granted in part and denied in part.

#### **I. Fitbit's Motion Leave to File a Sur-reply**

While the Ground Rules permit a movant to file a reply brief within three days of the filing of a response to a motion, "[s]ur-reply briefs will not be permitted absent extraordinary circumstances." Ground Rule 3.1.2. In its motion for leave to file a sur-reply, Fitbit argues that "extraordinary circumstances" exist because Jawbone's reply "mischaracterize[s]" the current state of discovery and alleges for the first time that supplemental interrogatory responses served after Jawbone's motion was filed are deficient. Mot. for Leave at 1-2. In its opposition, Jawbone argues, *inter alia*, that Fitbit's motion for leave should be denied because Fitbit did not comply with Ground Rule 3.2's certification requirement.

Ground Rule 3.2 requires that "[a]ll motions shall include a certification that the moving party has made reasonable, good-faith efforts to resolve the matter with the other parties at least two business days prior to filing the motion. . . ." (emphasis in original omitted; emphasis

added). This certification requirement ensures that Commission and private party resources are not wasted in needless motion practice. The certification must be “placed at the beginning of the motion under a heading entitled ‘Ground Rule 3.2 Certification’ or similar language.” Ground Rule 3.2. Fitbit’s motion contains no such certification and therefore does not comply with the Ground Rules. Accordingly, Fitbit’s motion for leave to file a sur-reply is hereby denied.

## II. Jawbone’s Motion to Compel

### A. Commission Rule 210.29(c)

For a significant number of the interrogatories at issue, the central issue is whether the responses comply with Commission Rule 210.29(c) (19 C.F.R. § 210.29(c)). Commission Rule 210.29(c) provides a party responding to interrogatories with the option of identifying records from which an answer may be derived or ascertained, instead of providing a narrative response. The wording and provisions of Commission Rule 210.29(c) closely mirror those of Rule 33(d) of the Federal Rule of Civil Procedure (“Rule 33(d)”). Because of the similarity between the two rules, the interpretation of Rule 33(d) has been found to be relevant to the interpretation of Commission Rule 210.29(c). *See, e.g., Certain Zero-Mercury-Added Alkaline Batteries, Parts Thereof, and Products Containing Same*, Inv. No. 337-TA-493, Order No. 70, 2004 WL 73341 at \*2 (Jan. 12, 2004) (“*Alkaline Batteries*”).

The option provided under Commission Rule 210.29(c) of identifying records is only available if “the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served.” Commission Rule 210.29(c). This requirement does not require only that the burden of deriving an answer from the identified documents be substantially the same for both parties; it requires that the burden of deriving an answer to the interrogatory be substantially the same for both parties. In other words, if the answering party can answer an interrogatory through a more convenient and less burdensome

PUBLIC VERSION

method than reviewing the identified records, it cannot avail itself of Commission Rule 210.29(c). See *Daiflon, Inc. v. Allied Chemical Corp.*, 534 F.2d 221, 226 (10th Cir. 1976), cert. denied, 429 U.S. 886 (1976) (“[I]f an answer is readily available in a more convenient form, Rule 33(c)<sup>1</sup> should not be used to avoid giving the ready information to a serving party.”); *Atlanta Fixture & Sales Co. v. Bituminous Fire & Marine Ins. Co.*, 51 F.R.D. 311, 312 (N.D. Ga. 1970) (finding that responding party’s reliance on pre-1993 Federal Rules of Civil Procedure 33(c) (“pre-1993 Rule 33(c)”) constituted an implied representation that the responding party “does not have available the answers to said interrogatories, or any part of said answers, apart from the proffered records which constitute the raw material from which said answers may be derived”).

Commission Rule 210.29(c) is not a procedural device for avoiding the duty to give information, see *In re Master Key*, 53 F.R.D. 87, 90 (D. Conn. 1971) (construing pre-1993 Rule 33(c)); rather “the primary purpose of the rule ‘is to shift the time and cost burden, of perusing documents in order to supply answers to discovery requests, from the producing party to the party seeking the information.’” *Alkaline Batteries*, 2004 WL 73341 at \*2 (quoting *U.S. Securities and Exchange Commission v. Elfindepan, S.A.*, 206 F.R.D. 574, 577-78 (M.D.N.C. 2002)). Accordingly, a party relying upon Commission Rule 210.29(c) “must affirm that the information is available in the specified record.” *Minter v. Wells Fargo Bank, N.A.*, 286 F.R.D. 273, 277 (D.Md.2012) (discussing the requirements of Rule 33(d)). If the records identified in responses “do not provide full and complete answers to the interrogatories, a party must include a narrative response to answer such omissions in the documents.” *Certain Products Containing Interactive Program Guide and Parental Controls Technology*, Inv. No. 337-TA-747, Order No.

---

<sup>1</sup> In a 1993 rule amendment, Federal Rule of Civil Procedure 33(c) was renumbered to 33(d).

8, 2011 WL 1336536, at \*3 (“*Interactive Program Guides*”). Finally, a party relying on Commission Rule 210.29(c) must “specify the records from which the answer may be derived or ascertained” with “sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the documents from which the answer may be ascertained.” Commission Rule 210.29(c).

If the party propounding the interrogatories challenges the responding party’s reliance on Commission Rule 210.29(c), the moving party must make a *prima facie* showing that the use of 210.29(c) is somehow inadequate to the task of answering the discovery, because the information is not fully contained in the documents, is too difficult to extract, or other such reasons. *Alkaline Batteries*, 2004 WL 73341 at \*2. If the movant makes this *prima facie* showing, the burden shifts to the producing party to justify its reliance on Commission Rule 210.29(c). *Id.*

**B. Discovery Requests Directed to Fitbit**

Jawbone’s motion sought to compel Fitbit to produce “all non-privileged information responsive to” Interrogatory Nos. 2-6, 12-15, 23-25, 28, 33, 34, 39, and 66-74, and the “corresponding Requests for Production.” Mot. to Compel at 1. Since filing its motion, Jawbone has indicated that the motion has been rendered moot with respect to Interrogatory Nos. 39, 73, and 74. Reply at 3; Opp. to Mot. for Leave at 4, fn. 2. Accordingly, the motion to compel is hereby denied as moot as to these interrogatories. The remaining interrogatories—Interrogatory Nos. 2-6, 12-15, 23-25, 28, 33, 34, and 66-72—and the “corresponding Requests for Production” are addressed below.

**1. Interrogatory Nos. 2-6 and 25**

Fitbit’s responses to Interrogatory Nos. 2-6 and 25 state “that information responsive to [these interrogatories], to the extent it exists, is relevant, is not privileged or subject to any other

protection from production, and is available to Fitbit, can be found in documents that have been or will be produced pursuant to 19 C.F.R. § 210.29(c). . . .” The responses, however, do not identify any documents and they have not been supplemented. As such Fitbit’s responses do not satisfy the most fundamental requirement of Commission Rule 210.29(c): The identification of documents from which an answer can be ascertained or derived.

Fitbit’s sole argument against Jawbone’s motion to compel was that the motion was premature. Specifically, Fitbit argues that it notified Jawbone during Discovery Committee calls on September 15, September 29, and October 13, 2015 that it intended “to produce documents on a rolling basis, supplementing its answers to the Subject Interrogatories accordingly, with the goal of being substantially complete by the end of November.” Fitbit Opp. at 1-2. It is now December 30, 2015. Fitbit’s own deadline has expired.

Accordingly, Jawbone’s motion to compel is hereby granted as to Interrogatory Nos. 2-6, and 25 and Fitbit is ordered to supplement its responses by no later than January 7, 2016. To the extent that a supplemental response relies upon Commission Rule 210.29(c), the response should affirmatively state that a full and complete answer to the interrogatory or a specific portion thereof can be derived or ascertained from the identified documents and the burden of deriving or ascertaining the answer is substantially the same for both parties. If a full and complete answer to the interrogatory cannot be derived or ascertained from the identified documents, the missing information should be provided in a narrative response.

**2. Interrogatory Nos. 12-15, 23, 24, 28, 33, 34, and 66-72**

On November 6, 2015, after Jawbone filed its motion to compel, Fitbit supplemented its responses to Interrogatory Nos. 23, 24, 33, and 34. In its reply, Jawbone argues that these supplemental responses are inadequate. On December 11, after Jawbone filed its reply, Fitbit served supplemental responses to Interrogatory Nos. 12-15, 28, and 66-72. Because of the

timing of their service, these supplemental responses are not addressed in Jawbone's motion or reply.

**a. Interrogatory No. 12**

Interrogatory No. 12 asks Fitbit to “[d]escribe all communications you have had with Flextronics regarding the manufacturing of your products in which Jawbone or any Jawbone product has been referenced.” In its supplemental response, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This supplemental response was made after Jawbone filed its reply in support of its motion and Jawbone has not sought leave to supplement its motion to address the response. Accordingly, on the record before me, there is no basis for finding the response deficient. Jawbone's motion to compel is hereby denied with respect to Interrogatory No. 12.

**b. Interrogatory No. 13**

Interrogatory No. 13 asks Fitbit to “[d]escribe all communication you have had with Flextronics regarding the appropriate vendors to use for the manufacturing of your products.” Fitbit's supplemental response invokes Commission Rule 201.29(c) and identifies a single three-page document that “may contain information responsive” to Interrogatory No. 13. Fitbit's response fails to meet the requirements of Commission Rule 210.29(c). Fitbit “must affirm that the information is available in the specified record.” *Minter*, 286 F.R.D. at 277. By stating only that the identified document “may” contain responsive information, Fitbit's response fails to affirm that the document contains any relevant information, much less that it contains all of the information sought by the interrogatory.

PUBLIC VERSION

Accordingly, Jawbone's motion to compel is hereby granted as to Interrogatory No 13 and Fitbit is ordered to supplement its response by no later than January 7, 2016. To the extent that the supplemental response relies upon Commission Rule 210.29(c), the response should affirmatively state that a full and complete answer to the interrogatory or a specific portion thereof can be derived or ascertained from the identified documents and the burden of deriving or ascertaining the answer is substantially the same for both parties. If a full and complete answer to the interrogatory cannot be derived or ascertained from the identified documents, the missing information should be provided in a narrative response.

**c. Interrogatory No. 14**

Interrogatory No. 14 asks Fitbit to "[d]escribe all communication you have had with Flextronics regarding the appropriate materials to use for the manufacturing of your products." Fitbit's supplemental response invokes Commission Rule 201.29(c) and identifies a single two-page document that "may contain information responsive" to Interrogatory No. 14. As discussed above with respect to Interrogatory No. 13, Commission Rule 210.29(c) requires Fitbit to "affirm that the information is available in the specified record." *Minter*, 286 F.R.D. at 277. Fitbit's response fails to affirm that the identified document contains any relevant information, much less that it contains all of the information sought by the interrogatory.

Accordingly, Jawbone's motion to compel is hereby granted as to Interrogatory No 14 and Fitbit is ordered to supplement its response by no later than January 7, 2016. To the extent that the supplemental response relies upon Commission Rule 210.29(c), the response should affirmatively state that a full and complete answer to the interrogatory or a specific portion thereof can be derived or ascertained from the identified documents and the burden of deriving or ascertaining the answer is substantially the same for both parties. If a full and complete

answer to the interrogatory cannot be derived or ascertained from the identified documents, the missing information should be provided in a narrative response.

**d. Interrogatory No. 15**

Interrogatory No. 15 seeks information “relating to any analysis, due diligence, or inquiry relating to [Fitbit’s] consideration of using, licensing or acquiring any technology or products of Jawbone, including, but not limited to, the Patents-in-Suit.” [REDACTED]

[REDACTED] This supplemental response was made after Jawbone filed its reply in support of its motion and Jawbone has not sought leave to supplement its motion to address the response. Accordingly, on the record before me, there is no basis for finding the response deficient. Jawbone’s motion to compel is hereby denied with respect to Interrogatory No. 15.<sup>2</sup>

**e. Interrogatory Nos. 23 and 24**

In its reply, Jawbone argues that Fitbit’s supplemental responses to Interrogatory Nos. 23 and 24 are inadequate, because the responses “consist of bare recitations of document numbers . . . that Fitbit claims ‘may’ contain relevant information.” Reply at 3. While it is true that Fitbit’s responses only identify documents, the interrogatories in question only request the identification of documents:

23. *Identify documents* (by Bates or production numbers) sufficient to show the final product specifications for any Accused Product or any component thereof.

24. *Identify documents* (by Bates or production numbers) sufficient to show the schematics describing the design of any Accused Product or any component thereof.

---

<sup>2</sup> To the extent Fitbit is aware of any *privileged* analyses responsive to Interrogatory No. 15, Ground Rule 4.9.1 requires that such analyses be identified in a privilege log.

(Emphasis added).

Jawbone also argues that Fitbit's supplemental responses are deficient because they identify non-responsive, as well as responsive, documents. In particular, Jawbone argues that "[i]n some cases, Fitbit lists multiple revisions of the same specification or schematic, though none of the revisions is labeled 'final,'" making it impossible for Jawbone to determine which specifications or schematics are final. Reply at 5-6. Jawbone's interrogatories do not ask Fitbit to identify all specifications and schematics that have been produced, but rather ask Fitbit only to identify documents "sufficient to show" the "final product specifications for any Accused Product or any component thereof" and "schematics describing the design of any Accused Product or any component thereof" for the accused products and components thereof, and Fitbit's responses should be limited to identifying such documents. The identification of non-responsive information in the form of competing versions of schematics and specifications masks the very information the interrogatories are seeking.

Jawbone also argues that "Fitbit has cited several of the same documents for both Interrogatory Nos. 23 and 24, though product specifications and product schematics are entirely different types of documents." Reply at 6. Documents that do not contain information responsive to an interrogatory should not be identified as documents from which a response to the interrogatory can be derived or ascertained. Jawbone, however, did not attach copies of the documents in question to its reply. It is entirely possible that a document includes both a specification for a product as well as the schematics for the product.

Jawbone's motion to compel is hereby granted as to Interrogatory Nos. 23 and 24 and Fitbit is ordered to supplement its responses by no later than January 7, 2015 to identify only responsive documents.

**f. Interrogatory Nos. 28 and 66-71**

Interrogatory Nos. 28 and 66-71 seek technical details concerning the operation of the accused products and Fitbit's servers. In response to these interrogatories, Fitbit identifies certain production documents pursuant to Commission Rule 210.29(c) that "may contain information responsive" to the interrogatories. In addition to the documents identified by production number, the responses state that responsive information can also be found "in the source code that has been made available for inspection by Fitbit." Fitbit provides no indication of where in the source code (*e.g.*, names of relevant files or modules) the responsive information can be found.<sup>3</sup>

As discussed above with respect to Interrogatory No. 13, Commission Rule 210.29(c) requires Fitbit to "affirm that the information is available in the specified record." *Minter*, 286 F.R.D. at 277. Fitbit's response fails to affirm that the documents identified contain any relevant information, much less that they contain all of the information sought by the interrogatories. Moreover, any response invoking Commission Rule 210.29(c) must "include sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the documents from which the answer may be ascertained." While the identification of production documents by production number would under most circumstances satisfy this requirement, the identification of "source code" without additional information does not.

Accordingly, Jawbone's motion to compel is hereby granted as to Interrogatory Nos. 28 and 66-71 and Fitbit is ordered to supplement its responses by no later than January 7, 2016. To the extent that a supplemental response relies upon Commission Rule 210.29(c), the response

---

<sup>3</sup> In addition to invoking Commission Rule 210.29(c) and identifying documents that "may" contain responsive information, each of Fitbit's December 11, 2015 supplemental responses to Interrogatory Nos. 28, 68, 69, and 71 includes a narrative statement of varying detail.

should affirmatively state that a full and complete answer to the interrogatory or a specific portion thereof can be derived or ascertained from the identified documents and the burden of deriving or ascertaining the answer is substantially the same for both parties. Moreover, if a supplemental response identifies Fitbit's source code as a document from which an answer can be derived or ascertained, the response should identify the relevant files and modules. If a full and complete answer to the interrogatory cannot be derived or ascertained from the identified documents, the missing information should be provided in a narrative response.

**g. Interrogatory Nos. 33 and 34**

Jawbone argues that Fitbit's responses to Interrogatory Nos. 33 and 34 are inadequate because the responses "consist of bare recitations of document numbers . . . that Fitbit claims 'may' contain relevant information." Reply at 3. Interrogatory No. 33 seeks, for each accused product, the identity and a detailed description of the role "of all entities involved in the manufacturing, fabrication, testing, packaging, sale, offer for sale, importation into the United States, sale after importation into the United States and/or sale for importation into the United States." Interrogatory No. 34 seeks information on the legal relationships, contractual agreements, and ownership interests of these entities. Fitbit's supplemental responses invoke Commission Rule 210.29(c) and identify 237 documents that "may contain information responsive" to Interrogatory No. 33 and 24 documents that "may contain information responsive" to Interrogatory No. 34.

Although the number of documents identified in the responses is not facially unreasonable given the breadth of the interrogatories, Fitbit's responses do not satisfy the requirements of Commission Rule § 210.29(c). As discussed above with respect to Interrogatory No. 13, Commission Rule 210.29(c) requires Fitbit to "affirm that the information is available in the specified record." *Minter*, 286 F.R.D. at 277. Fitbit's response fails to affirm that the

documents identified contain any relevant information, much less that they contain all of the information sought by the interrogatory.

Jawbone also argues that Fitbit's responses are deficient because they provide only a list of documents "with no accompanying explanation of what those documents are or how they are relevant." Reply at 5-6. If a party is able to and chooses to respond pursuant to Commission Rule 210.29(c), it is not required to provide an explanation of what the documents are or how they are relevant. Commission Rule 210.29(c) only requires that the responding party identify the documents in "sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the documents from which the answer may be ascertained." Barring unusual circumstances, Fitbit can comply with this requirement by identifying the documents by production number.

Accordingly, Jawbone's motion to compel is hereby granted as to Interrogatory Nos. 33 and 34 and Fitbit is ordered to supplement its responses by no later than January 7, 2016. To the extent that a supplemental response relies upon Commission Rule 210.29(c), the response should affirmatively state that a full and complete answer to the interrogatory or a specific portion thereof can be derived or ascertained from the identified documents and the burden of deriving or ascertaining the answer is substantially the same for both parties. If a full and complete answer to the interrogatory cannot be derived or ascertained from the identified documents, the missing information should be provided in a narrative response.

**h. Interrogatory No. 72**

Interrogatory No. 72 seeks information on how the accused products are placed "into a low power, reduced performance, reduced functionality, or other such limited mode prior to transportation." In its supplemental response, Fitbit states that [REDACTED]

[REDACTED]



**1. Interrogatories to Flextronics**

**a. Interrogatory Nos. 4, 7, 9, 15-17, and 69**

Although Flextronics' initial responses to Interrogatory Nos. 4, 7, 9, 15-17, and 69 stated that Flextronics would "provide responsive, non-privileged information located after a reasonable search of information located within Respondents' possession, custody, or control to the extent such responsive information exists," Flextronics has not done so. Flextronics argues that its failure to do so is the result of Jawbone's delay in disclosing its trade secret allegations. Flextronics Opp. at 3-5. Flextronics asserts that Jawbone did not disclose its trade secret allegations until November 13, 2015. In its opposition, Flextronics represents that "it will continue to supplement its responses now that Jawbone has identified its trade secrets." *Id.* at 6.

In essence, Flextronics argues that it was proper for it to delay discovery relating to Jawbone's trade secret allegations until Jawbone fully disclosed those allegations. Jawbone's alleged failure to provide discovery, however, does not excuse Flextronics from its obligation to respond to discovery. *Gropper v. David Ellis Real Estate, L.P.*, 2014 WL 518234, at \*3 (S.D.N.Y. Feb. 10, 2014) ("Discovery is not equity: one party's noncompliance with discovery requirements does not excuse the other's failure to comply. Each party's obligation is independent. . . ."); *Lumbermens Mut. Cas. Ins. Co. v. Maffei*, 2006 WL 2709835, at \*5 n. 21 (D.Alaska Sept. 20, 2006) ("The court does not consider 'tit-for-tat' objections to discovery to be legitimate objections. If the opposing party is recalcitrant in responding to discovery requests, the rules provide a mechanism for compelling responses and/or imposing sanctions. The rules do not authorize one party to withhold discoverable material in retaliation for the opposing party's withholding of discoverable material.").

Flextronics' reliance on *DeRubeis v. Witten Techns., Inc.*, 244 F.R.D. 676, 680-81 (N.D. Ga. 2007) in support of the proposition that "[c]ourts often delay trade secret discovery from the

defendant until the plaintiff has identified its trade secrets with specificity” is misplaced. Flextronics Opp. at 1-2 (citing *DeRubeis*, 244 F.R.D. at 680-81). As noted by that court, delaying discovery in a trade secret case is far from the universal rule. *DeRubeis*, 244 F.R.D. at 679-80. There are significant policy reasons weighing against delaying trade secret discovery from the defendant. First, the Federal Rules of Civil Procedure provide a plaintiff with a broad right to discovery. *Id.* This broad right to discovery is also contained in the Commission Rules. Second, “the trade secret plaintiff, particularly if it is a company that has hundreds or thousands of trade secrets, may have no way of knowing what trade secrets have been misappropriated until it receives discovery on how the defendant is operating.” *Id.* As a result, delaying discovery from the defendant could result in a “Catch 22,” wherein the plaintiff is forced to identify the trade secrets at issue without knowing which secrets may have been misappropriated. *Id.*

In addition to the policy reasons that have been found by district courts to weigh against delaying trade secret discovery from the defendant, the short deadlines that characterize Section 337 investigations also strongly counsel against delaying trade secret discovery from a respondent. The Commission is explicitly charged under 19 U.S.C. § 1337(b)(1) to conclude Section 337 investigations “at the earliest practicable time.” In order “[t]o promote expeditious adjudication,” the statute mandates that at the start of an investigation the Commission set a target date for its final determination. 19 U.S.C. § 1337(b)(1). As reflected in the Commission Rules, target dates exceeding 16 months are the exception to normal Commission practice. Commission Rule 210.51(a). Consistent with Commission practice and the Commission’s statutory obligation to conclude the investigation “at the earliest practicable time,” Chief Administrative Law Judge Bullock set a 16-month target date for this investigation. Order No. 4 at 1. Bifurcating discovery in a typical investigation—such as this one—with a target date of 16

months or less could result in one or more of the parties having insufficient time to obtain discovery to which they are entitled.

The question of whether Flextronics should have been allowed to delay its discovery responses until after Jawbone disclosed its trade secret allegations with higher degree of specificity, however, is a moot point. Flextronics never sought an order delaying discovery. As such, it was obligated under the Commission Rules and the Ground Rules to timely answer Jawbone's interrogatories. *See, e.g.*, Commission Rule 210.29(b)(2) ("The party upon whom the interrogatories have been served shall serve a copy of the answers and objections, if any, within ten days of service of the interrogatories or within the time specified by the administrative law judge."); Ground Rule 4.4.2 (similar).

Nor did Jawbone's alleged failure to disclose its trade secret contentions with greater specificity render "it difficult, if not impossible, for Flextronics to provide substantive responses." Flextronics Opp. at 4. In fact, responding to Interrogatory Nos. 7, 9, 15-17, and 69 did not require Flextronics to have *any* knowledge of Jawbone's trade secret allegations:

- Interrogatory No. 7 seeks identification of "each Flextronics employee who had access to Jawbone documents or other materials;"
- Interrogatory No. 9 seeks identification of "each Flextronics employee who worked on manufacturing products [*sic*] Fitbit's products or providing other services to Fitbit;"
- Interrogatory No. 15 seeks a description of "the production timeline and schedule, from the beginning of production until shipment, for products [Flextronics] manufactured for Jawbone;"
- Interrogatory No. 16 seeks identification of "any communications [Flextronics] had with Fitbit in which Jawbone or its products were referenced;"

- Interrogatory No. 17 seeks a description of “the circumstances by which [Flextronics] became the manufacturer of Fitbit products;” and
- Interrogatory No. 69 seeks a description of “the production timeline and schedule, from the beginning of production until shipment, for products [Flextronics] manufactured for Fitbit.”

Finally, Flextronics acknowledges that Jawbone disclosed its trade secret allegations with sufficient specificity by at least November 13, 2015, so as to remove any impediment to its responding to these interrogatories. Flextronics Opp. at 4.

Accordingly, Jawbone’s motion to compel is granted as to Interrogatory Nos. 4, 7, 9, 15-17, and 69 and Flextronics is ordered to supplement its responses by no later than January 7, 2016. To the extent that a supplemental response relies upon Commission Rule 210.29(c), the response should affirmatively state that a full and complete answer to the interrogatory or a specific portion thereof can be derived or ascertained from the identified documents and the burden of deriving or ascertaining the answer is substantially the same for both parties. If a full and complete answer to the interrogatory cannot be derived or ascertained from the identified documents, the missing information should be provided in a narrative response.

**a. Interrogatory Nos. 54 and 57**

Interrogatory No. 54 seeks information about Flextronics’ “organizational structure” and Interrogatory No. 57 seeks identification of any persons “likely to have knowledge of relevant facts or any discoverable information relevant to any disputed fact.” In its opposition, while characterizing these interrogatories as being unduly burdensome, Flextronics indicates that it will “produce information, to the extent it is relevant to the patents or trade secrets at issue, the importation, sale for importation, or sale after importation of the accused products, or other

issues in this investigation.” Flextronics Opp. at 5. Flextronics offered no explanation as to why it had not already provided such information.

Accordingly, Jawbone’s motion to compel is granted as to Interrogatory Nos. 54 and 57 and Flextronics is ordered to supplement its responses by no later than January 7, 2016. To the extent that a supplemental response relies upon Commission Rule 210.29(c), the response should affirmatively state that a full and complete answer to the interrogatory or a specific portion thereof can be derived or ascertained from the identified documents and the burden of deriving or ascertaining the answer is substantially the same for both parties. If a full and complete answer to the interrogatory cannot be derived or ascertained from the identified documents, the missing information should be provided in a narrative response.

## **2. Requests for Production to Fitbit**

Jawbone’s motion seeks to compel the production of all non-privileged documents responsive to its requests for production corresponding to the interrogatories subject to its motion to compel. Jawbone, however, does not identify the specific requests for production. Because Jawbone does not identify—much less address—the specific requests for production at issue, its motion to compel cannot be granted with respect to those requests. Accordingly, Jawbone’s motion to compel with respect to its requests for production to Flextronics is denied.<sup>5</sup>

## **III. Conclusion**

Jawbone’s motion to compel is hereby DENIED as moot as to Interrogatory Nos. 39, 73, and 74 to Fitbit, Interrogatory Nos. 1, 6, 8, 10-14, 18, 33, and 34 to Flextronics and Requests for Admission 1-222 to Flextronics. Further, for the reasons set forth above, Jawbone’s motion to

---

<sup>5</sup> Although the motion to compel with respect to Jawbone’s requests for production to Flextronics is denied, the parties should be mindful that fact discovery closes on January 29, 2016, and that documents should be produced sufficiently in advance of depositions to allow time for meaningful review

PUBLIC VERSION

compel is DENIED as to Interrogatory Nos. 12, 15, and 72 to Fitbit and the “corresponding Requests for Production” to Fitbit and Flextronics, and GRANTED as to Interrogatory Nos. 2-6, 13, 14, 23-25, 28, 33, 34, and 66-71 to Fitbit and Interrogatory Nos. 4, 7, 9, 15-17, 54, 57, and 69 to Flextronics. Fitbit and Flextronics are hereby ORDERED to supplement their interrogatory responses by no later than January 7, 2016.

This Order is being issued with a confidential designation, and pursuant to Ground Rule 1.10, each party shall submit to the Administrative Law Judge a statement as to whether or not it seeks to have any portion of this order deleted from the public version within seven (7) days. *See* 19 C.F.R. § 210.5(f). A party seeking to have a portion of the order deleted from the public version thereof must attach to its submission a copy of the order with red brackets indicating the portion(s) asserted to contain confidential business information. To avoid depriving the public of the basis for understanding the result and reasoning underlying the decision, redactions should be limited. Parties who submit excessive redactions may be required to provide an additional written statement, supported by declarations from individuals with personal knowledge, justifying each proposed redaction and specifically explaining why the information sought to be redacted meets the definition for confidential business information set forth in Commission Rule 201.6(a). The parties’ submissions under this subsection shall not be filed with the Commission Secretary but shall be submitted by paper copy to the Administrative Law Judge and by e-mail to the Administrative Law Judge’s attorney advisor.

**SO ORDERED.**

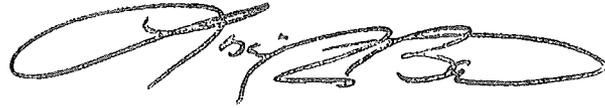


---

Dee Lord  
Administrative Law Judge

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **ORDER** has been served by hand upon the Commission Investigative Attorney, **Peter Sawert, Esq.**, and the following parties as indicated, on **February 2, 2016**.



Lisa R. Barton, Secretary  
U.S. International Trade Commission  
500 E Street, SW, Room 112  
Washington, DC 20436

**On Behalf of Complainants AliphCom d/b/a Jawbone &  
BodyMedia, Inc.:**

Kalpana Srinivasan  
**SUSMAN GODFREY L.L.P.**  
1901 Avenue of the Stars, Suite 950  
Los Angeles, CA 90067-6029

- Via Hand Delivery
- ~~Via Express Delivery~~
- Via First Class Mail
- Other: \_\_\_\_\_

**On Behalf of Respondent Fitbit, Inc. :**

Josh A. Krevitt  
**GIBSON, DUNN & CRUTCHER LLP**  
200 Park Avenue  
New York, NY 10166

- Via Hand Delivery
- ~~Via Express Delivery~~
- Via First Class Mail
- Other: \_\_\_\_\_

**On Behalf of Respondents Flextronics International Inc. &  
Flextronics Sales & Marketing (A-P) Ltd.:**

Mark L. Hogge  
**DENTONS US LLP**  
1301 K Street, NW  
East Tower, Ste. 600  
Washington, DC 20005

- Via Hand Delivery
- ~~Via Express Delivery~~
- Via First Class Mail
- Other: \_\_\_\_\_