

EXHIBIT O

From: [Rodrigues, Ruben J.](#)
To: [Eric Speckhard](#)
Cc: [BOST - F - Philips - Fitbit](#); [Fitbit Philips DC Service](#)
Subject: [Ext] RE: [EXTERNAL] Re: Philips v. Fitbit - Scope of Review and Dr. Buy's contact information.
Date: Friday, May 28, 2021 11:07:25 PM
Attachments: [We sent you safe versions of your files.msg](#)
[2021.05.28 - Philips Supplement to Confidential Privilege Log re A. Tol e-mails.pdf](#)

Mimecast Attachment Protection has deemed this file to be safe, but always exercise caution when opening files.

****EXTERNAL EMAIL** This email originated from outside the company. Do not click on any link unless you recognize the sender and have confidence the content is safe.**

Hi Eric,

As per your request we went back through to double check certain entries in the privilege log for Mr. Tol's e-mails that you had flagged. Attached please find a supplement to the privilege log that makes some additional corrections, and also provides a little more detail with respect to why these entries are protected from discovery. Additionally, upon this review we confirmed that entries previously identified as 162 and 163 should be produced and will so produce them. As previously explained, after service of the initial privilege log we did a second pass through the logged materials, produced many materials that were inadvertently included on the log, and corrected descriptions that were initially inaccurate. Upon this further additional review we identified very few errors, but, nonetheless endeavored to correct any issues and provide additional detail in an effort to address any concerns that Fitbit may have per our earlier discussion.

I can further confirm that the earliest item on the privilege log for which Philips claims work product protection arising out of anticipated litigation with Fitbit (including U.S. and foreign litigation) is June 2, 2015.

With regards to professional statute filings for Dutch attorneys, I can confirm that Ewoud Caspers has had a professional statute filed, and Philips also believes Laura Bonnes has a professional statute filed but has been unable to verify that in the past couple of weeks because certain individuals have been out of the office. I reiterate that we believe the professional statute filing has little bearing on whether any logged materials should be protected from discovery in this case.

Additionally, you asked that we elaborate as to why communications with Dutch Patent Attorneys, or "octrooigemachtigden," are protected from discovery. Under Dutch law, these communications would not be discoverable for at least the following reasons.

First, Dutch courts do not provide for automatic discovery of the sort that would lead to the discovery of communications with Dutch Patent Attorneys. Meaning that Dutch law would protect these materials from discovery, regardless of whether a specific privilege were to apply.

Second, while the Dutch Code of Civil Procedure ("DCCP") provides for a narrow and limited means to seek a court order demanding the production of documents, this procedure prohibits fishing expeditions and imposes strict requirements requiring that any demand be i) relevant to a legitimate interest, ii) tailored to specific documents, and iii) that those documents concern a legal relationship to which the demanding party is a party. Internal confidential communications of Phillips's Dutch Patent Attorneys would never qualify for such relief, and Fitbit has no relevant legitimate interest in such communications nor the requisite legal relationship to them.

Third, Dutch law would additionally affirmatively prohibit the production of confidential communications with Dutch Patent Attorneys that fall within the scope of their work as Dutch Patent

Attorneys, which is broader than merely acting as “patent agents” who are involved in patent prosecution (a characterization Fitbit has repeatedly made without basis). For example, Article 843a (3) and (4) of the DCCP prohibits the production of confidential information that is confidential pursuant to one’s office, profession or position while Article 1019a (3) DCCP also imposes additional restrictions on the discovery of information.

What is more, under Dutch law, communications and work prepared for the purpose of one’s own litigation position and strategy are protected pursuant to the right to a fair trial under Article 6 of the European Convention on Human Rights. *See, for example*, Supreme Court 16 March 2018, NJ 2018/423, annotated by J. Legemaate.

Dutch patent attorneys, who are obliged under their “office, profession, or position” to keep confidential all that comes to their knowledge by virtue of their work as patent attorneys, are exempt from disclosing evidence through a claim under 843a (3) DCCP. A patent attorney’s duty of confidentiality is codified in Article 23b (4) of the Dutch Patent Act (“DPA”), which reads as follows:

Unless otherwise under or pursuant to the law, a patent attorney or an individual working under such attorney’s supervision, is obligated to observe confidentiality regarding all that of which the attorney becomes aware pursuant to his activities. This obligation remains in force after termination of the relevant activities.

Thus, all that come to a patent attorney’s knowledge pursuant to his activities is protected from disclosure, and the scope of a Dutch Patent Attorney’s work, knowledge, and confidentiality obligations goes beyond that of merely assisting with patent prosecution. This is clear from the legislative history of Article 23b (4) DPA which indicates that the legislature intended to align the duty of confidentiality with lawyers and patent attorneys internationally (including the U.S.):

[I]t is provided that patent attorneys have a duty of confidentiality with respect to what comes to their knowledge by virtue of their work. . . . [S]uch professional secrecy is customary internationally: both European patent attorneys and patent attorneys in the United States have such an obligation. If the obligation were not to apply to Dutch patent attorneys, they could, under certain circumstances, be forced to disclose business-sensitive data, for example in a lawsuit, while patent attorneys from other countries would be exempt from that obligation. (Explanatory Memorandum of Amendment, Parliamentary Documents (“*Kamerstukken*”) II 1999/2000, 27 193 (R 1658), no. 6.)

Commentators have also endorsed the understanding that Dutch Patent Attorneys are authorized to practice in a manner that is not limited to patent prosecution, but that provides for advising on patent related matters more generally, including litigation. For example, Kantas has referred to this legislative history and noted that “[f]rom this, it can be derived that the tasks of the patent attorney are considered broader than only assisting in drafting and filing a patent application.” *Kantas*, in: Lexplicatie, commentary on article 23b DPA. In a dissertation by Fernhout, a number of reasons were listed why the scope of activities of a patent attorney cannot be considered limited to assistance with patent applications. In particular, Fernhout stated the following:

It should be noted that Art. 23b paragraph 1 Patent Act 1995 does not limit acting as an attorney to representing the applicant. The words “of the applicant” were deleted from the provision after the acceptance of an amendment to that effect in order to make it clear that any person other than the applicant may also be represented at the office only by a patent attorney or lawyer. This means that the legislator sees the duties of the patent attorney as broader than just providing assistance with the patent application. (Fernhout, “The privilege of witnesses in civil cases” (In Dutch: “*Het verschoningsrecht van getuigen in civiele zaken*”), Kluwer R&P, no. 31 (2004), p. 228-229.)

The scope of a Dutch patent attorney’s activities also include appearing in a court of law to represent a

client in patent matters can be found in Article 82 of the DPA, which reads as follows:

Patent attorneys have the right to speak at hearings of disputes within the meaning of Article 80 [*i.e.*, any kind of patent proceedings for which the District Court of the Hague is exclusively competent], without prejudice to the attorney-at-law's responsibility.

According to commentators Van Dongen and Dack, this provision demonstrates that a Dutch patent attorney has an important role in patent infringement and invalidity proceedings. The patent attorney often provides further technical explanation to the court, whether in written form or orally. *See* Van Dongen/Dack, in: Geerts/Visser, Text & Commentary Intellectual Property (in Dutch: "*Tekst & Commentaar Intellectuele Eigendom*"), Deventer (Kluwer), 2016.

Because a Dutch patent attorney's activities are broad, their duty of confidentiality is similarly broad, and any attempt to gain discovery into a Dutch Patent Attorney's communications relating to the scope of his confidential work would be rejected under Dutch law.

Regards,

-Ruben

From: Rodrigues, Ruben J.
Sent: Wednesday, May 19, 2021 4:42 PM
To: Eric Speckhard <ESpeckhard@desmaraisllp.com>
Cc: BOST - F - Philips - Fitbit <BOSTFPhilipsFitbit@foley.com>; Fitbit Philips DC Service <FitbitPhilipsDCService@desmaraisllp.com>
Subject: RE: [EXTERNAL] Re: Philips v. Fitbit - Scope of Review and Dr. Buy's contact information.

Hi Eric,

I don't think we'll be in a position to provide a full response by the end of this week, but we could agree to the end of next week and to extend the deadline for any motion concerning documents on the Tol privilege log to June 8th. Will that work?

Regards,

-Ruben

From: Eric Speckhard <ESpeckhard@desmaraisllp.com>
Sent: Tuesday, May 18, 2021 7:02 PM
To: Rodrigues, Ruben J. <RRodrigues@foley.com>
Cc: BOST - F - Philips - Fitbit <BOSTFPhilipsFitbit@foley.com>; Fitbit Philips DC Service <FitbitPhilipsDCService@desmaraisllp.com>
Subject: RE: [EXTERNAL] Re: Philips v. Fitbit - Scope of Review and Dr. Buy's contact information.

**** EXTERNAL EMAIL MESSAGE ****

Hi Ruben,

Thanks for meeting with us earlier today about Philips's revised privilege log. As discussed, Fitbit has some remaining questions regarding the log. We generally divided the discussion into three categories: