UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

PHILIPS NORTH AMERICA LLC, Plaintiff, v. FITBIT, INC., Defendant.	Civil Action No. 1:19-cv-11586-FDS

PLAINTIFF'S SUR-REPLY IN OPPOSITION TO FITBIT, INC.'S MOTION TO COMPEL THE PRODUCTION OF CERTAIN OF MR. ARIE TOL'S EMAIL COMMUNICATIONS

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I. Introduction

Fitbit's Reply (Dkt. No. 213 ("Reply")) fails to refute that under either U.S. or Dutch law, the communications at issue are privileged.

First, the declaration of Frits Gerritzen (Reply, Ex. 1 ("Gerritzen Decl.")) completely fails to offer an opinion as to what constitutes the proper scope of authorized work for a Dutch Patent Attorney [1] —a focus of Prof. Hoyng's declaration. Additionally, Mr. Gerritzen does not meaningfully rebut any of Professor Hoyng's opinions regarding the legal privilege that Dutch Patent Attorneys are afforded under Dutch law. Specifically, Mr. Gerritzen **does not even dispute** any of Prof. Hoyng's conclusions, such as that the authorized scope of work for Dutch Patent Attorneys is broader than mere prosecution of patent applications and that the communications would be privileged under Dutch law. Indeed, despite being asked by Fitbit "to analyse the arguments brought forward in Philips's Expert Statement for invoking privilege under Dutch law" and to "provide [his] opinion on those arguments", Mr. Gerritzen's declaration only purports to "provide the necessary nuance" to Prof. Hoyng's statements regarding Dutch privilege. Reply, Ex. 1, Gerritzen Declaration (hereinafter "Gerritzen Decl.") at 2.

Additionally, as explained by Prof. Hoyng, the "professional charter" requirement only applies to Dutch Attorneys-At-Law and applying it to Dutch Patent Attorneys "has never been argued by anybody". Ex. 1, Prof. Hoyng Supplemental Declaration (hereinafter "Supp. Decl."), at ¶ 30. Further, Fitbit's **only** support for this newly presented theory is Mr. Gerritzen's opinion that "it could reasonably be argued"; indeed Mr. Gerritzen does not once express the opinion that this novel theory is actually correct. *See* Gerritzen Decl. at 12.

[1] In its Reply Brief, Fitbit continues to incorrectly refer to the "octrooigemachtigden" as "Dutch patent agents" despite the fact that the proper translation, as explained in Philips's Opposition, is "Patent Attorney". Dkt. No. 210 ("Opp.") at n.3; Opp., Ex. 2 ("Hoyng Decl."), at 11, n. 20. In fact, Mr. Gerritzen not only exclusively uses the phrase "patent attorney" throughout his declaration, but he also expressly acknowledges that this is the correct definition of "octrooigemachtigden". *See* Gerritzen Decl. at ¶ 1.2 (I was asked by Fitbit to provide a declaration on legal privilege

Finally, none of the cases that Fitbit cites for the first time in their Reply Brief lead to a different conclusion. For instance, *Align Tech*, which Fitbit describes as "very similar" to the case at hand, concerned the laws of Denmark (not the Netherlands), cites to *Knauf* extensively, and describes a framework under which Dutch Patent Attorneys would be afforded privilege. Fitbit also fails to provide any contradictory authority to *Knauf* and, in fact, does not even argue that the analysis by *Knauf* is incorrect.

II. The Gerritzen Declaration Fails to Deny that Dutch Patent Attorneys are Afforded Privilege by Dutch Law and Are Authorized In Duties Beyond Filing Patent Applications

The Gerritzen Declaration is conspicuously missing **any** opinion by Mr. Gerritzen as to whether Dutch Patent Attorneys have authorized duties under Dutch law beyond drafting patent applications—the crux of Fitbit's entire argument. Likewise, the closest Mr. Gerritzen gets to actually taking a position on whether Dutch Patent Attorneys are afforded privilege is claiming that Prof. Hoyng's arguments "are not as clear-cut as presented in Philips's Expert Statement." Gerritzen Decl. at 2. Mr. Gerritzen does nothing to challenge Prof. Hoyng's ultimate conclusion that he "respectfully disagree[s] with Fitbit's assertion that the Netherlands does not recognize a patent attorney privilege for matters other than proceedings before the Dutch Patent Office." Dkt. No. 210 (Opposition), Ex. 2 (Hoyng Declaration) (hereinafter "Hoyng Decl.") at ¶ 56.

Further, the alleged "nuance" that the Gerritzen Declaration attempts to provide to Prof. Hoyng's opinions is mostly irrelevant and without merit. For instance, as explained by Prof. Hoyng, the *Telegraaf* case relied on heavily by Mr. Gerritzen had major public policy implications that do not apply in a discovery dispute between private parties.[2] Supp. Decl. at ¶ 5. Mr. Gerrizten's other arguments similarly lack merit. *See e.g.*, Supp. Decl. at ¶¶ 31-36.

[2] Specifically, *Telegraaf* involved whether the State could withhold information regarding whether special powers

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