

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

PHILIPS NORTH AMERICA LLC	)	
	)	
Plaintiff,	)	
	)	C.A. No. 1:19-cv-11586-IT
v.	)	
	)	
FITBIT, INC.,	)	<b>JURY TRIAL DEMANDED</b>
	)	
Defendant.	)	
	)	
	)	
	)	

**PLAINTIFF’S MOTION FOR LEAVE TO FILE A SUR-REPLY IN OPPOSITION TO DEFENDANT’S MOTION TO DISMISS**

Plaintiff Philips North America, LLC (“Philips”) respectfully requests leave to file the brief proposed Sur-Reply Brief attached as Exhibit 1 in response to the Reply brief filed by Defendant in support of its Motion to Dismiss (Dkt. 39). Philips’s proposed Sur-Reply is six pages in length, and is limited to addressing new arguments and issues raised in Defendant’s Reply that should have been raised in Plaintiff’s original Motion and that Philips has not had an opportunity to address. For example, and by Defendant’s own admission, much of its Reply brief is focused on addressing the allegations made in Philips’s Amended Complaint—which Defendant obviously had well before filing its motion. In particular the proposed Sur-Reply addresses **two** specific items:

1. Fitbit’s (legally incorrect) Reply argument that the detailed pleadings in Philips’ complaint should be *ignored* and only the patent considered for the purposes of evaluating the claims under 35 U.S.C. §101. (See Dkt. 39) This argument is directly contradicted by recent Federal Circuit case law. To make it, Fitbit relies on cases

where implausible pleadings *contradicted* the language of a patent—not the issue here.

2. The Supreme Court’s recent denial of *certiorari* in several cases addressing 35 U.S.C. §101. Without explanation, Fitbit’s Reply characterizes those decisions as “rejecting the same types of arguments that Philips raises” in its opposition. But in fact, the opposite is true—even though one of those denied petitions (*Cellspin*) was **filed by Fitbit**.

Where a Reply brief arguably raises new arguments, a Sur-Reply is appropriate. *See e.g. Klein v. MHM Correctional Services, Inc.*, No. 08-11814-MLW, 2010 WL 3245291, \*2 (D. Mass Aug. 16, 2010). This is especially so where the Reply arguments could have (and should have) been raised in the original motion, as is the case with Fitbit’s criticism of the facts alleged in Philips’s Amended Complaint.

The Court has not scheduled a hearing on Defendant’s Motion and no party will be prejudiced by the Court granting leave to file the proposed limited Sur-Reply.

**LOCAL RULE 7.1(a)(2) CERTIFICATE**

The undersigned counsel certify that they have conferred with counsel for Defendant, and that Defendant does not consent to the relief requested in this motion

Dated: February 3, 2020

Respectfully Submitted,

/s/ Ruben J. Rodrigues

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that, on February 3, 2020, a copy of the foregoing document was filed with the Court through the ECF system and that a copy will be electronically served on registered participants as identified on the Notice of Electronic Filing.

By: /s/ Ruben J. Rodrigues