IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

DEFENDANT FITBIT LLC'S SUR-REPLY IN OPPOSITION TO PHILIPS NORTH AMERICA LLC'S MOTION TO DISMISS AND TO ENTER FINAL JUDGMENT

Only one court can have jurisdiction over a case at any given time. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). That well-established rule "derives from the notion that shared jurisdiction almost always portends a potential for conflict and confusion." *United States v. Brook*, 145 F.3d 446, 455 (1st Cir. 1998). This case is a textbook example why that rule must be followed, with the parties now engaged in jurisdictional briefing in both this District Court and in the Federal Circuit because Philips filed its appeal before the entry of a final judgment.

Ironically, Philips' reply brief cites *Griggs* for the proposition that a premature notice of appeal is a "nullity" and the lower court retains its jurisdiction. *See* Dkt. 424 at 2 (citing *Griggs*, 459 U.S. at 61). But Fitbit moved to dismiss Philips' appeal on October 2, 2023, and Philips ***opposes*** that motion. *See* Defendant-Appellee Fitbit LLC's Motion to Dismiss for Lack of Jurisdiction, *Philips N. Am., LLC v. Fitbit LLC*, Appeal No. 23-2286 (Fed. Cir. Oct. 2, 2023), ECF No. 13. Philips wants its premature appeal to proceed under the Federal Circuit's jurisdiction,

while at the same time, Philips wants this Court to act under its own jurisdiction. Philips' positions are fundamentally at odds.

Philips' excuse for refusing to dismiss its appeal is Federal Rule of Appellate Procedure 4(a)(2), which is a rule "intended to protect the unskilled litigant who files a notice of appeal from a decision that he reasonably but mistakenly believes to be a final judgment, while failing to file a notice of appeal from the actual final judgment." *FirstTier Mortg. Co. v. Investors Mortg. Ins. Co.*, 498 U.S. 269, 276 (1991). But Philips cannot point to any decision in this case that it reasonably believed to be a final judgment. Thus Rule 4(a)(2) does not apply, and none of Philips' case law citations suggest otherwise.

Philips cites cases with drastically different facts from this case. For example, in *PODS, Inc. v. Porta Stor, Inc.*, the Federal Circuit applied Rule 4(a)(2) because the district court purported to enter a "formal 'Judgment in a Civil Case' that appeared to be appealable." 484 F.3d 1359, 1365 (Fed. Cir. 2007). Here, by contrast, this Court has not entered any formal judgment, which is—of course—the very reason that Philips filed the instant motion for entry of judgment.

In two of Philips' cited cases, the Federal Circuit applied Rule 4(a)(2) to protect a litigant that mistakenly filed a notice of appeal immediately after an order that appeared to be final, but shortly before the district court formally entered a final appealable order. *See ABC Corp. I v. P'ship & Unincorporated Ass'ns Identified on Schedule "A"*, 52 F.4th 934, 940 (Fed. Cir. 2022) (preliminary injunction motion granted on October 6, notice of appeal filed on October 8, preliminary injunction order formally entered on October 13); *J.G. Peta, Inc. v. Club Protector, Inc.*, 65 F. App'x 724, 725 (Fed. Cir. 2003) (notice of appeal filed after grant of summary judgment motion, but two days before formal entry of judgment by court clerk). The situation here is not at all like either of those cases because Philips cannot point to a non-final order that was immediately

followed by a final appealable order from this Court. Rather, Philips argues that all claims have been resolved based on three separate orders issued by this Court over a two-year span—claim construction in June 2021, summary judgment in September 2022, and reconsideration denial in July 2023—combined with Federal Circuit affirmance of a Patent Trial and Appeal Board decision.

Philips also cites *Peralta v. Cal. Franchise Tax Bd.*, 673 F. App'x 975 (Fed. Cir. 2016). There, the Federal Circuit applied Rule 4(a)(2) to assert jurisdiction over a *pro se* litigant's appeal after the district court dismissed her complaint without prejudice to amend, and then later entered final judgment. *Id.* at 977. Ms. Peralta was the unskilled litigant that Rule 4(a)(2) was intended to protect. Philips is not.

Finally, Philips cites *Pause Tech. LLC v. TiVo Inc.*, 401 F.3d 1290 (Fed. Cir. 2005), with a parenthetical noting that the Federal Circuit "grant[ed] Appellant leave to seek remedial action with the District Court to obtain final judgment." Dkt. 424 at 2. Philips neglects to mention, however, that in *Pause Tech.*, the Federal Circuit dismissed the appeal ***before*** granting the appellee leave to seek remedial action in the district court. *See id.* at 1295. Here, by contrast, Philips refuses to agree to dismissal of its appeal, yet seeks remedial action in this Court anyway.

In short, until Philips' improper appeal is dismissed, this Court lacks jurisdiction over this case. Thus, Fitbit opposes the instant motion.

Dated: October 6, 2023

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CERTIFICATE OF SERVICE

I certify that this document is being filed through the Court's electronic filing system, which serves counsel for other parties who are registered participants as identified on the Notice of Electronic Filing (NEF). Any counsel for other parties who are not registered participants are being served by first class mail on the date of the electronic filing.

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