

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 SUPPLEMENTAL SUBMISSION WITH REGARD TO FITBIT'S
MOTION TO COMPEL (Dkt. 198) IN ACCORDANCE WITH MAGISTRATE JUDGE J.
DEIN'S INSTRUCTIONS (See Dkt. 229)**

Pursuant to the Honorable Magistrate Judge Judith G. Dein’s instructions at the hearing held on August, 24th, 2021 (*See* Dkt. 229), Plaintiff Philips North America LLC (“Philips”) provides the following submission with regard to Fitbit’s Motion to Compel.

A. Philips Agrees to Withdraw Work Product for Entries Nos. 3, 26, and 28 in favor of the Attorney-Client Privilege for such Entries.

On August 24th, Judge Dein heard argument on Defendant Fitbit, Inc.’s (“Fitbit”) Motion to Compel. During this hearing, Judge Dein requested that Philips reevaluate its position as to whether it would continue to maintain work product protection for certain communications on Philips’s privilege log dated prior to the formal notices of infringement on February 17, 2016 for Garmin (*See* Ex. 1-A to Philips’ opposition, Dkt. 210-02) and October 10, 2016 for Fitbit (*See* Ex. 1-B to Philips’ opposition, Dkt. 210-03). Accordingly, Philips carefully evaluated the logged communications prior to those dates as well as well as prior to other litigations between Philips and Fitbit/Garmin that were instituted beginning on September 27, 2017 in Europe. Having carefully evaluated those, and despite Philips’s belief that its assertion of work product over these communications was proper in light of Philips’s anticipation of litigation, in order to simplify the review by the Court, **Philips withdraws its assertion of work product protection for Privilege Log Entry Nos. 3, 26, and 28** thereby relying on its proper assertion of Attorney Client Privilege supported by Philips’s most recent privilege log, which is Ex. M to Fitbit’s original motion, and the Declaration of A. Tol, which is Ex. 1 to Philips’ opposition (*See* Dkt. No. 210-01 ¶¶ 16, 20).

All the other communications for which work product has been asserted specifically concern litigation preparation and planning as described in the declaration of Mr. Tol, including communications relating to the preparation of the notice letter to Fitbit—the preparation of which involved U.S. Attorney Elias Schilowitz from the very beginning, as described in Mr. Tol’s declaration, even if Mr. Schilowitz was not CCed on all logged communications. (*See, e.g.*, Dkt. No. 210-01 at ¶¶ 18, 19, 21, 22)

B. Timeline of Notice and Litigations Against Fitbit and Garmin

In view of the discussion of the timing of various events at the hearing, including the timing of Philips providing notice to Fitbit and Garmin and the filing of litigation in Europe, Philips has prepared the below timeline supported by citations to the record for the Court's benefit and reference:

Date	Event	Cite
Feb. 17, 2016	Infringement Notice Letter sent to Garmin	Dkt. 210-02
Oct. 10, 2016	Infringement Notice Letter sent to Fitbit	Dkt. 210-03
Sept. 27, 2017	Philips files patent infringement suit against Garmin in Germany	Dkt. No. 201-01 ¶ 8
Oct. 20, 2017	Garmin initiates revocation proceeding in UK against Philips asserted patent	Dkt. No. 201-01 ¶ 9
Oct. 27, 2017	Philips files another patent infringement suit against Garmin in Germany	Dkt. No. 201-01 ¶ 8
Dec. 1, 2017	Philips files countersuit against Garmin in the UK for patent infringement	Dkt. No. 201-01 ¶ 9
Dec. 4, 2017	Philips files patent infringement suit against Fitbit in Germany	Dkt. No. 201-01 ¶ 8
Dec. 12, 2017	Philips files separate patent infringement suit against Fitbit in Germany	Dkt. No. 201-01 ¶ 8
Jan. 25, 2018	Garmin initiates nullity proceeding in Germany against Philips asserted patent	Dkt. No. 201-01 ¶ 9
July 22, 2019	Philips files patent infringement suit against Garmin in C.D. Cal.	Dkt. No. 201-01 ¶ 12
July 22, 2019	Philips files present patent infringement suit against Fitbit in D. Mass	Dkt. No. 201-01 ¶ 12

C. Inadvertent Exclusion of Entry Nos 421, 424, and 433 from Mr. Tol's Declaration.

Upon its further review of Mr. Arie Tol's Declaration, Philips discovered that three of the Privilege Log Entries that Fitbit has moved to produce were inadvertently not referenced in Mr. Tol's Declaration. Specifically, Entry Nos. 421 and 424 should have been included in the list of entries referenced in paragraph 41 of Mr. Tol's declaration (*See* Dkt. 210-01 ¶ 41) while Entry No. 433 should have been included in the list of entries referenced in paragraph 42. (*See* Dkt. 210-01 ¶ 42). These entries relate to the same subject matter as the other entries referenced in those paragraphs and Mr. Tol's descriptions applies equally to them.¹

Dated: September 3, 2021

Respectfully Submitted,

/s/ Eley O. Thompson

Lucas I. Silva (BBO 673,935)

Ruben J. Rodrigues (BBO 676,573)

John W. Custer (BBO 705,258)

FOLEY & LARDNER LLP

111 Huntington Avenue

Suite 2500

Boston, MA 02199-7610

Phone: (617) 342-4000

Fax: (617) 342-4001

lsilva@foley.com

rrodrigues@foley.com

jcuster@foley.com

Eley O. Thompson (*pro hac vice*)

FOLEY & LARDNER LLP

321 N. Clark Street

Suite 2800

Chicago, IL 60654-5313

Phone: (312) 832-4359

Fax: (312) 832-4700

ethompson@foley.com

Counsel for Plaintiff

Philips North America LLC

¹ Philips also notes that Entry Nos. 162 and 163 were produced to Fitbit prior to Fitbit's Motion to Compel, and

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 3, 2021, 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.

/s/ John W. Custer

John W. Custer