

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

PHILIPS NORTH AMERICA LLC,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 1:19-cv-11586-FDS
v.	)	
	)	
FITBIT LLC	)	
	)	
Defendant.	)	
	)	

**FITBIT’S STATUS REPORT REGARDING FITBIT’S MOTION TO COMPEL  
CERTAIN EMAILS OF MR. ARIE TOL (DKT. 198)**

Pursuant to Magistrate Judge Dein's instructions at the August 24, 2021 hearing (*see* Dkt. 229) on Defendant Fitbit LLC's ("Fitbit") motion to compel (Dkt. 198), Fitbit submits this status report summarizing the parties' continued discussions.

During the August 24 hearing, Magistrate Judge Dein requested that the parties make a further effort to narrow their disputes.

Based on the Court's request and careful consideration of all of the pending disputes, Fitbit hereby withdraws its request to compel entry numbers 244-248 and 260-270 from Philips's privilege log, discussed in paragraph 36 of Mr. Tol's declaration (Dkt. 210-1 (Ex. 1 to Philips's Opposition to Fitbit's Motion)).

In an effort to further narrow the issues before the Court, Fitbit also reached out to Philips to request that it provide important information concerning several of the withheld documents described in Mr. Tol's declaration, since, as explained in Fitbit's motion, Philips has not adequately supported its privilege claims. Despite Fitbit's request, Philips refused to provide any additional information. (*See* Ex. A attached hereto.)

Specifically, regarding entries 19-21, 24, 30-31, 35-37, 42-43, 46-47, 60-64, and 71-73, Mr. Tol's declaration, like the privilege logs before it, summarily asserts that these communications either sought or were made in furtherance of seeking legal advice from Mr. Elias Schilowitz (a Philips in-house intellectual property licensing attorney who is not even included in the "from," "to," or "cc" fields of the majority of these communications) relating to the October 2016 letter from Philips to Fitbit. However, these entries do not specify the nature of that advice in a way that would permit Fitbit "to assess the claim," as required by the Federal Rules (*e.g.*, Fed. R. Civ. P. 26(b)(5)(A)). (*See* Dkt. 210-1, ¶¶ 18-19, 21-23, 26, 29-30.) Therefore, in an effort to narrow disputes, Fitbit requested that Philips state the legal issue on which Mr. Schilowitz's advice was allegedly sought so that Fitbit could assess whether the communications are in fact privileged legal advice (*e.g.*, discussions about Philips's infringement allegations) or instead non-privileged

business advice (*e.g.*, discussions of potential licensing terms to propose to Fitbit). Philips refused to provide additional information. (Ex. A at 9/3/21 email from R. Rodrigues.) Fitbit also requested that Philips confirm whether these communications are entirely privileged such that they must be withheld rather than redacted. (Ex. A at 8/31/21 email from E. Speckhard.) Again, Philips refused to do so. (Ex. A at 9/3/21 email from R. Rodrigues.) Because Philips has not carried its burden to show that these communications include exclusively privileged legal advice rather than non-privileged business advice, Fitbit maintains its request that the Court either compel their production or review the communications *in camera* to assess Philips's privilege claims.

Regarding entries 299-301, 408, 412-420, 422-23, 425-31, 437-38, 440-41, 443, 450-51, 458-60, 463-64, Fitbit requested that Philips identify whether these communications exclusively relate to Lifescan's alleged breach of a licensing contract with Philips, or if they also contain non-privileged business discussions relating to Philips's renegotiation of the license and/or how to characterize payments received under the revised agreement. (Ex. A at 8/31/21 email from E. Speckhard.) Philips's response denied that any renegotiation occurred. (Ex. A at 9/3/21 email from R. Rodrigues.) But, as evidenced by documents already produced by Philips, the "settlement" of that dispute was in fact a revised license agreement including different terms—*i.e.*, a renegotiation. Because Philips has not carried its burden to show that these communications include exclusively privileged legal advice rather than non-privileged business advice, Fitbit maintains its request that the Court either compel their production or review the communications *in camera* to assess the validity of Philips's claims.

Fitbit maintains its motion with respect to all other documents subject to the motion and not discussed herein.

Dated: September 7, 2021

Respectfully submitted,

FITBIT LLC .

By Its Attorneys,

/s/ David J. Shaw

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the above document was served on September 7, 2021 on counsel for Defendant via electronic mail.

/s/ Elizabeth A. DiMarco