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

LEAVE TO FILE REQUESTED IN JOINT MOTION (Dkt. 244)

REPLY BRIEF IN SUPPORT OF PLAINTIFF'S MOTION TO STRIKE FITBIT'S INEQUITABLE CONDUCT DEFENSE

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Fitbit does not (and cannot) deny that its inequitable conduct pleading—essentially an allegation of fraud—is subject to a heightened standard under Fed. R. Civ. P. 9(b). Yet, Fitbit's Opposition only demonstrates the **implausibility** of its allegations and how they fail to meet even the pleading requirements of Fed. R. Civ. P. 8, let alone the heightened standards of Rule 9(b). *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is **plausible** on its face.' . . . The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'") (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)) (emphasis added; internal citations omitted).

Perhaps recognizing the deficiency of its original pleading, Fitbit has amended its Answer to allege **an additional basis** for inequitable conduct on a theory of reverse infectious unenforceability.[1] Basically, the allegation is that, to the extent Mr. Helget did not commit inequitable conduct during prosecution of the '233 Patent, the '233 Patent is still purportedly unenforceable because Mr. Helget allegedly committed inequitable conduct during prosecution of the later-issued (now-cancelled) '902 Patent. As discussed in more detail below, there could not have been inequitable conduct during prosecution of the '902 Patent for many of the same reasons that there was none during prosecution of the '233 Patent. The allegation is also untimely for the same reasons discussed in Fitbit's original motion. What is more, Fitbit's attempt to argue that any

[1] While Philips objects to the amendment on the basis of timeliness in view of the scheduling order in this matter, as explained in the parties' Joint Motion for Leave to File a Reply Brief and Sur-Reply Brief and Joint Stipulation Relating Thereto (Dkt. 244), to the extent the pleading is not untimely, Philips does not otherwise object to the amendment. However, Philips believes that the additional theory of inequitable conduct added by the amendment concerning infectious unenforceability should be stricken along with the rest of Fitbit's inequitable conduct pleadings for the reasons stated in Philips's original Motion and this Reply.

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