

**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

**LEAVE TO FILE GRANTED ON
OCTOBER 14, 2021 (D.I. 247)**

**FITBIT'S SUR-REPLY TO PHILIPS'S
MOTION TO STRIKE FITBIT'S INEQUITABLE CONDUCT DEFENSE**

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Philips's Reply (D.I. 248 ("Reply")) rehashes the arguments from Philips's original motion and memorandum (D.I. 236; D.I. 237). Those arguments remain unsupported.

First, Philips maintains that the Scheduling Order (D.I. 54), and not the Federal Rules of Civil Procedure, governs the timing of Fitbit's original Answer (D.I. 224). Recognizing that the text of the Scheduling Order refutes that argument, Philips now claims that the "purpose" of the Order should control. Philips's argument finds no support in any pertinent rule or case law, and is also undermined by Fitbit's disclosure of its inequitable conduct defense during discovery.

Second, Philips repeats its flawed argument that Mr. Helget could not commit inequitable conduct by withholding the '902 application because the '902 application was also prosecuted before the same examiner as the '233 application. Philips's position is contradicted by the applicable regulations and governing Federal Circuit case law.

Third, Philips complains that Fitbit has not provided case law addressing the exact factual circumstances now before this Court. Fitbit has provided supporting case law addressing each substantive issue now in dispute and Philips's cases are not to the contrary.

Fourth, Philips accuses Fitbit of "rank speculation" as to Mr. Helget's intent in withholding the '902 application, and argues that an intent to deceive is not "more probable" than simple mistake. Philips's demand that Fitbit establish the probability—rather than plausibility—of Mr. Helget's intent misconceives Fitbit's burden at the pleading stage (particularly considering that Philips' counsel blocked Mr. Helget's deposition). Fitbit has pleaded specific factual allegations that permit a reasonable inference of Mr. Helget's intent to deceive the PTO. That is all that is required.

Fifth, Philips takes issue with Fitbit's allegation that the '233 Patent is unenforceable under the doctrine of infectious unenforceability, arguing that it is untimely and contrary to law. But

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