

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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3	PHILIPS NORTH AMERICA LLC,)	
)	
4	Plaintiff)	
)	
5	-VS-)	CA No. 19-11586-IT
)	Pages 1 - 30
6	FITBIT, INC.,)	
)	
7	Defendant)	

SCHEDULING CONFERENCE

BEFORE THE HONORABLE INDIRA TALWANI
UNITED STATES DISTRICT JUDGE

United States District Court
1 Courthouse Way, Courtroom 9
Boston, Massachusetts 02210
December 2, 2019, 2:28 p.m.

LEE A. MARZILLI
OFFICIAL COURT REPORTER
United States District Court
1 Courthouse Way, Room 7200
Boston, MA 02210
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1 A P P E A R A N C E S:

2 ELEY O. THOMPSON, ESQ. and LUCAS L. SILVA, ESQ.,
3 Foley & Lardner LLP, 111 Huntington Avenue, Suite 2500,
4 Boston, Massachusetts, 02199, for the Plaintiff.

5 JENNIFER B. FUREY, ESQ., Goulston & Storrs,
6 400 Atlantic Avenue, Boston, Massachusetts, 02110, for
7 the Defendant.

8 YAR R. CHAIKOVSKY, ESQ., Paul Hastings LLP,
9 1117 S. California Avenue, Palo Alto, California, 94304,
10 for the Defendant.

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P R O C E E D I N G S

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2 THE CLERK: U.S. District Court is back in
3 session. This is Case No. 19-CV-11586, Philips North
4 America, LLC v. Fitbit, Inc. Will counsel please identify
5 themselves for the record.

6 MR. THOMPSON: Your Honor, Eley Thompson on behalf
7 of Philips North America, Foley & Lardner.

8 THE COURT: Good afternoon.

9 MR. SILVA: Good afternoon, your Honor. Luke
10 Silva, also on behalf of Philips.

11 THE COURT: Good afternoon.

12 MR. CHAIKOVSKY: Good afternoon, your Honor. Yar
13 Chaikovsky on behalf of Fitbit.

14 MS. FUREY: And good afternoon, your Honor.
15 Jennifer Furey, Goulston & Storrs, also on behalf of Fitbit.

16 THE COURT: Good afternoon. So I think this was
17 billed as a scheduling conference. We had the original
18 complaint. There was a motion to dismiss. I now have the
19 First Amended Complaint, so the motion to dismiss that's on
20 the docket is denied as moot. That's No. 19.

21 So I understood from your report that you're
22 anticipating reviewing that and deciding whether or not to
23 file a new motion to dismiss. Is that correct?

24 MR. CHAIKOVSKY: Yes, your Honor. In fact, we
25 have reviewed it. We will be filing a new motion to

1 dismiss. Obviously under the rules we have 14 days. I believe
2 we filed it either last Tuesday or Wednesday. We will get it
3 filed on time. We don't think anything that was added changes
4 the course with respect to the four patents being ineligible
5 under 101.

6 THE COURT: Okay. So as I'm sure you know, since
7 you've gone through what I've done on other cases, I recognize
8 that a motion to dismiss can be granted even where there are
9 disputed claim terms; but if you are going to brief this,
10 recognize that this isn't an opportunity for claim construction.
11 This is accepting their claim construction, not whether you
12 agree with it or don't agree with it. Otherwise it's really
13 not worth your time or mine.

14 MR. CHAIKOVSKY: Yes, your Honor, we understand that.
15 In fact, I think we would be very happy to accept their claim
16 constructions. Their claim constructions would be broader
17 constructions to Wisconsin infringement concerns and under
18 those broader constructions that Philips has, in all
19 likelihood. But even if you accept it narrower, the claim
20 constructions are irrelevant. With the law as it is and with
21 the case law from the Federal Circuit, *Cleveland Clinic* and
22 others in a post-*Aatrix/Berkheimer* world, these patents, these
23 specifications admit that everything is conventional and well
24 known and generic. There's nothing we've done in their
25 complaint that changes that. In fact, you can look at the

1 *Cellspin* case that they cite which involved Fitbit, and that
2 case itself states that it doesn't change the fact, if the
3 patent itself admits these things are known conventionally, you
4 can't change that fact. You can't say the sky is red and
5 accept that as true. And here we just have basically the
6 plaintiff actually making allegations that are divorced from
7 the claims, and the claims themselves are ineligible. So we
8 will be refile, and the constructions themselves can be as
9 Philips posits them to be.

10 THE COURT: Okay. I do take these pretrial motions
11 seriously, and I understand that or it is my view that properly
12 litigated, everybody benefits from teeing up legal issues when
13 legal issues can be teed up before you spend a lot of money on
14 nonlegal issues when that's appropriate. What I find
15 cumbersome is that I am now, I think -- I don't think my
16 circumstances here are unusual, but I do think that it is every
17 single case in front of every single defendant now gets a
18 motion to dismiss, and so there are different techniques for
19 dealing with it. I think some judges are just saying, "Okay,
20 we're going to ignore it." Some people are saying, "Let's
21 grant it." But if it's going to be done properly, if it's
22 granted too soon, you get reversed on appeal. If it's brought
23 too soon, you're wasting my time. So if it is the right time
24 to bring it, feel free and bring it. I will give it good
25 consideration. But please recognize that there's no shortcut

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