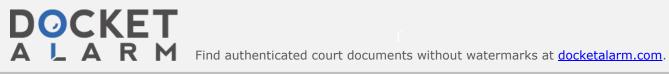
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                   IN THE UNITED STATES DISTRICT COURT
                    FOR THE DISTRICT OF MASSACHUSETTS
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     PHILIPS NORTH AMERICA LLC,
                   Plaintiff
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 5
                -VS-
                                           CA No. 19-11586-IT
                                            Pages 1 - 30
 6
     FITBIT, INC.,
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                     Defendant
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 9
                          SCHEDULING CONFERENCE
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                   BEFORE THE HONORABLE INDIRA TALWANI
                      UNITED STATES DISTRICT JUDGE
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                                    United States District Court
                                     1 Courthouse Way, Courtroom 9
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                                    Boston, Massachusetts 02210
                                    December 2, 2019, 2:28 p.m.
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                             LEE A. MARZILLI
23
                         OFFICIAL COURT REPORTER
                      United States District Court
                       1 Courthouse Way, Room 7200
24
                            Boston, MA 02210
25
                               (617)345-6787
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1	APPEARANCES:
2	ELEY O. THOMPSON, ESQ. and LUCAS L. SILVA, ESQ., Foley & Lardner LLP, 111 Huntington Avenue, Suite 2500, Boston, Massachusetts, 02199, for the Plaintiff.
3	
4	JENNIFER B. FUREY, ESQ., Goulston & Storrs, 400 Atlantic Avenue, Boston, Massachusetts, 02110, for
5	the Defendant.
6	YAR R. CHAIKOVSKY, ESQ., Paul Hastings LLP, 1117 S. California Avenue, Palo Alto, California, 94304, for the Defendant.
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### P R O C E E D I N G S

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

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

THE COURT: Good afternoon.

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

THE COURT: Good afternoon.

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

MS. FUREY: And good afternoon, your Honor.

Jennifer Furey, Goulston & Storrs, also on behalf of Fitbit.

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

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

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



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

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

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



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

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



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