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6 **UNITED STATES DISTRICT COURT**
7 **NORTHERN DISTRICT OF CALIFORNIA**

8 GOOGLE LLC,
9 Plaintiff/Counterclaim Defendant,
10 v.
11 ECOFACTOR, INC.,
12 Defendant/Counterclaim Plaintiff.

Case No. 4:21-cv-3220-HSG

**JOINT CASE MANAGEMENT
STATEMENT**

Date: August 10, 2021
Time: 2:00 P.M.
Courtroom: 2
Judge: Haywood S. Gilliam, Jr.

WHITE & CASE LLP
ATTORNEYS AT LAW
SILICON VALLEY

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INTRODUCTION

Pursuant to this Court's May 11, 2021 Notice (ECF No. 15), the Standing Order for All Judges of the Northern District of California, and Civil Local Rule 16-9, Plaintiff/Counterclaim Defendant Google LLC ("Google") and Defendant/Counterclaim Plaintiff EcoFactor, Inc. ("EcoFactor") submit this Joint Case Management Statement.

1. JURISDICTION & SERVICE

Google filed this action on April 30, 2021. ECF No. 1. This is a declaratory judgment action for non-infringement under the Declaratory Judgment Act, 28 U.S.C. § 2201, and under the patent laws of the United States, 35 U.S.C. §§ 1-390. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1338(a) and 2201(a). Venue is proper in this judicial district pursuant 28 U.S.C § 1400(b). EcoFactor has been served. Neither jurisdiction nor venue has been disputed.

2. FACTS

Google seeks a finding that its smart thermostat systems, including the Nest Thermostat and the Nest Third Generation Learning Thermostat (collectively, "Google Accused Products") do not infringe United States Patent Nos. 8,740,100 ("the '100 patent"); 8,751,186 ("the '186 patent"); 9,194,597 ("the '597 Patent"); and 10,584,890 ("the '890 Patent") (collectively, the "Asserted Patents"). EcoFactor has asserted both defenses and counterclaims, and EcoFactor's counterclaims seek a finding that the Google Accused Products infringe the Asserted Patents, and remedies for Google's infringement, including injunctive relief, damages, a finding that this is an exceptional case under 35 U.S.C. § 285, and other relief the Court may deem proper under the circumstances.

3. DISPUTED LEGAL ISSUES

THE PARTIES HAVE IDENTIFIED THE FOLLOWING PRINCIPAL ISSUES CURRENTLY IN DISPUTE:

- 1 1. Whether the Google Accused Products directly infringe one or more claims of
- 2 each Asserted Patent under 35 U.S.C. § 271(a), and/or indirectly infringe one or
- 3 more claims of each Asserted Patent under 35 U.S.C. §§271(b) or (c);
- 4 2. Whether this case is exceptional under 35 U.S.C. § 285, entitling the prevailing
- 5 party to attorneys' fees.

6 **4. MOTIONS**

7 1. Anticipated Motions: Google and EcoFactor anticipate moving for summary

8 judgment and may file other dispositive and non-dispositive motions as the case progresses. The

9 parties anticipate filing a joint motion for a protective order governing the confidentiality of

10 information and the review of source code in this matter, as well as a joint motion for an order

11 governing the treatment of electronically stored information (ESI) in discovery.

12 **5. AMENDMENT OF PLEADINGS**

13 The parties agree that they may amend their pleadings, including the parties, claims, or

14 defenses, consistent with the Federal Rules of Civil Procedure or with leave of the Court upon a

15 showing of good cause.

16 The parties do not currently intend to amend the operative pleadings but reserve the right to

17 request leave of the Court to do so should the Court determine that either party needs to provide

18 additional information.

19 **6. EVIDENCE PRESERVATION**

20 Each party has reviewed the ESI Guidelines and each party believes that it has taken

21 appropriate and reasonable measures to preserve evidence relevant to each party's claims and

22 defenses in this matter.

23 **7. DISCLOSURES**

24 The Parties served initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1)(A) on August 3,

25 2021.

26 **8. DISCOVERY**

27 The parties have not served any discovery yet.

28

1 **A. Changes to the timing, form, or requirement for disclosure (Fed. R. Civ. P. 26(f)(3)(A))**

2 The parties served initial disclosures on August 3, 2021 and do not propose any change to
3 the form or requirement for such disclosures.

4 **B. The subjects on which discovery may be needed (Fed. R. Civ. 26(f)(3)(B))**

5 The parties anticipate that the scope of discovery will encompass the factual and legal
6 issues identified in Sections 2 and 3 above, and the requested relief discussed in Section 9 below,
7 including related and subsidiary factual and legal issues and matters. The parties reserve the right
8 to amend subjects for discovery that may be sought pending further discovery.

9 **C. Any issues about disclosure, discovery, or preservation of electronically stored information, including the form or form in which it should be produced (Fed. R. Civ. P. 26(f)(3)(C))**

10 The Parties anticipate presenting an ESI order to Court to govern the discovery of
11 electronically stored information. The parties will exchange draft proposed ESI orders and will
12 present agreed-on terms to the Court, along with any points of disagreement requiring the Court's
13 guidance.

14 **D. Any issues about claims of privilege or of protection as trial-preparation materials (Fed. R. Civ. P. 26(f)(3)(D))**

15 The parties agree that absent a specific showing of need, documents created on or after
16 April 30, 2021 that are subject to a claim of attorney-client privilege, work product immunity, or
17 any other privilege or immunity do not need to be included in the parties' privilege logs. Subject
18 to the foregoing, the parties agree that issues of privilege or work product shall be addressed as
19 provided in the Federal Rules of Civil Procedure, Federal Rule of Evidence 502, and the
20 Protective Order and/or ESI Order to be entered in this action.
21

22 **E. Changes that should be made to the limitations on discovery (Fed. R. Civ. P. 26(f)(3)(E))**

23 To the extent not limited below, and unless otherwise agreed to by the parties, the parties
24 agree that discovery is subject to the limitation set forth in the Federal Rules of Civil Procedure,
25 Local Rules of the Court, and the ESI Order and Protective Order to be entered in this action. If
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1 a party requests discovery that exceeds any of the limitation set forth below, the parties agree to
2 meet and confer in good faith to attempt to resolve the issue without intervention of the Court. If
3 the parties are unable to reach agreement, a party may seek leave from the Court for the additional
4 discovery.

5 The Parties agree to serve interrogatories, document requests, deposition notices, requests
6 for admission, and responses thereto, on each other via email. The parties further agree that the
7 service of a complete copy of these documents via email on or before midnight Pacific time shall
8 count as same-day service.

9 • **Interrogatories to Parties**

10 The parties agree that the limitations of Federal Rule of Civil Procedure 33 apply.

11 • **Requests for Admission**

12 The parties agree that each side may serve up to 30 Requests for Admission. Requests for
13 Admission related to the authentication of documents and public availability of prior art are
14 exempt from this limitation.

15 • **Depositions**

16 The parties agree that each party is limited to 70 hours in its deposition of fact witnesses
17 in this litigation, including individual and 30(b)(6) witnesses, and excluding expert depositions,
18 Furthermore, either party may request additional hours for good cause. All other requirements of
19 Federal Rule of Civil Procedure 30 apply.

20 **F. Any other orders that the court should issue under Rule 26(c) or under Rule
21 16(b) and (c)**

22 The parties anticipate presenting a stipulated protective order governing the discovery of
23 confidential information, including source code, to the Court.

24 **G. Production of ESI**

25 The parties anticipate presenting a stipulated protocol for ESI production to the Court.

26 **9. CLASS ACTIONS**

27 This matter is not a class action matter.
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