

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION**

ECOFACITOR, INC., Plaintiff, v. ECOBEE, INC., Defendant.	Case No.: 6:20-cv-00078-ADA JURY TRIAL DEMANDED
ECOFACITOR, INC., Plaintiff, v. ECOBEE, INC., Defendant.	Case No.: 6:21-cv-00428-ADA JURY TRIAL DEMANDED <u>LEAD CASE</u>

ORDER GRANTING JOINT MOTION TO CONSOLIDATE ACTIONS

Upon consideration of the Joint Motion to Consolidate Actions submitted by Plaintiff EcoFactor, Inc. and Defendant ecobee, Inc. in the above-captioned cases, the Court is of the opinion that the Motion should be granted.

IT IS THEREFORE ORDERED that the Joint Motion is GRANTED and that Case No. 6:20-cv-00078-ADA (“the -00078 Action”) is consolidated into Case No. 6:21-cv-00428-ADA (“the -00428 Action”) for all purposes, including trial. It is further ORDERED that this consolidation be implemented according to the following stipulations by the parties:

1. All discovery materials and filings in the -00078 Action will be treated as though they were submitted in the consolidated -00428 Action, subject to the additional terms below.

2. By September 13, 2022 (i.e., four weeks before the close of fact discovery), the parties shall update the discovery responses and document productions previously provided in the -00078 Action solely to include (1) updated financial documents and information, and (2) documents and information regarding ecobee’s two new thermostat products that were released in May 2022 (Smart Thermostat Enhanced and Smart Thermostat Premium).

3. The Court will hold ecobee to its stipulation, solely for purposes of litigating the alleged infringement of U.S. Patent No. 8,738,327 (the “’327 patent”), that there is no material difference between the accused functionality and relevant source code of the Smart Thermostat Enhanced and Smart Thermostat Premium, on the one hand, and the accused ecobee Smart Thermostat with Voice Control, on the other hand, the latter of which was already addressed in the parties’ expert reports. Consequently, EcoFactor’s same infringement arguments and ecobee’s same non-infringement arguments apply to the Smart Thermostat Enhanced and Smart Thermostat Premium. However, for avoidance of doubt, ecobee does not stipulate—and nothing herein prejudices ecobee from arguing—that the Smart Thermostat Enhanced and Smart Thermostat Premium are materially different from Smart Thermostat with Voice Control for purposes other than analyzing infringement of the ’327 patent—including, for example, for purposes of analyzing infringement of the patents currently in issue in the -00428 Action.

4. On or before October 18, 2022 (the deadline for opening expert reports on the patents already at issue in the -00428 Action), opening expert reports previously submitted in the -00078 Action may be supplemented to address updated sales data and ecobee’s two new thermostat products. On or before November 15, 2022 (the deadline for rebuttal expert reports on the patents already at issue in the -00428 Action), rebuttal expert reports previously submitted in the -00078 Action may be supplemented to address new material contained in supplemental

opening reports. The technical expert reports of Mr. Zeidman and Dr. Sourì will be supplemented only to reference the parties' Stipulation 3 above and convey that their existing opinions therefore apply to ecobee's two new thermostat products. Supplements to the damages expert reports of Mr. Kennedy and Ms. Riley will be consistent with their existing damages theories. Mr. Kennedy and Ms. Riley each may be deposed for up to two hours on the supplemental contents of their supplemental reports. Given the very narrow purpose of their supplemental reports, there will be no further deposition of Mr. Zeidman or Dr. Sourì regarding their -00078 Action reports.

5. The following three motions, which are presently pending in the -00078 Action, will be decided in the proposed consolidated -00428 Action: (1) ecobee's Corrected Motion to Strike New Infringement Theories (Dkt. No. 90); (2) ecobee's Corrected Motion to Exclude the Damages Opinions of David Kennedy (Dkt. No. 91); and (3) EcoFactor's Motion to Exclude Opinions of ecobee's Damages Expert Michele Riley (Dkt. No. 94).

6. The parties shall serve new pretrial disclosures on January 10, 2023, thus replacing the pretrial disclosures previously served in the -00075 Action.

7. ecobee agrees not to seek a stay or otherwise delay trial of the consolidated -00428 Action, absent (1) serious and unanticipated illness or injury to lead counsel or experts that would prevent such individuals from participating in the trial as scheduled to begin on March 21, 2023, or (2) other unforeseen and serious events that would make it unreasonable or impossible to try the case as scheduled.

8. All existing motions *in limine* and pending evidentiary objections will be deemed moot, and the parties will submit new motions *in limine* and objections in the normal course in advance of the new trial date.

9. All current deadlines in the -00078 action not addressed above will be vacated.

10. The -00428 action shall be designated as the "Lead Case." All counsel of record in the -00075 action shall take timely notice of all future filings in the -00428 action and, if needed, file any appropriate notice of appearance in the -00428 action. All counsel of record in the -00075 action are hereby deemed to receive service of all future filings in the -00428 action. The parties shall make all future filings on the -00428 docket.

11. The parties are ORDERED to meet and confer to file a joint motion in the -00428 action to enter a scheduling order that clearly sets forth all deadlines.

SIGNED on this 25th day of July, 2022.


ALAN D. ALBRIGHT
UNITED STATES DISTRICT JUDGE