

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

OLLNOVA TECHNOLOGIES, LIMITED, (CAUSE NO. 2:22-CV-072-JRG
)
Plaintiff, ()
vs. ()
ECOBEE, INC., et al., (MARSHALL, TEXAS
) OCTOBER 3, 2023
Defendants. (8:30 A.M.

VOLUME 3

TRIAL ON THE MERITS
BEFORE THE HONORABLE RODNEY GILSTRAP
UNITED STATES CHIEF DISTRICT JUDGE
and a jury

SHAWN McROBERTS, RMR, CRR
100 E. HOUSTON STREET
MARSHALL, TEXAS 75670
(903) 923-8546
shawn_mcroberts@txed.uscourts.gov

Shawn M. McRoberts, RMR, CRR
Federal Official Court Reporter

1 MR. DORSKY: No objection, Your Honor.

2 THE COURT: All right. I gather Defendant doesn't
3 have anything additional to add?

4 MR. DORSKY: I have a few additional exhibits to
5 add, Your Honor.

6 THE COURT: Please go to the podium.

7 MR. DORSKY: Defendant reads into the record the
8 following additional exhibits used during the Plaintiff's case
9 in chief. The first are joint exhibits JTX: JTX 5, JTX 6,
10 JTX 7, JTX 8, JTX 10, JTX 14, JTX 15, JTX 35, JTX 68, and for
11 Defendants' exhibits DTX 79. That is all.

12 THE COURT: All right. Thank you, Mr. Dorsky.
13 Any objection to that, Mr. Parish?

14 MR. PARISH: No objection, Your Honor.

15 THE COURT: All right. Thank you, counsel.

16 While the jury is still out of the courtroom, I want to
17 turn to an item that arose, an issue that arose overnight. I
18 discussed this with counsel in chambers, but I want to review
19 it again on the record.

20 My understanding is that sometime after the close of
21 evidence yesterday over the evening, Defendants decided that
22 they would drop their invalidity defenses and counterclaims as
23 to the '887 and the '371 patents. Those theories of
24 invalidity were based on § 102 and § 103. But they would
25 maintain their individual challenges as to the '495 patent

1 under § 101, § 102, and § 103 and that they would maintain
2 their invalidity challenge as to the '282 Patent based on
3 § 102 and § 103.

4 Is that correct, Mr. Caixeiro?

5 MR. CAIXEIRO: Yes, Your Honor. But a very minor
6 correction, I believe that we gave that disclosure while court
7 was actually still in session.

8 THE COURT: I'm going to have to ask you to go to
9 the podium. I want to make sure you I hear everything you
10 say.

11 MR. CAIXEIRO: Yes, Your Honor.

12 Absolutely true with the one just clarification that the
13 message was sent while court was still in session yesterday
14 where you said it happened after the close of the business.

15 THE COURT: Okay. All right. And after having
16 received that communication from Defendant, Plaintiff has
17 indicated to the Court that they feel that the same has been
18 harmful and prejudicial to them and they're seeking the
19 imposition of some sanction based on that.

20 Ms. Fair, will you give me a short rendition of
21 Plaintiff's view on this from the podium as well?

22 MS. FAIR: Yes, Your Honor.

23 In Plaintiff's view there is a specific deadline set
24 forth in the Court's docket control orders for narrowing. We
25 specifically discussed it at the pretrial conference, so it

1 wasn't something that would be a surprise or be hidden from
2 the Defendants. We relied on their final election that they
3 gave us on the designated date.

4 We opened on Friday based on their final election,
5 including informing the jury that there would be invalidity
6 arguments made as to all four patents, and at this point in
7 time we were alerted in the middle of trial that they would be
8 narrowing further. And so from our perspective we did ask for
9 remedy from the Court to alleviate the prejudice to us for
10 their narrowing too late in the game.

11 We understand the Court appreciates narrowing we do, too,
12 but the timing is the problem here, Your Honor.

13 THE COURT: All right. Well, the Plaintiff has
14 asked the Court to impose a sanction against the Defendant
15 based on this dropping of the invalidity challenges as to the
16 '887 and the '371. Specifically, the Plaintiffs asked the
17 Court to take away two hours of designated trial time from the
18 Defendant and to limit their closing argument time by reducing
19 it from 40 minutes to 25 -- from 40 minutes to 25 minutes,
20 taking away 15 minutes of closing argument time.

21 As I stated, I've spent probably 30 minutes in chambers
22 with counsel this morning going over all the context and the
23 background as to what gave rise to this dispute, and as I told
24 them in chambers, I think this is appropriate for something to
25 be addressed on the record and that's why we're doing it that

1 way at this time.

2 Here's what the Court has concluded.

3 The docket control order has a specific provision in it
4 that, quite honestly, was fairly recently added to the Court's
5 standard docket control order because of a similar problem
6 that happened in a different trial where part of the
7 Defendant's case was dropped without warning in the middle of
8 the trial and the Plaintiff alleged that they had been
9 prejudiced because of that, and in an effort to avoid this
10 kind of surprise mid trial in the future, the Court added the
11 second item in its standard docket control order requiring a
12 final disclosure and rendition of the Defendant's invalidity
13 positions and there's also a separate item in the docket
14 control order requiring a final disclosure of the Plaintiff's
15 infringement contentions in advance of trial. The standard
16 order is 10 days for the Plaintiff and 7 days before trial for
17 the Defendant.

18 In this particular case at pretrial the Defendant asked
19 to have that item in the docket control order modified to give
20 them 10 days before jury selection to make their final
21 disclosure as to invalidity defenses and arguments, which the
22 Court did, and Plaintiff was entitled to rely on that. And
23 since -- since that time, Plaintiff, I think, is rightfully
24 saying that they've been surprised unfairly by this change in
25 position mid trial.

1 I agree with Ms. Fair that had this been done earlier in
2 the case and well before jury selection, it would not only be
3 not a problem, it probably would be a welcome change, as most
4 streamlining of the case is from both sides. But doing it mid
5 trial, with the jury in the box, while the parties are in the
6 midst of defending their previously disclosed positions, is
7 different, and it does create an unfair surprise to the
8 Plaintiff. I do not think that what the Plaintiff has asked
9 for is reasonable here.

10 Here's what the Court's going to do. The Court's going
11 to deduct 30 minutes of designated trial time from the
12 Defendants' case in chief. The Court is going to direct that
13 the Plaintiffs prepare and file a declaration setting forth
14 the time, the hourly rates, and any out-of-pocket expenses
15 they've expended since September the 1st in preparing to
16 defend against the invalidity challenges that have now been
17 dropped by the Defendant. Obviously the Defendant is
18 maintaining some of its invalidity challenges and I'm not
19 talking about that, I'm only talking about the time, effort,
20 and expenses dedicated specifically to the invalidity
21 challenges to the '887 and the '371 patents that the
22 Defendants are now dropping. That declaration should include
23 a total monetary amount that Plaintiffs have expended in
24 preparation for those invalidity challenges which have been
25 dropped since September the 1st, and I'm going to order

1 Defendants to compensate and reimburse Plaintiff in that
2 amount, whatever it might be.

3 Additionally, I'm going to allow the Plaintiff when it
4 cross examines the Defendants' invalidity expert to ask
5 that -- the experts explicitly, "Are you presenting any
6 arguments today that the '887 or the '371 patents are invalid
7 for any reason?" I'm not going to allow the Plaintiff to go
8 further than that, talk about something being dropped mid
9 trial, but they are entitled to query the expert presented for
10 invalidity by the Defendants that in fact that expert is not
11 presenting any testimony to support an invalidity challenge as
12 to these two patents.

13 Finally, I think as in any trial, it's fair game when a
14 party in their opening statement sets forth a position and
15 then their evidence over the course of the trial falls short
16 in some way from meeting what they told the jury they were
17 going to present in opening statement -- it's fair for the
18 other side to point that out in closing. I'm going to allow
19 the Plaintiff, if it chooses to in its closing argument, to
20 argue that Plaintiffs -- excuse me -- Defendant told the jury
21 in opening statement that they were going to challenge all
22 four patents on invalidity and they've, in fact, only
23 challenged two of those four patents on invalidity.

24 Again, the Plaintiff is not going to characterize the
25 conduct of the Defendant, they're not going to say that they

1 were sandbagged or there was some bait and switch, they're not
2 going to use any derogatory language, but factually they can
3 point out that in opening Defendant indicated it was
4 challenging all our patents on the basis of alleged invalidity
5 and over the course of the trial evidence as to invalidity has
6 only been presented as to the '495 and the '282 patents, not
7 the '887 and the '371. And I think that is a fair and
8 targeted remedy for what's happened.

9 Any questions about the Court's order in this regard from
10 either party?

11 Does Plaintiff understand what I'm saying?

12 MS. FAIR: Yes, Your Honor.

13 THE COURT: Does Defendant understand what I'm
14 saying.

15 MR. CAIXEIRO: Yes. I do have a clarification
16 question, Your Honor.

17 THE COURT: Go to the podium and ask your question
18 and I'll attempt to clarify it.

19 MR. CAIXEIRO: And it is just whether when the
20 affidavit or declaration comes in with -- with expenses,
21 whether there would be any objection process to that.

22 THE COURT: Well, obviously that's something that
23 should be taken up with the Court only. It has no place in
24 the trial. I don't expect the Plaintiff to do anything other
25 than set forward the realistic actual out-of-pocket expenses