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October 3, 2017

The Honorable William C. Bryson
United States Court of Appeals for the
Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

VIA ELECTRONIC FILING

Re: *Sonos, Inc. v. D&M Holdings Inc., D&M Holdings U.S. Inc. and Denon Electronics (USA), LLC*,[1] C.A. No. 14-1330 (WCB)

Dear Judge Bryson:

In response to the Court's September 26 Order (D.I. 414), D&M suggests that the Court reduce the burden on the jury, and make the trial manageable for the Court and the parties, by: (1) conducting a five-day bellwether trial on two of the asserted patents (or three if two of the patents share a common specification) in which Sonos would assert no more than 10 claims;[2] (2) directing Sonos to identify the patents and claims on which it intends to proceed by no later than October 12, 2017; and (3) requiring that D&M narrow its invalidity case to three prior art references per patent by no later than October 19, 2017.[3] As discussed below, D&M's proposal is consistent with Judge Andrews' prior determination that the trial would last five days, not 10, as Sonos requested, and with Judge Andrews' preference that the trial involve two patents. Further, D&M's proposal will reduce the burden on the jury during the holiday season and help to conserve resources of the parties and the Court.

[1] Defendants are collectively referred to herein as "D&M."

[2] Most of the remaining asserted claims are dependent claims (19 out of the 27) that already contain numerous limitations and will be more difficult for the jury to absorb than independent claims with fewer claim limitations. Further, many of asserted dependant claims depend from multiple-dependant and independent claims that *have not* been asserted. Consequently, many more than 27 separate claims must be addressed at trial.

[3] For purposes of the limitations on the number of prior art references, Sonos has previously agreed not to object to D&M counting the UPnP reference as a single reference. *See* Ex. A, E-mail from S. Sullivan to J. Jackson, March 20, 2017.

Sonos filed this patent infringement action on October 21, 2014, alleging infringement of four patents. (D.I. 1). After amending its Complaint in December of 2014 and again in March of 2015, Sonos asserted 12 patents. (D.I. 6, 31). Subsequently, at the scheduling conference in August of 2015, Judge Andrews advised Sonos that it could assert no more than 12 patents total in this lawsuit. On the January 29, 2016 deadline to amend pleadings, Sonos requested leave to drop seven of its 12 asserted patents and substitute seven different patents, which the Court granted on March 7, 2016.[4] (D.I. 100). Subsequently, Sonos dismissed one patent with prejudice (D.I. 151), agreed to a stay pending reexamination with respect to a design patent that was determined to be invalid by the PTAB (D.I. 229), and voluntarily dropped two more patents as part of its obligation to streamline its claims for trial. D&M has thus been required to defend against 19 patents during the course of this litigation. Although 11 of those patents have been dropped or dismissed, eight patents and 27 asserted claims remain just two months before the scheduled trial date.

The Sonos patents are directed to various distinct, and specific, functionality generally relating to networked wireless audio devices. For example, U.S. Patent No. 8,938,312 is directed to a line-in connector that stops audio playback from one source in response to detection of audio signals from another source. U.S. Patent No. 9,042,556 is directed to a technology that "shapes sound" in different manners in response to a change in speaker orientation. Of the 8 asserted patents, only the two so-called "synchronization" patents (U.S. Patent Nos. 9,213,357 and 9,195,258) share common specifications.[5] For purposes of its damages analysis, Sonos grouped its asserted patents into 5 discrete categories of accused functionalities (synchronization; group volume control; stereo pairing; autoplay/line-in connector; and speaker orientation).

Although Sonos proposed a 10-day trial (D.I. 57) at the August 18, 2015, initial scheduling conference, Judge Andrews rejected Sonos's proposal and explained:

> I am going to change your ten-day jury trial to a five-day jury trial. I understand that you can't actually do 12 patents in five days, but we'll deal with that. My preferred method would be that you get it down to two patents, and then we can easily do it in five days, but if you can't do that, then we'll come up with something else. (Ex. B, Tr. at 25:20-26:2).

Accordingly, the parties have been planning on a five-day trial for more than two years and have known that Judge Andrews' preferred approach was for Sonos to reduce the number of asserted patents to two before trial.

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[4] All 7 of these patents were pending applications both at the time that the accused products were released and when this lawsuit was originally filed.

[5] The group volume control patents (U.S. Patent Nos. 7,571,014 and 8,588,949) are related to the synchronization patents in that they all claim priority to the same provisional application. Although the specifications for the group volume control patents and the synchronization patents have some overlap, the specifications are not identical and those two sets of patents have completely different claims and involve distinct accused functionality.

Sonos currently asserts eight patents, only two of which share a common specification. These eight patents encompass five discrete functionalities. Each of these five accused functionalities involve different evidence, different source code, different expert analysis, and several different damages models. Given this case's breadth and procedural history, D&M respectfully requests that the Court "follow the well-worn path in other oversized patent cases and conduct a 'bellwether' trial on liability and damages relating to just three patents,"[6] assuming that Sonos includes the two patents with a shared specification as part of the group.

The approach proposed by D&M is identical to Chief Judge Stark's recent approach in the *Future-Link Systems* case. *See* Ex. C. There, 12 patents remained in a lawsuit scheduled for trial last month. To get the case down to a manageable size for trial, Judge Stark determined that: (1) he would conduct a bellwether trial concerning liability and damages for three asserted patents; (2) the patent owner would have eight days to reduce its asserted claims to no more than a total of ten, to be selected from the patents to be tried in September; and (3) that seven days after the reduction in claims, the alleged infringer would reduce its prior art references to no more than three per patent. *Id.* at 5. Judge Stark further determined that the proceedings as to the other patents-in-suit would be stayed until after the trial. *Id.* at 5 n. 7.

Judge Stark's approach is consistent with the approach taken by other Delaware judges. For example, Judge Andrews expressed his preference for a trial involving two patents at the scheduling hearing in this case. In *Juniper Networks, Inc. v. Palo Alto Networks, Inc.*, C.A. No. 11-1258 (SLR) (D. Del. Feb. 6, 2014), Judge Robinson stated at the pre-trial conference in a patent case in which there were seven asserted patents:

> If I've learned one thing of late, it's that going forward with multiple patents that aren't related is really too much for a jury. They're not going to digest it and it's not fair to the jury and you don't get a good decision. (Ex. D, Tr. at 4).

Judge Robinson rejected the patentee's request for a ten-day trial covering all patents and ordered the patentee to prioritize the patents and explain why they should proceed with "more than two or three, if two are related." *Id.* at 50, lines 6-14. There was then a seven-day trial covering three patents.[7]

Palo Alto Networks' Delaware counsel (now Sonos's counsel) argued that going to trial on three patents "would still impose too great a burden on the jury" because the "three infringement claims Juniper seeks to present involve three different accused functionalities, requiring different evidence, difference source code, and different expert analysis for each

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[6] *Intel Corp. v. Future-Link Systems, LLC*, C.A. No. 14-377-LPS (D. Del. July 31, 2017) (D.I. 640 at 2), attached as Ex. C.

[7] Judge Robinson ultimately gave the parties 9 total trial days, but bifurcated direct and indirect infringement into 2 phases, with the second phase on indirect infringement only going forward if there was jury verdict of direct infringement. The first phase on direct infringement of the three patents went 7 days. There was no need for the second phase because there was a mistrial.

patent." Ex. E. Even though there was a shared specification for two of the three patents, he argued that those patents "have completely different claims, and the accused features . . . do not overlap." *Id.*

Here, notwithstanding Judge Andrews' decision to reduce the length of trial to five days and his preference that Sonos assert no more than two patents at trial, Sonos contends that it should not have to drop <u>any</u> patents and that the Court should actually <u>increase</u> the length of the trial to 8 days. Sonos's proposal simply ignores the Court's request for suggested "steps that could be taken to reduce the number of patents . . . to be tried." (D.I. 414). Thus, Sonos's proposal does nothing to alleviate the justifiable concern that a jury will simply be unable to adequately handle a trial covering eight asserted patents. Worse yet, Sonos's proposal would substantially increase the burden imposed on the jury by requiring the jury to hear three additional days of trial presentations, carry the trial over a weekend, and potentially require the jury to deliberate on the eve of the Christmas break when many jurors (not to mention court staff and witnesses) are trying to spend time with their families and enjoying the holidays.

Sonos's proposal is also highly prejudicial to D&M. When Judge Andrews asked the parties whether they would agree to the December 11 setting, D&M confirmed that date was acceptable based on Judge Andrews' prior ruling that the trial would last five days and conclude on December 15. D&M thus requested that its witnesses keep free the week of December 11. Not surprisingly, D&M has identified at least three potential witnesses who have either work-related conflicts or pre-paid family travel plans during the week of December 18 that could prevent those witnesses from appearing if the trial were extended to eight days.

The Sonos proposal also contradicts the "well-worn path" taken by the judges in Delaware and numerous other courts where, as here, there are too many asserted patents left in a case to reasonably be presented to a jury. The Sonos patents implicate five different accused functionalities, requiring different evidence, different source code and different expert analysis. That is especially the case because only two of the remaining asserted patents share a common specification.

Respectfully,

/s/ Jack B. Blumenfeld

Jack B. Blumenfeld (#1014)

JBB/dlw
cc: Clerk of Court (Via Hand Delivery)
All Counsel of Record (Via Electronic Mail)