Court File No. A-

FEDERAL COURT OF APPEAL

BETWEEN:

SEISMOTECH IP HOLDINGS INC.
SEISMOTECH SAFETY SYSTEMS INC.

APPELLANTS

AND:

ECOBEE TECHNOLOGIES ULC

RESPONDENT

NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellants. The relief claimed by the appellants appears on the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellants. The appellants request that this appeal be heard at **Vancouver, British Columbia**.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the Federal Courts Rules and serve it on the appellants' solicitor, or where the appellant is self-represented, on the appellant, WITHIN 10 DAYS of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the Federal Courts Rules instead of serving and filing a notice of appearance.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: October 13, 2023

Issued by:_____
(Registry Officer)

Address of local office: Pacific Centre
P.O. Box 10065
701 West Georgia Street
Vancouver, BC
V7Y 1 B6

WITH NOTICE TO: **ECOBEE TECHNOLOGIES ULC**
Piasetzki Nenniger Kvas LLP
ATTN: Mr. William Regan
120 Adelaide Street West, Suite 2308
Toronto ON M5H 1T1

WITH COURTESY COPY TO: **APPLE CANADA INC. and APPLE INC.**
McCarthy Tétrault LLP
ATTN: Mr. Richard Lizius and Ms. Kendra Levasseur
Suite 5300 TD Bank Tower Box 48
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Toronto ON M5K 1E6

APPEAL

THE APPELLANTS APPEAL to the Federal Court of Appeal from the order of Mr. Justice Grammond dated October 5, 2023 (the "**Order**"), by which the respondent's motion under Rule 104 (the "**Motion**") to be added as a defendant in the underlying action, or alternatively for leave to intervene under Rule 109, was granted in file T-1147-23.

THE APPELLANTS ASK that:

1. The appeal be allowed and:

    a. that the Order be set aside, that this Honourable Court issue a direction that the respondent serves its Motion on the defendants that are related to the respondent's products (the "**Affected Defendants**"), and that the Motion be heard before a different judge of the Federal Court thereafter;

    b. in the alternative, that the Order be set aside and that the respondent's Motion be dismissed without leave to re-apply, or alternatively with leave to re-apply for intervention under Rule 109 for discrete steps in the underlying action; and

    c. costs be awarded to the appellants for the Motion;

2. Alternatively, the appeal be allowed and the Order varied to include all or some of the following terms for adding the respondent as a party to the underlying action:

    a. the appellants (i.e., the plaintiffs in the underlying action) be permitted to seek security for costs against the respondent given the circumstances;

    b. the respondent shall preserve any contact information of the Affected Defendants and the respondent shall not object to the disclosure of the Affected Defendants at the discovery stage of the underlying action;

    c. the respondent may seek removal of the underlying action from the application of Rules 292-299 of the *Federal Courts Rules* only with consent of all defendants and the plaintiffs; and/or

d. as a condition of being added as a party to the action, that the respondent:

    i. accept to be solidarily liable to the appellants for any monetary awards and/or costs that may be awarded against the Affected Defendants; and/or

    ii. irrevocably waive any disclaimer of warranties and/or limitation of liabilities in its contracts with the Affected Defendants;

e. costs be awarded to the appellants for the Motion;

3. In the further alternative, the appeal be allowed and the Order varied to state that no costs are awarded for the Motion;

4. Costs of this appeal, if opposed; and

5. This Honourable Court grant such further orders and relief as it deems just.

THE GROUNDS OF APPEAL are as follows:

1. The respondent knows the identity and contact information of the Affected Defendants. There is uncontested evidence that is crystal clear on this point. The Federal Court erred in proceeding to hear the Motion without the Affected Defendants having been served with that Motion or having been given any notice:

    a. The Federal Court erred in not applying the valid and enforceable court order in the underlying action specifically providing that defendants affected by a motion are to be served (i.e., the Affected Defendants in the context of the Motion).

    b. The Federal Court erred in not following a fundamental principle underpinning the *Federal Courts Rules* is that “a motion record must be served on all parties to a proceeding and not merely on selected parties”

(*Gilling v Canada (Minister of Transport)*, [1998] F.C.J. No. 952 (F.C.) at paras. 2 and 6).

c. The Federal Court erred in holding that the Affected Defendants need not be served with the Motion. Service on John Doe Defendants may be dispensed with when the identity of the John Doe Defendants is not known to the moving party (*BMG Canada Inc. v. John Doe*, 2005 FCA 193 [***BMG FCA***] at paras. 24 and 26), which is not the case here.

d. The respondent did not bring any motion, formal or informal, before the Court to dispense with serving the Motion on the Affected Defendants. Not only was there no evidence capable of supporting a finding that the respondent did not know the identity of the Affected Defendants in the underlying action, there was uncontested evidence that the respondent has knowledge of the identity of the Affected Defendants.

2. The Federal Court erred in law by conflating the narrow legal test under Rule 104 for adding a "necessary party" to an action, with the test for naming of respondents that are "directly affected" for an application for judicial review under Rule 303(1)(a).

3. The Federal Court erred in law or principle, or otherwise made a palpable and overriding error in applying the Rule 104 test, including but not limited to:

a. The Federal Court erred in permitting the respondent be added as a defendant, bypassing the lack of statutory jurisdiction over the contribution and indemnity issues relied upon by the respondent. The Federal Court does not have statutory jurisdiction over contribution and indemnity issues arising from a patent infringement action (*McCain Foods Limited v. J.R. Simplot Company*, 2021 FCA 4).

b. The Federal Court erred in adding the respondent as a defendant when no remedies are sought against the respondent, and when the respondent

does not fall within the description of John Doe Defendants in the underlying action. The Federal Court accepted that the appellants were not seeking a remedy against the respondent in the action. There was also no evidence capable of supporting a finding that the respondent's legal rights would be prejudiced by the appellants' action.

c. The Federal Court erred in not respecting Parliament's intent for enacting the comprehensive provisions in the *Patent Act* stipulating who would participate in an infringement action. The *Patent Act* does not require the respondent be a named defendant, and when "the statute does not so require, and the Court should not create new law by application of a rule of practice to require that such a party be added as a defendant" (*Apotex Inc. v. Canada (Attorney General)*, [1986] 2 FC 233 at 244).

d. The Federal Court erred in finding that the appellants' expired patents could affect the respondent's right to manufacture and sell its products. The Federal Court made a finding, in the absence of any evidence, that the respondent's manufacturing or selling of its products would be impeded.

e. The Federal Court erroneously conflated trademarks and patents, and applied cases for adding trademark owners as a defendant, when the respondent here has no equivalent statutory right to manufacture or sell its products as compared to a trademark owner. A key difference between trademark and patents is that a trademark owner has a statutory right to use the trademark for their goods and services (s. 19 of the *Trademarks Act*).

f. The Federal Court erred in finding that the respondent would be subject to hypothetical claims or class actions brought by the Affected Defendants. The respondent had not given any assurance that it would not enforce its warranty disclaimers or limitation of liability terms against the Affected Defendants. The contracts between the Affected Defendants and the respondent contain class action waivers and arbitration provisions, similar

to the ones this Court recently upheld in *Difederico v. Amazon.com, Inc.*, 2023 FCA 165.

4. The Federal Court erred in awarding costs to the respondent for the Motion when the respondent expressly waived costs. It is "a breach of the duty of fairness because it would subject the party against whom they are awarded to a liability when the party had had no notice or an opportunity to respond." (*Exeter v. Canada (Attorney General)*, 2013 FCA 134 at para. 12; *Chen v. Canada (Public Safety and Emergency Preparedness)*, 2019 FCA 170 para. 60). The Federal Court's error goes one step further than those cases since in *Exeter* and *Chen* the successful party did not request costs, whereas in the current case the respondent not only did not request costs, but explicitly waived costs.

5. Such further grounds as counsel may advise and this Honourable Court may permit.

October 13, 2023

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