

**United States Court of Appeals
for the Federal Circuit**

ECOFACOR, INC.,
Plaintiff-Appellee

v.

GOOGLE LLC,
Defendant-Appellant

2023-1101

Appeal from the United States District Court for the Western District of Texas in No. 6:20-cv-00075-ADA, Judge Alan D. Albright.

ON PETITION FOR REHEARING EN BANC

ROBERT A. VAN NEST, Keker, Van Nest & Peters LLP, San Francisco, CA, filed a petition for rehearing en banc for Google LLC. Also represented by STEPHANIE JILL GOLDBERG, KRISTIN ELIZABETH HUCEK, LEO L. LAM, ROBERT ADAM LAURIDSEN, EUGENE M. PAIGE.

REZA MIRZAIE, Russ August & Kabat, Los Angeles, CA, filed a response to the petition for EcoFactor, Inc. Also represented by KRISTOPHER DAVIS, MARC A. FENSTER, MINNA JAY, BRIAN DAVID LEDAHL, JAMES PICKENS.

Before MOORE, *Chief Judge*, LOURIE, DYK, PROST, REYNA,
TARANTO, CHEN, HUGHES, STOLL, and STARK, *Circuit
Judges*.¹

PER CURIAM.

ORDER

Google LLC (Google) filed a petition for rehearing en banc. A response to the petition was invited by the court and filed by EcoFactor, Inc. (EcoFactor). The court also accepted amicus briefs filed by US*Made, Garmin International, Inc., Red Hat, Inc., SAP America, Inc., SAS Institute, Inc., Symmetry, LLC, Tesla, Inc., Vizio, Inc., Dell, Inc., Intel Corporation, Cisco Systems, Inc., Apple Inc., and Lawyers for Civil Justice.

The petition and response were referred to the circuit judges in regular active service. A poll was requested and taken, and the court decided that the appeal warrants en banc consideration.

Accordingly,

IT IS ORDERED THAT:

- (1) The petition for rehearing en banc is granted.
- (2) The panel opinion in *EcoFactor, Inc. v. Google LLC*, No. 2023-1101, 104 F.4th 243 (Fed. Cir. 2024), is vacated, and the appeal is reinstated.
- (3) The parties are requested to file new briefs, which shall be limited to addressing the district court's adherence to Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), in its allowance of testimony from EcoFactor's damages expert assigning a per-unit

¹ Circuit Judge Newman and Circuit Judge Cunningham did not participate.

royalty rate to the three licenses in evidence in this case.

- (4) Google's en banc opening brief is due 45 days from the date of this order. EcoFactor's en banc response is due within 45 days of Google's en banc opening brief, and Google's reply brief within 30 days of the response brief. The parties may file a supplemental appendix within 7 days after service of the reply brief. The court requires 30 paper copies of all briefs and appendices provided by the filer within 5 business days from the date of electronic filing of the document. The parties' briefs must comply with Fed. Cir. R. 32(b)(1).
- (5) Any briefs of amici curiae may be filed without consent and leave of the court. Any amicus brief supporting Google's position or supporting neither position must be filed within 14 days after service of Google's en banc opening brief. Any amicus brief supporting EcoFactor's position must be filed within 14 days after service of EcoFactor's response brief. Amicus briefs must comply with Fed. Cir. R. 29(b).
- (6) Oral argument will be held at a time and date to be announced later.

September 25, 2024
Date

FOR THE COURT



Jarrett B. Perlow
Clerk of Court