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

ALLURE ENERGY, INC.,	§	
	§	
***Plaintiff*,**	§	**Civil Action No. 9:13-CV-102-RC**
	§	
v.	§	
	§	
NEST LABS, INC., GREEN MOUNTAIN ENERGY COMPANY and RELIANT ENERGY RETAIL HOLDINGS, LLC,	§	**JURY TRIAL DEMANDED**
	§	
	§	
	§	
	§	
***Defendants*.**	§	

PLAINTIFF ALLURE ENERGY, INC.'S
MOTION FOR PRELIMINARY INJUNCTION AND BRIEF IN SUPPORT

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STATEMENT OF ISSUES PRESENTED

Should the Court grant Plaintiff's Motion for Preliminary Injunction where: 1) Plaintiff has demonstrated a strong likelihood of success on the merits with respect to its claim that Defendant Nest Labs, Inc. is infringing U.S. Patent No. 8,571,518 (the "'518 Patent") as Nest's "Learning Thermostat" utilizes Allure's patented proximity control technology; 2) Plaintiff has demonstrated that it is suffering and will continue to suffer irreparable injury absent a preliminary injunction due to Nest's use of Allure's patented proximity control technology to capture significant market share and further in view of its recent acquisition by Google; 3) the balance of harms favors the issuance a preliminary injunction; and 4) a preliminary injunction would promote the public interest?

Plaintiff's answer: Yes

The Court should answer: Yes

STATEMENT OF MOST CONTROLLING AUTHORITY

Plaintiff Allure Energy, Inc. relies upon Fed. R. Civ. P. 65(a) and the additional authorities cited in the accompanying Brief in Support.

I. INTRODUCTION[1]

For years, Allure has expended enormous time and resources to establish its position in the emerging market for "smart" thermostats. Understanding well that establishing brand recognition in an emerging market is critical to a company's ultimate success, Allure has sought to protect its innovations by successfully securing patent rights. One of these patent rights concerns proximity detection, the subject of the '518 patent.

In the fall of 2011, Nest began selling its "Learning Thermostat," which utilizes Allure's proximity detection technology. Even after Allure notified Nest of its intellectual property rights, Nest continued to expand its market share by exploiting Allure's technology. This has left Allure to battle a direct competitor which is improperly using its own technology. Nest's "Learning Thermostat" clearly infringes at least one claim of the '518 Patent. This situation justified injunctive relief to protect Allure's Constitutionally protected patent rights. Without preliminary injunctive relief, Nest will be able to continue to use Allure's technology, free of charge, during the pendency of this litigation.

Last month, the justification for injunctive relief increased exponentially. On January 13, 2014, Google – one of the world's largest and most recognized brands, commanding upwards of 70% of the total U.S. internet search market – announced that it had entered into an agreement to buy Nest.[2] That acquisition was completed today. With Google's vast and unparalleled resources in terms of advertising and marketing, its virtually limitless sales channels, and its fierce determination to literally and forcefully push internet searchers toward its own products, Nest's ability to dominate the "smart" thermostat market will effectively have no limits. Despite Allure's diligent growth of

[1] Nest's "Learning Thermostat" infringes additional Allure patents, including those cited in the Second Amended Complaint, but Allure limits this Motion to the '518 Patent.

[2] Nest is making and selling the accused product. Defendants Green Mountain Energy Company and Reliant Energy Retail Holdings, LLC are selling the product and the basis for a preliminary injunction articulated here applies equally to them.

its business and its aggressive pursuit of its patent rights, it will lose its rightful place at the forefront of the industry, forced to the sidelines while Nest fortifies its position by using Allure's technology. Money damages will barely begin to compensate Allure for such a loss, and Allure asks the Court to grant temporary injunctive relief to prevent this exploitation of its rights.

II. STATEMENT OF FACTS

A. Allure's groundbreaking, patented proximity detection technology.

Allure Energy, Inc. ("Allure") is an Austin, Texas based company that designs, manufactures, and sells home environment and energy management products, including "smart" thermostats. (**Exhibit 1**, Declaration of Kevin Imes, ¶ 1). In 2008, Kevin Imes – who has both a B.S. in Electrical Engineering and an MBA from The University of Texas at Austin – formed Allure to research and develop "smart" technology, an area in which both private investors as well as the federal government are investing billions of dollars. (*Id*., ¶ 2, 7).

Allure's initial focus was on home energy efficiency. (Ex. 1, ¶ 7). Mr. Imes' inspiration came, in part, from a conversation with his father, who complained one day that he had forgotten to turn down the thermostat before leaving home. (*Id*., ¶ 8). Mr. Imes – also aware of studies concluding that only 10% of homeowners with programmable thermostats actually utilized the programming feature – conceived of a solution to the shortcomings of traditional thermostats: a thermostat that utilizes proximity detection to determine when the user is "home" or "away" and then alters the temperature setting automatically. (*Id*., ¶ 8). Allure called this a self-adaptive learning thermostat with proximity detection. (*Id*., ¶ 8).

With the concept for a "proximity detection" thermostat in mind, Mr. Imes came up with several inventions which he believed would satisfy the proximity detection objective and included them in several patent applications. (Ex. 1, ¶ 9). Allure filed the first patent application in October 2009. (*Id*., ¶ 9). Allure has since filed over 50 patent applications directed to various inventions in

this field, over 20 of which have issued claims including learning thermostat technologies and thermostats with proximity detection. (*Id*., ¶ 9).

Allure's first sales of products, which incorporated its patented inventions, took place in 2010. (Ex. 1, ¶ 10). The first product that utilized Mr. Imes' invention was the Allure Mobile TSTAT. (*Id*., ¶ 10). As interest in the Allure Mobile TSTAT grew, Allure began assembling the necessary team to continue promoting and selling it. (*Id*., ¶ 11). Allure hired Jim Mills in April 2010 to spearhead these efforts. (*Id*., ¶ 11; **Exhibit 2**, Declaration of James Mills, ¶ 5). Allure spent countless hours marketing and selling the Allure Mobile TSTAT. (Ex. 1, ¶¶ 10, 11). Through Allure's marketing efforts, and due to the specific problem that the Allure Mobile TSTAT solved through its proximity detection technology, significant interest developed in the product, including among utility companies and other tech-companies. (Ex. 1, ¶¶ 13, 14; Ex. 2, ¶ 6). Allure publicly launched its website to promote the Allure Mobile TSTAT in mid-2010. (Ex. 1, ¶ 14; Ex. 2, ¶ 7).

Based on the Allure Mobile TSTAT's early success, Allure secured the interest of a large energy company, Defendant Reliant, which wanted to partner with Allure. (Ex. 1, ¶ 11; Ex. 2, ¶ 8). Reliant shared Allure's vision of identifying ways to create products that save energy and reduce energy costs and was particularly interested in the Allure Mobile TSTAT due to its proximity control technology. (Ex. 1, ¶ 12; Ex. 2, ¶ 8).

B. Allure's marketing and development of EverSense.

As Allure promoted the Allure Mobile TSTAT throughout 2010, it identified new ways that the product could be improved to meet customer demands. (Ex. 1, ¶ 15). In the summer of 2011, Allure hired new team members and assembled additional resources in order to design a next generation product, which became "EverSense." (*Id*., ¶ 15).

EverSense carried over and expanded on the same "proximity detection" technology that made the Allure Mobile TSTAT a cutting-edge energy product. (Ex. 1, ¶ 16). One of the key

components that makes EverSense unique is that it utilizes Allure's patented "proximity control technology," which is the technology that allows EverSense to detect a user's presence or lack of presence – i.e. whether the user is home or away – and instantly adapt to a user's daily schedule by automatically adjusting the temperature settings in the home based upon the homeowner's proximity relative to the thermostat. (*Id*., ¶ 16). Another unique feature is that the capability of EverSense to implement the home and away mode based upon the homeowner's proximity to the thermostat is housed on the thermostat itself. (*Id*., ¶ 16). EverSense was uniquely positioned in the marketplace and was highly differentiated over traditional thermostats with its proximity control technology. (*Id*., ¶ 16). (*See* **Exhibit 3**, photograph of EverSense).

Allure worked diligently to be ready to unveil EverSense at the January 2012 Consumer Electronics Show ("CES"), which is a global consumer electronics and consumer technology tradeshow that takes place every January in Las Vegas. (Ex. 1, ¶ 18). By early December 2011, EverSense prototypes had been completed. (*Id*., ¶ 18). At the 2012 CES, EverSense was extremely well received and secured substantial attention and positive feedback during and after CES 2012. (*Id*., ¶ 19; *see also* Ex. 2, ¶¶ 14, 15). Reliant even showcased and promoted EverSense in a "smart" recreational vehicle demonstration at the show. (Ex. 1, ¶ 19; Ex. 2, ¶ 14).[3] Reliant also showcased EverSense on television, including on Good Morning Texas in Dallas. (Ex. 2, ¶ 17). Due to the widespread positive reaction Allure received, Allure increased its efforts to manufacture and sell EverSense. (Ex. 1, ¶ 19). Specifically, Allure targeted energy providers and retailers such as Lowe's, Best Buy and others. (Ex. 2, ¶ 16).

To date, Allure has invested several millions of dollars in EverSense, including funds spent on initial and ongoing research and development, building programs and mobile applications, marketing and advertising, investment in intellectual property, building prototypes, and much more.

[3]*See also* http://www.wfaa.com/good-morning-texas/See-an-energy-smart-RV-141057943.html.

(Ex. 1, ¶ 17). EverSense received numerous accolades based on its patented technology and has won several awards based on its recognized innovation. (Ex. 1, ¶ 20).

C. Allure expended substantial resources protecting its technology embodied in EverSense.

Since its formation, Allure has expended considerable resources securing patent protection on its unique automated energy management technology through the filing of numerous U.S. and foreign patent applications, including substantial additional resources spent to file for accelerated examination in order to ensure patent protection for its products from the earliest point in time possible. (Ex. 1, ¶ 21). These efforts have resulted in the issuance of several U.S. patents with additional patent applications still pending and under examination. (*Id*., ¶ 20). To date, Allure has spent in excess of a half-million dollars securing patent protection for its inventions. (*Id*., ¶ 21). In particular, Allure took measures to protect its investment in what it anticipated would be (and what ultimately proved to be) highly valuable proximity detection technology. (Ex. 1, ¶ 22). Allure filed its first U.S. Provisional Patent Application (No. 61/255,678) on October 28, 2009, in which it first disclosed one of the key features of EverSense – proximity detection. (*Id*., ¶ 22).

Although Allure has received several patents covering its proximity detection technology, the present Motion for a Preliminary Injunction is based only on the '518 Patent (U.S. Patent No. 8,571,518). (**Exhibit 4**). The application for the '518 Patent was filed on October 12, 2012 claiming priority from U.S. Provisional Patent Application No. 61/255,678 filed on October 28, 2009. The '518 Patent, entitled "Proximity Detection Module on Thermostat," identifies Mr. Imes and James Hollister as the inventors and issued on October 29, 2013. (Ex. 4). Claim 1 of the '518 Patent states:

> A system, comprising:
>
> > a thermostat disposed at a site and including a communication module capable of communicating with a mobile device associated with the site;
> >
> > said thermostat including a proximity detection module disposed thereon, said proximity detection module having a home mode and an away mode;

said thermostat configured to enable the away mode;

said proximity detection module configured to:

detect the presence of a user at the site; and

alter an operating condition of the thermostat during the away mode in response to the detected presence of the user. [Ex. 4].

D. Nest introduces its infringing "Learning Thermostat."

In the late fall of 2011, Allure learned that Nest had launched a so-called "Learning Thermostat." (Ex. 1, ¶ 24). When Allure first examined Nest's product, and read Nest's public descriptions of it and its operation, Allure believed that it incorporated Allure's proximity detection technology and learning technology and infringed one or more of Allure's patents. (*Id*., ¶ 24).

As discussed below, the Declaration of Joseph C. McAlexander III, a well-known expert in the smart technology field, explains how the Nest thermostat clearly infringes the '518 Patent. (*See* **Exhibit 5**). Not only does the Nest "Learning Thermostat" include Allure's patented technology, but Nest appears to have publicly taken credit for these cutting-edge innovations.[4]

As soon as Allure learned of the launch of Nest's "Learning Thermostat," it advised Nest, including its CEO, Tony Fadell, of the existence of Allure's patents and pending applications related to its smart thermostats with auto-learning capabilities and proximity control technology. (Ex. 1, ¶ 27). Allure invited Nest to contact Allure to discuss the issue, but neither Mr. Fadell nor Nest ever responded to the December 19, 2011 letter. (*Id*., ¶ 26). Instead, notwithstanding Allure's filing of patent applications dated well before Nest's product development and launch, and Allure's express notice to Nest of Allure's patents, Nest aggressively marketed, and is continuing to market,

[4] *See* Levy, Steven, "Brave New Thermostat: How the iPod's Creator Is Making Home Heating Sexy," Wired, *available at* http://www.wired.com/gadgetlab/2011/10/nest_thermostat/all/) (October 25, 2011) (stating that Nest's thermostat "revolutionize[d]" this technology; quoting one commentator who stated Nest's thermostat "breaks the mold"; quoting Nest executive Matt Rogers, "We assumed there might be someone, even some small company or startup innovating along these lines . . [t]here was nobody.").

Nest's infringing products to the public. (*Id*., ¶ 29).

After litigation commenced, Allure, Nest and their respective counsel met on July 17, 2013 to discuss a possible resolution of this dispute, but no resolution was reached. (*Id*., ¶ 28).

E. Nest's ongoing infringement is causing irreparable harm to Allure.

The harm that Allure has suffered and continues to suffer to this day due to Nest's ongoing infringement is substantial. Not only is Nest's infringement depriving Allure of its ability to capitalize on its patented technology, it is harming Allure in innumerable other ways. (Ex. 1).

First, Nest has captured an overwhelming portion of the market for adapting "smart" thermostats by improperly utilizing and promoting Allure's patented technology, and, in particular, Allure's proximity detection and control technology. (Ex. 1, ¶ 30; Ex. 2, ¶ 24). One recent study suggests that Nest is already the number two vendor of "smart" thermostats behind Honeywell and its non-adapting thermostat.[5] Tellingly, Nest currently has approximately 166,000 Facebook "likes."[6] This fact is significant because it reflects Nest's improper marketing efforts with the "early adopters" who buy a new product early after its introduction and then promote it in their social circles and through social media to attract second waves of purchasers. (Ex. 1, ¶ 38). Based on reported information, Nest has installed nearly 1 million thermostats since 2011. (Ex. 1, ¶ 31). By January 30, 2013, Nest was reportedly shipping between 40,000 and 50,000 thermostats *per month*.[7] Nest's rapid, aggressive and highly funded push into all markets throughout the country (and even internationally) has overwhelmed the market and shaped the public's perceptions. (*Id*., ¶ 30).

Capturing market share with first time "smart" thermostats buyers is critical, as the market emerges from its infancy. (Ex. 1, ¶ 40; Ex. 2, ¶ 25). Capturing first-time buyers is essential to

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5 *See* http://www.navigantresearch.com/research/navigant-research-leaderboard-report-smart-thermostats (last visited Feb. 10, 2014).

6 *See* https://www.facebook.com/nest (last visited Feb. 10, 2014).

7 *See* http://www.theverge.com/2013/1/30/3933412/nest-shipping-over-40000-thermostats-every-month (last visited Feb. 10, 2014).

success in the "smart" technology field because once first-time buyers of a "smart" thermostat make a selection about which product to buy, getting them to switch to a different product is extremely difficult. (*Id.*) Now that Nest has captured a substantial number of first time "smart" thermostat buyers, it will be overwhelmingly difficult to convince them to switch to Allure. (*Id.*). As the life-cycle of a thermostat is relatively long compared to other consumer products, one lost sale today may equate to a lost customer for decades or even forever. (Ex. 1, ¶ 40). Because of Nest's infringement, Allure may never be able to sell its own patented technology to customers who have already purchased Nest's infringing product.

Moreover, by promoting Allure's technology as its own and marketing itself as an "innovator," Nest has intentionally created a perception in the public and the media that Nest is the "inventor" or "creator" of this technology, and that Allure is merely a "copy-cat." (Ex. 1, ¶ 32)[8]. This perception is not only false in light of the many patents Allure has received and its independent and prior development of proximity control technology, but it has a significant negative impact on Allure's ability to market and sell its competing products and generate customer goodwill. (Ex. 1, ¶ 32; Ex. 2, ¶ 26). Nest's infringement has also impacted Allure's ability to attract investors and the capital needed to realize the full potential of EverSense and its technology. (Ex. 1, ¶ 41).

Nest has also been able to leverage its public perception (created through its infringement) to develop partnerships with major retailers and energy companies. By utilizing infringing technology, Nest has developed partnerships with and sells its Learning Thermostat to the biggest national (and even international) retailers, including Lowe's, Amazon, Best Buy, The Home Depot, Apple Stores and Target. (Ex. 1, ¶ 33; Ex. 2, ¶ 26). The collective reach of these retailers in terms of their access to consumers is immeasurable. (*Id.*, ¶ 33). Because of Nest's continuing infringement, Allure has had a difficult time trying to gain access and sell EverSense to such retailers. (Ex. 1, ¶

[8] S*ee also*, e.g. http://gigaom.com/2011/10/24/introducing-a-thermostat-steve-jobs-would-love-nest/; http://www.wired.com/gadgetlab/2011/10/nest_thermostat/all/ (last visited Feb. 10, 2014).

33; Ex. 2, ¶¶ 27-28). Indeed, Allure is frequently asked how its product differs from Nest's and has either been pressured to reduce its price to gain access to these types of retailers or has been rejected outright as extraneous because the retailer already carries Nest's product. (Ex. 2, ¶ 28).

In addition to its partnerships with retailers, Nest also advertises that it has partnered with numerous energy companies throughout the country, including Southern California Edison, Green Mountain Energy, New Jersey Natural Gas, National Grid, NRG, Austin Energy, Infinite Energy and Reliant, among others. (Ex. 1, ¶ 34; *see also* https://nest.com/energy-partners/). Nest's partnership with Reliant is particularly troubling because of the extensive discussions and understanding that Allure previously had with Reliant, as discussed in Jim Mills' Declaration. (Ex. 2, ¶¶ 8-10; 14, 17, 21-22). Nest's partnerships with companies like Reliant is even more harmful to Allure because, in addition to supplying customers, these partnerships lend credibility to Nest's product. (Ex. 1, ¶ 32; Ex 2, ¶ 23).[9] Nest has also leveraged its infringement to capture revenue in other ways. For example, Nest is now advertising its partnership with Mercedes Benz to promote sales of a vehicle incorporating Allure's patented proximity control technology. (Ex. 1, ¶ 37).

Nest's infringing Learning Thermostat has also caused price erosion. (Ex. 1, ¶ 42). Nest's thermostat is for sale at a retail price of about $250. As a result of Nest's decision about how to price Allure's technology, Allure has had to take steps to drop the price of EverSense. *Id.*

F. Google's acquisition of Nest substantially increases the harm to Allure.

Google recently agreed to buy Nest for $3.2 billion.[10] The deal has already closed based on Nest's amended corporate disclosures, which were filed on February 11, 2014. Google's vast resources in terms of advertising, marketing, sales channels, and economies of scale are self-

[9] *See also* http://finance.yahoo.com/news/nrg-expands-nest-thermostat-partnership-212600950.html.
[10] *See* Press Release, Google, Google to Acquire Nest (Jan. 13, 2014), https://investor.google.com/releases/2014/0113.html (last visited Feb. 10, 2014).

evident.[11] Most concerning is publicly available information suggesting that Google has the capability to focus the attention of Google users on Nest's product.[12] Google's recent announcement that it will acquire Nest only heightens the imminence and degree of irreparable harm to Allure. (Ex. 1, ¶ 42). Prior to the acquisition, Nest would have had to rely on the same sales channels as Allure (although, as discussed herein, Nest has improperly dominated those channels by utilizing Allure's patented technology). As Nest's CEO has acknowledged, Nest will now enjoy the benefit of Google's massive platform, and the harm to Allure will increase exponentially.[13]

III. ARGUMENT

A. Standard of Review.

This Court has the discretion to issue an injunction to "prevent the violation of any rights secured by patent." 35 U.S.C. § 283. The standards applied to the grant of preliminary injunctions in patent infringement cases are the same as those in any other area of the law. *Atlas Powder Co. v. Ireco Chemicals*, 773 F.2d 1230, 1233 (Fed. Cir. 1985). The purpose of a preliminary injunction is to preserve the status quo by preventing infringement pending a decision on the merits. *Abbott Labs. v. Sandoz*, 544 F.3d 1341, 1344-45 (Fed. Cir. 2008). Damages for past infringement are reserved for determination after a trial. *Atlas Powder Co.*, 773 F.2d at 1232. The moving party must establish a right to a preliminary injunction in light of four factors: "(1) a reasonable likelihood of success on the merits; (2) irreparable harm if a preliminary injunction were not granted; (3) the balance of

[11] Google is known as "a global technology leader" and "its brand [is] one of the most recognized in the world." *Id*. In 2012 alone, Google's consolidated revenues surpassed $50 billion. *See* Google, 2013 Financial Tables, http://investor.google.com/financial/tables.html (last visited Feb. 10, 2014).

[12] *See, e.g.*, http://www.upi.com/Science_News/Technology/2014/02/05/European-Commission-and-Googlereach-antitrust-compromise/UPI-67611391631069/ ("Rivals had charged Google with directing a disproportionate amount of searches to its own products and services, leaving them out in the cold, a situation made critical by Google's dominance in the search engine market.").

[13] *See* Press Release, Google, Google to Acquire Nest (Jan. 13, 2004) https://investor.google.com/releases/2014/0113.html ("Tony Fadell, CEO of Nest, said: 'We're thrilled to join Google. With their support, Nest will be even better placed to build simple, thoughtful devices that make life easier at home, and that have a positive impact on the world.'").

hardships and (4) the impact of the injunction on the public interest." *Polymer Technologies, Inc. v. Bridwell*, 103 F.3d 970, 973 (Fed. Cir. 1996). No element is dispositive – "the district court must weigh and measure each factor against the other factors and against the form and magnitude of the relief requested." *Hybritech, Inc. v. Abbott Labs.*, 849 F.2d 1446, 1451 (Fed. Cir. 1988).

B. A preliminary injunction is unquestionably appropriate here.

1. Allure is very likely to succeed on the merits.

The first factor to be considered in determining whether injunctive relief should issue – the likelihood that Allure will prevail on the merits – pertains to patent infringement and patent validity. *Hybritech*, 849 F.2d at 1451. Regarding infringement, the likelihood that Allure will prevail on the merits is determined by comparing the properly construed patent claims with the accused product. *See H.H. Robertson Co. v. United Steel Deck, Inc.*, 820 F.2d 384, 389-90 (Fed. Cir. 1987), *rev'd in part on other grounds*, *Markman* v. *Westview Instruments, Inc*., 52 F.3d 967 (Fed. Cir. 1995). Allure does not need to prove infringement "beyond all question," nor does it need to prove the absence of evidence supporting Nest's defenses. *Id*. Rather, Allure must demonstrate that there is a reasonable probability it will meet its burden of proving infringement at trial. *Id*. at 390. Allure need only demonstrate that at least one claim in one asserted patent is infringed. *Abbot Labs. v. Andrx Pharms, Inc*., 473 F.3d 1196, 1213 (Fed. Cir. 2007). The Court does not resolve the issue of validity at this preliminary stage, but instead must "make an assessment of the persuasiveness of the challenger's evidence, recognizing that it is doing so without all evidence that may come out at trial." *New England Braiding Co. v. A.W. Chesterton Co*., 970 F.2d 878, 882-83 (Fed. Cir. 1992).

Here, the proof of Nest's infringement is straightforward and unassailable. There is little doubt that Nest infringes at least Claim 1 of the '518 Patent, as set forth in the expert Declaration of Joseph C. McAlexander III. (Ex. 5). More particularly, Nest's "Learning Thermostat" is a "smart" thermostat that is designed to lower energy bills by programming itself to learn the user's schedule.

(Ex., 5, ¶ 13). It includes a proximity detection module having a home mode and an away mode and is configured to detect the presence of a user and switch, for example, from the regular scheduled operating mode to an "away" mode when the user has left the area and to switch from the away mode to the regular scheduled operating mode when the presence of the user is detected. (*Id*., ¶ 15). Nest's second generation "Learning Thermostat" includes sensors for proximity. (*Id*., ¶ 15). The device utilizes the proximity sensors and software to automatically switch from normal operation to "away" operation once it detects that the users have left the area. (*Id*., ¶ 15).

According to the "What is Auto-Away?" document on the Nest website, "[t]he Nest Learning Thermostat uses Nest Sense™ (an exclusive combination of sensors and algorithms) to notice when you're away and when you come home. With Auto-Away, the Nest Thermostat turns itself down automatically when you're away to prevent heating or cooling an empty home. Upon your arrival, the Nest Thermostat will return to your regular schedule." *Id*. The claim chart attached as Exhibit A to Mr. McAlexander's Declaration compares the language of the subject claim of the '518 Patent with Nest's "Learning Thermostat" and provides clear evidence of infringement. As set forth therein, *each and every limitation* of Claim 1 of the '518 Patent is found in Nest's "Learning Thermostat." (*See* Ex. 5). Accordingly, there can be little dispute about Allure's strong likelihood of success with respect to its claim of infringement.

The '518 Patent is also unlikely to be subject to any serious validity challenge. Allure is entitled to a statutory presumption that the '518 Patent is valid. 35 U.S.C. § 282. This presumption applies even at the preliminary injunction stage. *See, e.g., Canon Computer Sys. Inc. v. Nu-Kote Int'l, Inc*., 134 F.3d 1085, 1088 (Fed. Cir. 1998) ("a patent is presumed valid, and this presumption exists at every stage of the litigation"). To the extent that Nest challenges the validity of the '518 Patent, Nest bears the burden of proving invalidity at trial by clear and convincing evidence. *Purdue Pharma L.P. v. Boehringer Ingelheim GmbH*, 237 F.3d 1359, 1365 (Fed. Cir. 2001). Moreover,

Nest's burden will be particularly difficult here, where the applicant submitted over 300 prior art references, both U.S. and foreign, and the examiner performed his own independent search thereafter and found additional prior art references and nevertheless granted the patent. Absent a showing to the contrary, Allure is entitled to rely upon that presumption in excluding likely infringers during the pendency of this litigation.

2. Allure will suffer irreparable harm absent an injunction.

There is no dispute that Nest's "Learning Thermostat" is designed to compete with, and take sales away from, EverSense. It does so by misappropriating the patented hallmark of EverSense – proximity control technology. Absent a preliminary injunction, Nest's continued sales of its "Learning Thermostat" during the pendency of this case will inflict substantial and irreparable harm on Allure. The harms that have accrued and will continue to accrue to Allure from Nest's ongoing infringement are such that "no damages payment, however great, could address." *Celsis in Vitro, Inc., v. Cellzdirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012). At a minimum, these include Allure's: 1) loss of market share, goodwill, and other business opportunities; and 2) loss of the benefit of patent exclusivity. The Federal Circuit has recognized each of these forms of damage as irreparable harm that warrant the imposition of injunctive relief. *Robert Bosch, LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1152-54 (Fed. Cir. 2011) (the district court "committed a clear error in judgment" in denying a motion for a permanent injunction where the record contained "undisputed evidence of direct competition in each of the market segments identified by the parties," "unrebutted evidence of loss of market share and access to potential customers," and the patentee suffered "loss of market share, loss of customers, and loss of access to potential customers.").

a) Without an injunction, Allure will suffer irreparable harm because Allure and Nest are direct competitors.

Allure and Nest are direct competitors in a market for the use of the very technology that Allure spent years developing and hundreds of thousands of dollars patenting. Due to Nest's

infringement, Allure is being forced, quite literally, to compete against its own patented technology. (Ex. 2, ¶¶ 24, 27). The effect of Nest's infringement is magnified due to the fact that the market for "smart" thermostats remains in, but will soon emerge from, its infancy. Federal Circuit precedent recognizes numerous forms of irreparable harm flowing from exactly this situation.

First, Allure has already lost and, absent an injunction, will continue to lose substantial market share to Nest, which it may never be able to regain. (Ex. 1, ¶¶ 30-31; 39-40; Ex. 2, ¶ 24). Nest brags that it has installed millions of "Learning Thermostats" and reports indicated that last year, Nest was shipping between 40,000 and 50,000 thermostats per month. One report suggests that Nest – which once claimed to be a "start-up" – is now the number two provider of "smart" thermostats behind Honeywell. Of course, Google's recent plan to acquire Nest for $3.2 billion speaks volumes about its market share. Nest has been able to accomplish this (and prevent Allure from doing so) by infringing Allure's patent. Such loss of market-share alone constitutes irreparable harm as a matter of law and warrants preliminary injunctive relief. *Bosch,* 659 F.3d at 1151 (a court "commit[s] a clear error of judgment" when it fails to find irreparable harm in the face of "evidence of . . . parties' direct competition" and "loss in market share and access to potential customers resulting from [the defendant's] introduction of infringing" products); *02 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, No. 2011-1054, 2011 WL 5601460, at *8-9 (Fed. Cir. Nov. 18, 2011).

The loss of market share is particularly harmful to Allure due to the unique nature of the "smart" thermostat market. The market for thermostats, in general, is unique in that thermostats, due to their relatively long product life, are not an item that consumers purchase frequently. (Ex. 1, ¶ 41). Once a customer relationship is formed, another competitor will likely not have another opportunity to capture that customer for years. (*Id.*) Stated differently, a lost sale to Nest is more than just one lost transaction or lost dollars – if Allure loses sales to Nest's infringing "Learning Thermostat," it will be almost impossible to establish market share and to quantify its lost business

opportunities. (*Id*.) *See Hybritech*, 849 F. 2d at 1455 (finding evidence of irreparable harm where infringer prevented a patentee from "establish[ing] a market position and creat[ing] business relationships in the market"); *Celsis in Vitro*, 664 F.3d at 930 ("There is no effective way to measure the loss of sales or potential growth—to ascertain the people who do not knock on the door or to identify the specific persons who do not reorder because of the existence of the infringer.").

The irreparable harm to Allure is only magnified by the fact that the market for "smart" thermostats is in its infancy and is at an absolutely critical juncture as consumers' long-term preferences and purchases may be determined to a great extent by their first "smart" thermostat. (Ex. 2, ¶ 25). It has been widely recognized that loss of market share is often long-term or even permanent due to the effects of brand loyalty and switching costs associated with changing products. *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994) ("[W]hen the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor . . . the irreparable injury prong is satisfied.") (citations omitted); *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 596 (3d Cir. 2002) ("In a competitive industry where consumers are brand-loyal, we believe that loss of market share is a potential harm which cannot be redressed by a legal or an equitable remedy following a trial.") (internal quotations and citations omitted). The Federal Circuit has also recognized irreparable harm as a result of the "incumbency effect" created when a first-time customer purchases an infringing product. *Broadcom Corp. v. Emulex Corp.*, 732 F.3d 1325, 1337 (Fed. Cir. 2013). The potential permanency of Allure's lost market share is only heightened in this case, as at least one federal court has recognized with respect to "smart" technology, the "initial decision regarding which product to purchase" may be even more important because the "potential customers that [the patentee] loses to [the infringer] may have long-term effects that are difficult to calculate and may not be recaptured." *Apple, Inc. v. Samsung Elecs. Co.*,

2011 U.S. Dist. LEXIS 139049, at *64 (N.D. Cal. Dec. 2, 2011).

Unless enjoined from making and selling its "Learning Thermostats," Allure and Nest will continue to compete for sales of first-time "smart" thermostats with the same limited number of customers. The fact that Allure and Nest directly compete in what essentially amounts to a "two-player market" for proximity thermostats strongly favors an injunction under Federal Circuit precedent. *See, e.g., Presidio Components, Inc. v. Am. Tech. Ceramics Corp.*, 702 F.3d 1351, 1363 (Fed. Cir. 2012) ("Direct competition in the same market is certainly one factor suggesting strongly the potential for irreparable harm without enforcement of the right to exclude."); *Bosch*, 659 F.3d at 1151 ("the existence of a two-player market may well serve as a substantial ground for granting an injunction" and "creates an inference that an infringing sale amounts to a lost sale for the patentee."). Like the Federal Circuit, this Court has recognized that "direct competition in a marketplace weighs heavily in favor of a finding of irreparable injury." *i4i Ltd. P'ship v. Microsoft Corp.*, 670 F. Supp. 2d 568, 599 (E.D. Tex. 2009); *TiVo Inc. v. EchoStar Commc'ns Corp.*, 446 F. Supp. 2d 664, 669 (E.D. Tex. 2006) (noting the importance of direct competition as evidence of irreparable harm), *aff'd in part, rev'd in part and remanded*, 516 F.3d 1290 (Fed. Cir. 2008); *see also Baker Hughes Inc. v. Nalco Co.*, 676 F. Supp. 2d 547 (S.D. Tex. 2009) ("the loss of sales to a direct competitor evinces irreparable harm."). Direct competition causes irreparable injury because "[c]ompetitors change the marketplace. Years after infringement has begun, it may be impossible to restore a patentee's . . . exclusive position by an award of damages and a permanent injunction. Customers may have established relationships with infringers. . . [and] [r]equiring purchasers to pay higher prices after years of paying lower prices to infringers is not a reliable business option." *Polymer Techs v. Bridwell*, 103 F.3d 970, 975–76 (Fed. Cir. 1996). This Court has also recognized that the loss of market share, revenue, and goodwill that will almost certainly result from infringement by a direct competitor are often incalculable and irreparable. *Smith & Nephew, Inc. v.*

Arthrex, Inc., No. 2:07-cv-335-TJW-CE, 2010 WL 2522428, at *6-7 (E.D. Tex. 2010).

As in the cases cited above, Allure and Nest are direct competitors in what is essentially a two-competitor market for proximity detection thermostats due to Nest's infringement. (Ex. 2, ¶¶ 24, 27). Other "smart" thermostats makers may make thermostats that can be controlled remotely but not with proximity detection. If not for Nest's infringement, Allure would be the only thermostat manufacturer to offer a thermostat with Allure's patented proximity control technology. Each sale that Nest makes as a result of its infringement is a sale lost to Allure. (Ex. 1, ¶ 41). By utilizing Allure's patented proximity control technology and marketing it as Nest's own "Auto-Away" feature, Nest has robbed Allure of substantial market share, an opportunity to do business with retail and energy company giants, including Reliant, the millions of customers who have purchased Nest's infringing thermostat, and the attendant ability to generate and expand customer goodwill. (Ex. 1, ¶¶ 28-43; Ex. 2, ¶¶ 19-29). Nest is continuing, to this day, to build its reputation, goodwill, customer-base, and brand-loyalty through the use of Allure's patented technology. In so doing, Nest is permanently depriving Allure of is right to capture these benefits using its own patented technology. (Ex. 1, ¶¶ 30; Ex. 2, ¶¶ 23, 25, 29). If Nest's infringement is not enjoined, Allure will lose the opportunity to establish customer loyalty and will suffer incalculable damages and irreparable harm. An award of damages, no matter how great, could not possibly compensate Allure for what Nest is taking, which will extend permanently and indefinitely into the future absent an injunction due to the nature of the products at issue. Moreover, with access to Google's resources, Nest and Google will continue to devalue Allure's patents and technology having unlimited access to Google's ad platform and access to billions in cash reserves, this will put Allure at an unquantifiable competitive disadvantage as market share will continue to erode and become

permanently lost to Google and Nest.[14] (Ex. 1, ¶ 31).

b) Allure's patent provides a right to exclude.

In addition, Nest's continued infringement itself constitutes irreparable harm. Indeed, Allure's statutory right to exclude infringers, such as Nest, is "the principal value of [its] patent," *Reebok Int'l Ltd. v. J. Baker, Inc*., 32 F.3d 1552, 1557 (Fed. Cir. 1994), and is a right rooted in the Intellectual Property Clause of the Constitution. *Bosch*, 659 F.3d at 1148–49 (citing U.S. Const. art. I, § 8, cl. 8). Because "the very nature of the patent right is the right to exclude others," *Smith Int'l Inc. v. Hughes Tool Co*., 718 F.2d 1573, 1581 (Fed. Cir. 1983); *see also Bell & Howell Documents v. Alteck Systems*, 132 F3d 701, 708 (Fed Cir 1997), and because Allure has that right for only a limited time, Allure's inability to vindicate the right during the term of the '518 Patent constitutes harm. *H.H. Robertson*, 820 F.2d at 390. The Federal Circuit recently reaffirmed that courts should consider the harm a patentee suffers simply by being unable to vindicate the right to exclude. *Bosch*, 659 F.3d at 1148–49. While such harm "alone cannot justify an injunction, it should not be ignored either." *Id*. at 1149. This is particularly so where, as here, the patentee and the alleged infringer are direct competitors. *Id*. at 1149–51 (noting that harm to a patentee is particularly weighty in "traditional cases" involving an infringer competing directly with the patentee).

3. The harm to Allure if an injunction is not granted outweighs any harm to Nest or third-parties.

The ongoing irreparable harm to Allure far outweighs any potential harm to Nest, which is willfully infringing the '518 Patent. In balancing the hardships, "[t]he magnitude of the threatened injury to the patent owner is weighed, in the light of the strength of the showing of likelihood of

[14] Nest has also caused other forms of irreparable harm to Allure. For instance, Allure has lost significant opportunities to obtain outside investment due to Nest's infringement. (Ex. 1, ¶ 38). The Federal Circuit has also recognized that the reduction in research and development activities is another type of irreparable harm. *Bio-Tech. Gen. Corp. v. Genentech, Inc*., 80 F.3d 1553, 1566 (Fed. Cir. 1996). Allure has also been forced to drop the price of its product to compete against its own patented technology. (Ex. 1, ¶ 38).

success on the merits, against the injury to the accused infringer if the preliminary decision is in error." *H.H. Robertson, Co*., 820 F.2d at 390 (emphasis added). The Federal Circuit has emphasized that where there is a strong showing of irreparable harm and likelihood of success, the balance of hardships favors the patentee. *Celsis In Vitro*, 664 F.3d at 922; *PPG Indus., Inc. v. Guardian Indus. Corp*., 75 F.3d 1558, 1567 (Fed. Cir. 1996). Here, Allure has shown that it is highly likely to succeed in this case, and, absent a preliminary injunction, will be irreparably injured by Nest's infringement. The Federal Circuit has also recognized that "substantial hardship" occurs when one must "compete against its own patented invention." *Bosch*, 659 F.3d at 1156.

In contrast, Nest will not suffer any legitimate or irreparable damage – any hardship to Nest comes from its own decision to make and sell a product that infringes. "Simply put, an alleged infringer's loss of market share and customer relationships . . . does not rise to the level necessary to overcome the loss of exclusivity experienced by a patent owner due to infringing conduct." *Pfizer, Inc. v. Teva Pharm. USA, Inc.*, 429 F.3d 1364, 1382 (Fed. Cir. 2005). And the commercial success of Nest's infringing product is not a legitimate consideration – Nest is "not entitled to continue infringing simply because it successfully exploited its infringement." *i4i*, 598 F.3d at 863 (citations omitted). "A party cannot escape an injunction simply because its primary product is an infringing one." *Bosch*, 659 F.3d at 1156. Nor is it relevant that Nest might have to expend resources to redesign its product; such expenditures are "irrelevant" because they are "consequences" of Nest's decision to use Allure's patented technology in the first place. *Id*. Given the magnitude of the threatened injury to Allure and the strength of the showing of likelihood of success by Allure, the balance of hardships strongly favors preliminary relief. *H.H. Robertson Co. v. United Steel Deck, Inc*., 820 F.2d 384, 390 (Fed. Cir. 1987); *overruled on other grounds, Markman v. Westview Instruments, Inc*., 52 F.3d 967 (Fed. Cir. 1995). Moreover, Google's acquisition of Nest eliminates any possible argument that the balance of hardships tips in Nest's favor. Allure must now compete

against a $50 billion company (Google) to promote and sell its *own patented technology*.

4. A preliminary injunction advances the public interest.

The public interest strongly supports the enforcement of Allure's patent rights. *See PPG Industries, Inc. v. Guardian Industries Corp*., 75 F.3d at 1567 (district court did not err in ruling that the "strong public policy favoring the enforcement of patent rights" warranted injunctive relief). Indeed, the patent system is designed to incentivize innovators, such as Allure, to invest in research and development. *See Abbott Labs. v. Sandoz, Inc.*, 544 F.3d 1341, 1363 (Fed. Cir. 2008) ("The patent laws promote . . . progress by offering a right of exclusion for a limited period as an incentive to investors to risk the often enormous costs in terms of time, research, and development."); *Abbott Labs. v. Andrx Pharm., Inc*., 452 F.3d 1331, 1348 (Fed. Cir. 2006). Denying patent owners the right to enforce their patent rights diminishes these incentives. Allure invested considerable time and resources developing EverSense and was awarded several patents, including the '518 Patent, to protect these efforts. Allowing Nest to continue its infringement in willful disregard of Allure's patent rights not only will irreparably harm Allure, but will also violate the public's strong interest in encouraging innovation and protecting intellectual property rights. Finally, there is no "critical public interest that would be injured by the grant of preliminary relief." *Hybritech, Inc. v. Abbott Labs*., 849 F.2d 1446, 1458 (Fed Cir. 1988). On the other hand, an injunction prohibiting Nest's continuing infringement – which would only cause Nest to stop making and selling its infringing thermostats – will not have any negative impact on the public.

IV. REQUEST FOR ORAL ARGUMENT

Allure respectfully requests that the Court entertain oral argument on the present Motion.

V. CONCLUSION

For the foregoing reasons, Allure respectfully requests that this Court grant its Motion and enter a Preliminary Injunction.

Respectfully submitted,

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Dated: February 11, 2014

Attorneys for Plaintiff Allure Energy, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on February 11, 2014. All other counsel of record will be served via facsimile or first class mail.

/s/ *John S. Artz*

CERTIFICATE OF CONFERENCE

This is to certify that counsel have complied with the meet-and-confer requirements set forth in Local Rule CV-7(h) and this Motion is opposed. The personal conference required by the rule was conducted on February 11, 2014 by e-mail. The undersigned counsel participated in the conference on behalf of Plaintiff and Eric M. Albritton participated as counsel for Defendants. The factual basis for the Motion was also discussed by the parties' counsel on February 10, 2014. Allure's counsel articulated the basic components of the present Motion and counsel for Nest expressed disagreement with the Motion and any basis for it, such that agreement could not be reached. The discussions conclusively ended in an impasse, necessitating the filing of this Motion.

/s/ *John S. Artz*