SMITH KATZENSTEIN JENKINS LLP

August 28, 2020

VIA CM/ECF
The Honorable Leonard P. Stark
J. Caleb Boggs Federal Building
844 N. King Street
Room 6124, Unit 26
Wilmington, DE 19801-3555

Re: *Arendi S.A.R.L. v. Google LLC*, C.A. No. 13-919-LPS

Dear Chief Judge Stark:

In connection with the September 4, 2020 discovery dispute teleconference in the above-referenced action (D.I. 215), Arendi S.á.r.l. ("Arendi") submits this opening letter and requests that the Court permit Arendi's only two offices, Atle Heløy and Violette Heger-Hedløy, to access sale and download counts for the accused products. Arendi does not seek access to financial documents, just the unit numbers; yet, Google has designated these basic figures as "Confidential Outside Counsel Only." Although Google bears the burden of demonstrating the propriety of this designation, Google has not explained why these summary figures are "extremely confidential and/or sensitive in nature . . . and likely to cause economic harm or significant competitive disadvantage" if shared with Arendi. Google's unprincipled refusal to grant access to this information prevents Arendi from knowing the scale of its own case and making informed decisions concerning its prosecution.

Facts:

Pursuant to the Protective Order, the "Confidential Outside Counsel Only" designation is reserved for a narrow slice of material produced in this case: "CONFIDENTIAL INFORMATION that is extremely confidential and/or sensitive in nature and that the Producing Party reasonably believes the disclosure of which to anyone other than the persons or entities listed in paragraphs 6.C.4.a, b, d, e, f, g, and h is likely to cause economic harm or significant competitive disadvantage to the Producing Party." D.I. 16-1, at ¶6.D.1, p. 8. Arendi is not among the persons or entities listed in those paragraphs. *See* D.I. 16-1, at ¶6.C.4.a, b, d, e, f, g, & h (p. 7). The Protective Order is clear that "[t]he burden of demonstrating the confidential nature of any information shall at all times be and remain on the designating Party." D.I. 16-1, at ¶6.D.1, p. 8. The Protective Order emphasizes that a "Receiving Party may at any time request that the Producing Party cancel or modify the Protected Information designation . . . ." D.I. 16-1, at ¶9.A, p. 15, and "for the avoidance of doubt" further permits the Receiving Party to seek access to Confidential Outside Counsel Only information if its counsel "determines that [it] is in the best interests of its client to review produced documents relating to damages," D.I. 16-1, at ¶6.D.1, p. 8.

Arendi alleges that certain Google applications and mobile devices infringe U.S. Patent No. 7,917,843 ("the '843 Patent"). Google has designated the *number* of application

downloads and the *number* of mobile devices sold since the issuance of the '843 Patent to be Confidential Outside Counsel Only. By designating those unit totals as Confidential Outside Counsel Only, Google barred Arendi from accessing those figures. As a result, Arendi does not know the scale of its own lawsuit.

On July 20, 2020, counsel for Arendi wrote to opposing counsel, requesting to share the disputed "unit/user/download" information with its client. Ex. A. On July 23, 2020, Google rejected Arendi's request. *Id.* The parties met and conferred on July 27, 2020. Google provided no real explanation of why disclosing the aggregate unit figures to Arendi "is likely to cause economic harm or significant competitive disadvantage to" Google—despite inquiries from Arendi's counsel. Google argued baldly that unit numbers are sensitive competitive information but did not explain how Arendi—a non-practicing entity—would benefit competitively from access to this information. Nor did Google explain how providing access to mere numbers, not any sensitive documents, would prejudice Google or place it at a competitive disadvantage.

Rather than justify the designation, Google asserted that Arendi "waived" the right to request access to the data because it had previously requested sales, user and revenue data for the Accused Products. *See, e.g.*, Ex. A (emails dated July 23 at 6:56 PM and February 23 at 12:10 PM). The request to which Google referred was an email of February 23, 2020, where Arendi's counsel asked to share "unit sales/users and revenue for the Accused Products" with its client. Ex. A.

Arendi did not limit its request for this information to Google. Blackberry, Oath and Sony, which are defendants in related cases pending before the Court, have each granted Arendi's request to access comparable unit data.

Analysis:

Under the Protective Order, "[t]he burden of demonstrating the confidential nature of any information shall at all times be and remain on" Google as the designating party. D.I. 16-1, at ¶6.D.1, p. 8. Specifically, Google must show that the unit data is "*extremely* confidential and/or sensitive in nature and that the Producing Party reasonably believes the disclosure" to Arendi "is likely to cause *economic harm or significant competitive disadvantage* to" Google. D.I. 16-1, at ¶6.D.1, p. 8. These burdens placed on Google by the Protective Order are consonant with those required in this Circuit, which mandates that "[t]he burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the order." *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786–87 (3d Cir. 1994); *see also id.* at 787 n.17 (noting that even when an umbrella protective order is appropriately entered, "[a]fter delivery of the documents, the opposing party would have the opportunity to indicate precisely which documents it believed not to be confidential, and the party seeking to maintain the seal would have the burden of proof with respect to those documents.").

Google has not even tried to meet its burden—offering bare assertions rather than evidence or explanation of why sharing the annual number of downloads and sales *with Arendi* would likely cause it "economic harm or significant competitive disadvantage." Arendi has asked to see only top-level download and sales data; it does not even seek basic

financial information about the products such as profit and loss data. Not only is the unit data aggregated on an annual basis, but with respect to devices, the data that Arendi seeks to access does not even identify Accused Products individually. Rather, it aggregates sales of multiple Google devices into five broad categories. With respect to app downloads, Google itself publishes a running tally of the total number of installs for each app on its Play Store, Ex. B, belying its contention that the data Arendi seeks is "extremely" sensitive and likely to cause "economic harm or significant competitive disadvantage."[1]

Google must show that the disclosure *to Arendi* would give rise to its hypothetical injury. Arendi has not requested the full de-designation of the unit data; rather, it seeks access for its officers Atle Hedløy and Violette Heger-Hedløy to enable their intelligent prosecution of Arendi's case. Neither Arendi nor its two officers are competitors of Google and, therefore, disclosure does not pose any competitive risk to Google.

Blackberry, Oath and Sony have each agreed to grant Arendi access to their comparable sales or download data. Like Google, each of these entities are defendants in a related case brought by Arendi to enforce its rights under the same '843 Patent. Unlike Arendi, each of these entities directly competes with Google's lines of software or mobile devices. The agreement of these similarly situated entities undermines Google's bare assertion that releasing unit numbers are "extremely sensitive" and their release to Arendi would result in "economic harm or significant competitive disadvantage."

Whereas Google has offered no explanation of how its own interest would be harmed, Google's embargo of unit data does harm Arendi's ability to manage its own actions and impedes the fairness and efficiency of this litigation. Arendi, for example, cannot intelligently discuss with its counsel how to focus its resources in this case; it cannot intelligently narrow the issues or products involved; and it can neither evaluate the propriety of settlement nor formulate a reasonable settlement demand.

Recognizing that it cannot justify its confidentiality designation, Google raises the specter of waiver. Google overlooks that the Protected Order states, "A Receiving Party may **at any time** request that the Producing Party cancel or modify the Protected Information designation with respect to any document or information contained therein." D.I. 16-1, ¶ 9.A (p. 15) (emphasis added). Arendi is availing itself of that right.

Moreover, the immediate impetus for Arendi's request both in February and July was the impending deadline for opening expert reports. Those reports had been due on April 24, D.I. 206, but were delayed to August 7 due to complications arising from the ongoing COVID-19 pandemic, D.I. 209. Thus, even if the Protective Order did not explicitly state that a party could request modification of a designation "at any time," Arendi's request is timely under the circumstances.

Therefore, Arendi respectfully asks that the Court grant Arendi's officers, Atle Hedløy and Violette Heger-Hedløy, access to the requested unit information.

[1] Regrettably the data published on Play Store cannot satisfy Arendi's needs in this lawsuit. For example, the data is not limited to the relevant damages period or geographic area.

Respectfully,

/s/ Eve H. Ormerod

Eve H. Ormerod (No. 5369)

cc: Clerk of Court (via CM.ECF)
All Counsel of Record (via CM/ECF)