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September 1, 2020

VIA ELECTRONIC-FILING
The Honorable Leonard P. Stark
J. Caleb Boggs Federal Building
844 N. King Street
Wilmington, DE 19801

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

Dear Chief Judge Stark:

Pursuant to the Court's Order (D.I. 215), Defendant Google LLC ("Google") submits this letter brief in response to Plaintiff Arendi S.à.r.l.'s ("Arendi") request that the Court permit Atle Hedløy and Violette Heger-Hedløy, the sole officers of Arendi, to access Google's highly confidential information. The Court should deny Arendi's request.

Background: During discovery, Google produced information appropriately designated as Highly Confidential under the Protective Order, including internal, detailed device sales and app download information. In February 2020, counsel for Arendi requested permission to share "sales/users and revenue for the Accused Products" with the Hedløys. (D.I. 216-1.) Google timely objected to the request. (*Id.*) Arendi did not respond until approximately five months later, in July 2020, when it renewed its request. (*Id.*) Google again timely objected (*id.*), which led to a joint discovery dispute letter (D.I. 212). In its letter brief, Arendi requests the Hedløys be given access to Google's highly confidential "unit information," which Arendi defines as "the *number* of application downloads and the *number* of mobile devices sold[.]" (D.I. 216 at 1-2.)

Analysis: At its heart, Arendi's challenge is not to the designation of Google's confidential documents, but rather a request to modify the Protective Order to provide special "access for its officers" to certain information in the Highly Confidential documents. (D.I. 216 at 3.) "Good cause" does not exist for this request. Moreover, the information was properly designated and there is risk of harm to Google if the information is disclosed to the Hedløys.

Good Cause Does Not Exist to Modify the Protective Order

"Good cause" is required to modify the Protective Order. *PhishMe, Inc. v. Wombat Security Techs., Inc.*, C.A. No. 16-403-LPS-CJB, 2017 WL 4138961, at *2 (D. Del. Sept. 8, 2017). Here, Arendi has posited some vague notion that the Hedløys cannot manage the litigation and intelligently discuss the case with counsel without knowing exact sales figures and download information. Arendi has not cited a single case where detailed, non-public sales and download information was required to be provided to a patent holder's officers as part of case evaluation. Arendi is represented by experienced counsel who can convey non-confidential information about the magnitude of the sales/downloads of the accused products in order to allow Arendi to make

intelligent decisions, much as Google must similarly rely on its counsel. It is not clear—and Arendi never explains—how unit information would allow Arendi to make the decisions on resources, accused products, and settlement for which Arendi claims it is required. (D.I. 216 at 3.) Further, Arendi's long delay in seeking this information defeats Arendi's claim of the purported "need" for its officers to review Google's confidential information.[1]

Moreover, even if Arendi could articulate good cause, as discussed below, disclosure to the Hedløys is improper because they are involved in "competitive decisionmaking" such that it would "present an unacceptable risk of inadvertent disclosure or competitive misuse of confidential information[.]" *PhishMe*, 2017 WL 4138961, at *3 (citing *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1467–68 (Fed. Cir. 1984)); Ex. 1 (*T-Jat Sys. 2006 Ltd. v. Expedia, Inc., et al.*, C.A. No. 16-581-RGA, ECF No. 87 (D. Del. Oct. 19, 2018)) at 4-6 (rejecting claim that non-attorney employees needed access to confidential materials for "case strategy"). Arendi has not offered evidence, such as declarations from the Hedløys, to the contrary. Providing Google's confidential information to Arendi's officers creates a high risk for inadvertent disclosure or competitive misuse, and should not be permitted.

The Disputed Information Is Highly Confidential and Has Not Been Publicly Disclosed

The precise amount of app downloads and unit sales of its devices is commercially sensitive information that Google does not disclose publicly because it could be used improperly to target Google or its products. Indeed, the Protective Order specifically presumes that such information deserves the highest confidentiality designation, which would prevent disclosure to the Hedløys: "The ***parties agree*** that the following information, if non-public, shall be ***presumed*** to be 'CONFIDENTIAL OUTSIDE COUNSEL ONLY': (a) trade secrets, marketing, ***financial, sales, web traffic***, . . . or ***customer data or information***[.]" (D.I. 16-1 ¶ 6(D)(1) (emphasis added).) This presumption is consistent with the long-held view that internal financial information (such as the type in dispute here) is the type of competitively sensitive information that deserves protection. *See e.g., Mosaid Techs. Inc. v. LSI Corp.*, 878 F. Supp. 2d 503, 510 (D. Del. 2012) (granting request for redaction of financial information from a transcript); *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 727 F.3d 1214, 1224-26 (Fed. Cir. 2013) (finding court abused discretion in not sealing financial information); *see also* Fed. R. Civ. P. 26(c)(1)(G) (providing that courts may grant a protective order provision that allows for "commercial information not [to] be revealed or [to] be revealed only in a specified way").

In essence, Arendi is seeking to modify the Protective Order to allow the Hedløys access to Google information that was designated as Highly Confidential under the Protective Order, not challenge

[1] Arendi raised the issue in February 2020 and Google responded within the requisite timeframe. (D.I. 216-1.) While Arendi argues that it may challenge designations "at any time" (D.I. 216 at 3), it ignores that the Protective Order provision refers to an ***initial*** challenge of the designation (D.I. 16-1 ¶ 9(A)). Once a party raises a challenge to a designation, a specific procedure is laid out in the Protective Order that requires, *inter alia*, that "[i]f an agreement cannot be reached within five (5) business days of the conference, the Receiving Party ***shall request*** that the Court cancel or modify a designation." (*Id.* ¶ 9(B) (emphasis added).) There are no allowances for serial or repeat challenges to designations. (*See id.*) Arendi was required to move the Court nearly six months ago (D.I. 216-1) and its failure to do so is a waiver.

Google's designation.[2] (D.I. 216 at 3 ("Arendi has not requested the full de-designation of the unit data[.]").) Arendi attempts to justify the disclosure by arguing that some of the information it now wants to show its officers is public information. (D.I. 216 at 3.) However, the information Arendi cites shows only high-level, inexact numbers of app downloads (*i.e.*, "500M+") (D.I. 216-2), and it contains no unit information for the accused devices. This public information is a far cry from the detailed and targeted information that Google produced in this litigation. Arendi itself recognizes that the public information is general and "not limited to the relevant damages period or geographic area." (D.I. 216 at 3 n.1.) Axiomatically, if the public information were sufficient, Arendi would not be seeking to disclose Google's Highly Confidential, internal information to the Hedløys.

Arendi makes much of the fact that some defendants have allegedly agreed to allow the Hedløys access. (D.I. 216 at 2.) This argument is unavailing. Arendi noticeably ignores LG Electronics, Inc., Apple Inc., and Motorola Mobility LLC in its list of defendants, suggesting they have not agreed. Further, there is no evidence before the Court that such information is comparable to the information sought from Google, or that the identified defendants maintain their information as Google does. Finally, what others choose to do with their information is irrelevant to the protection of Google's confidential information under the Protective Order. (D.I. 16-1.)

The Hedløys Are Competitors of Google and Disclosure to Them Could Harm Google

Arendi also argues that it/Hedløys are not competitors of Google, thus disclosure of the information to them would not harm Google. Arendi's argument has been rejected in this District. Arendi, through the Hedløys, is operating as a patent licensing/assertion company that has been pursuing Google for damages for many years. Providing the Hedløys with detailed information about Google's sales and app downloads would provide the Hedløys with detailed insight regarding Google's products and allow the Hedløys to target Google (and/or other Android device manufacturers) in future licensing/assertion actions. This knowledge could lead to economic harm and significant competitive disadvantage to Google, and also risks inadvertent disclosure.

This District has recognized that through the assertion of patents, patent owners/company principals are competitors of a defendant, like Google, because they are "essentially declaring that Defendants are improperly competing with it in the marketplace, in contravention of [the patent owner's] patent monopoly on that technology." *See Blackbird Tech LCC v. Service Lighting & Elec. Supplies, Inc.*, C.A. No. 15-53-RGA, 2016 WL 2904592, at *4 (D. Del. May 18, 2016). For Arendi "to seek to hold [Google] liable for improperly competing in the marketplace and turn around and say it in no way competes with [Google] is too convenient, and other courts have similarly given little weight to such arguments." *Id.* (citing *ST Sales Tech Holdings, LLC v. Daimler Chrysler Co.*, Civil Action No. 6:07–CV–346, 2008 WL 5634214, at *6 (E.D. Tex. Mar. 14, 2008)). Thus, the *Blackbird* court required significant restrictions on Blackbird's officers if they wanted to receive confidential information, including restrictions on further lawsuits. *Id.* at *6. The same rationale concerning competition applies here, and the most efficient way to protect Google from potential harm is by adhering to the Protective Order and prohibiting disclosure of the requested information.

[2] Arendi's sole case citation is inapposite for the same reason: Arendi does not challenge the confidentiality designation of the underlying documents. (D.I. 216 at 2.)

Respectfully,

/s/ David E. Moore

David E. Moore

DEM:nmt/6856283/40549

Enclosures
cc: Counsel of record (*via electronic mail*)