

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

ARENDI S.A.R.L.,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 12-1601-LPS
v.	)	
	)	<b>JURY TRIAL DEMANDED</b>
MOTOROLA MOBILITY LLC F/K/A	)	
MOTOROLA MOBILITY, INC.,	)	
	)	
Defendant.	)	
<hr/>		
ARENDI S.A.R.L.,	)	
	)	
Plaintiff,	)	C.A. No. 13-919-LPS
	)	
v.	)	<b>JURY TRIAL DEMANDED</b>
	)	
GOOGLE LLC,	)	
	)	
Defendant.	)	

**LETTER TO THE HONORABLE LEONARD P. STARK FROM  
DAVID E. MOORE, ESQUIRE**

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Dated: December 28, 2020  
6981645 / 39729

Dear Chief Judge Stark:

Arendi's response (Google D.I. 242, Motorola D.I. 235) to Google's and Motorola's motion to strike confirms that (1) prior to expert reports, Arendi's *sole* mention of the doctrine of equivalents ("DOE") was in its boilerplate Complaint allegations, which included no explanation or analysis of any kind; (2) Arendi did not identify any DOE theory in its 4(a) disclosures and 4(c) infringement contentions; (3) Arendi did not disclose DOE in response to Defendants' interrogatory explicitly seeking any Arendi DOE theories; and (4) Arendi presented detailed DOE theories and analyses for the first time in the cases in its expert's *reply* reports on purported infringement (the "Smedley Replies"). This Court's early disclosure rules in patent cases are meant to prevent the surfacing of complicated and nuanced DOE arguments after the close of fact discovery. Allowing Arendi to inject and pursue new DOE theories at this late stage of the case would unfairly disadvantage defendants Google and Motorola and reward Arendi's gamesmanship. Instead, the Court should strike Arendi's DOE theories from this case as a proper remedy for Arendi's failure to articulate any DOE theories through seven years of litigation.

The only documents that Arendi can identify in its response to suggest disclosure of DOE prior to the Smedley Reports are the Complaints filed in 2013 and 2018. *See, e.g.*, D.I.<sup>1</sup> 242, p. 1. Specifically, Arendi's response identifies only the Complaints' boilerplate reference to infringement "'literally or under the doctrine of equivalents.'" D.I. 1 at ¶ 19." *Id.* But the disclosure and contentions rules in this District exist precisely because conclusory and boilerplate allegations in a complaint typically provide little, if any, explanation or analysis and generally are not sufficient to disclose plaintiff's infringement theories, including based on DOE.<sup>2</sup> *See Sonos, Inc. v. D&M Holdings Inc.*, C.A. No. 14-1330-WCB, 2017 WL 5633204, at \*1 (D. Del. Nov. 21, 2017) ("a boilerplate reservation of right to assert the doctrine of equivalents" was insufficient to allow a plaintiff "to present a doctrine of equivalents theory of infringement at trial"); *Nazomi Comm'ns, Inc. v. Microsoft Mobile Oy*, 597 Fed. Appx. 1075, 1078-79 (Fed. Cir. 2014) (affirming exclusion of DOE where plaintiff "only provid[ed] boilerplate language").

Arendi effectively concedes that following the Complaints, it did not disclose or explain any DOE theories in any way prior to expert reports. Indeed, Arendi admits that it did not even mention DOE in its 4(a) and 4(c) disclosures, including in its infringement contentions and charts, let alone provide any specific explanations as to how the accused products might infringe under DOE. *See, e.g.*, D.I. 242, p. 1-2. Given that these disclosures, contentions and charts are specifically intended to alert defendants to the theories a plaintiff is pursuing (and to guide discovery on that basis), the absence of any discussion of DOE in the 4(a) and 4(c) disclosures – and the failure of Arendi to amend its contentions to add any DOE theories and explanations before the close of fact discovery – is dispositive. *Intellectual Ventures I LLC v. AT&T Mobility LLC*, C.A. No. 13-1668, 2017 WL 658469, at \*3, 6 (D. Del. Feb. 14, 2017) (granting defendants' motion to strike portions of expert's report that injected new DOE infringement theories into case where contentions did not identify an equivalent for the "application-aware" limitation or explain the DOE theory); *Finjan Inc. v. Rapid7, Inc.*, C.A. No. 18-1519, 2020 WL 5798545, at \*3, 4 (D. Del. Sept. 29, 2020) (striking DOE opinions never raised in infringement contentions). Arendi's claim that its general accusation of "infringement" somehow disclosed DOE, even though the contentions do not reference DOE or substantively explain any DOE theory, is nothing more than a self-serving, after-the-fact effort to escape the consequences of Arendi's lack of DOE disclosure. *Finjan Inc.*, 2020 WL 5798545, at \*4 ("Finjan argues that its new DOE theories are supported by its previously disclosed literal infringement theories accusing the same functionality. But DOE theories of infringement are separate and distinct from theories of literal infringement.") Infringement contentions would be meaningless if a plaintiff could simply say, after fact discovery, that its general accusation of "infringement" inherently disclosed all possible theories – direct or indirect, literal or DOE.

<sup>1</sup> All D.I. references are to 13-cv-919 unless otherwise noted.

<sup>2</sup> [https://www.ded.uscourts.gov/sites/ded/files/pages/Electronic%20Discovery%20Default%](https://www.ded.uscourts.gov/sites/ded/files/pages/Electronic%20Discovery%20Default%20Rules.pdf)

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Arendi further admits that Google and Motorola served an interrogatory specifically asking whether, and on what basis, Arendi was asserting DOE. *See, e.g.*, Google D.I. 242, p. 1. Arendi concedes that it failed to identify any DOE theory or explanation in its response to Defendants' interrogatory, and instead directed Google and Motorola to the contentions, which undisputedly did not assert any theory based on DOE. *Id.* ("Arendi objected that the interrogatory was 'premature to the extent it purport[ed] to require Arendi to disclose materials, such as infringement contentions and expert materials, prior to the time they are due'" (emphasis added).) Arendi's argument that Google and Motorola should have challenged Arendi's responses, demanded supplemental responses, moved to compel, or otherwise sought judicial relief makes no sense. Of course Google and Motorola did not move to compel explanation of Arendi's unknown and undisclosed DOE theory because based on the contentions, the interrogatory responses, and every other disclosure during fact discovery, Google and Motorola had no idea that Arendi was secretly nursing DOE theories that needed to be pried free. Google and Motorola were genuinely surprised to see such new theories couched as "expert opinions" in the Smedley Reports.

Importantly, in an effort to justify its lack of disclosure and explanation of any DOE theories prior to the Smedley Replies, Arendi improperly treats DOE as though it were a defensive theory that could only be formulated after Arendi received Defendants' non-infringement report responding to Dr. Smedley's expressed theories. *See, e.g.*, Google D.I. 243 at 2-3. DOE is, however, an offensive theory of infringement that is the plaintiff's (Arendi's) burden to disclose and prove. Had Arendi properly disclosed and explained a DOE theory during fact discovery and in Dr. Smedley's opening report, Google and Motorola could have explored the facts central to such theory, and Dr. Rinard could have analyzed and rebutted that theory. But Arendi did neither. Arendi attempts to excuse its late disclosure based on the false assertion that Dr. Rinard somehow advanced "novel claim constructions." But Dr. Rinard merely applied the Court's constructions to the accused technologies to conclude that Google and Motorola do not infringe. *See, e.g.*, D.I. 242, at 2 (applying the Court's construction of "a document" as a "word processor, spreadsheet or similar file" and opining that an accused database is not a "file"). In any event, even if Dr. Rinard had presented new claim constructions (he did not), Arendi's sole cited case does not support the notion that such a new construction somehow permits a plaintiff to present DOE for the first time in the case in a reply expert report. *EON Corp. IP Holdings LLC v. FLO TV Inc.*, C.A. No. 10-812-RGA, 2013 WL 6504689, at \*3 (D. Del. Dec. 10, 2013) (allowing an alternative DOE theory where DOE had been raised in both infringement contentions and opening expert reports, but claim terms had "not yet been construed by the court").

Arendi suggests there is an absence of prejudice because Dr. Rinard testified that his opinions did not change based on the Smedley Replies. *See, e.g.*, Google D.I. 238, p. 4. This is a red herring. Dr. Rinard simply stated that his opinions on "no literal infringement" did not change from his rebuttal reports ("Rinard Rebuttals"), which they did not. Tellingly, Arendi carefully avoided asking Dr. Rinard a single substantive question about DOE during his fourteen hours of deposition testimony. The Rinard Rebuttals make clear that Dr. Rinard had not considered or opined on any DOE analyses because there were no such analyses or opinions in Smedley's (opening) Reports. Dr. Rinard was entirely justified in not going back to formulate new DOE opinions based on Dr. Smedley's untimely additions in the Smedley Replies, particularly because Dr. Rinard was aware that Google and Motorola had filed this motion and were seeking to strike those untimely opinions from the case. (Ex. A, 12/18/20 Rough Tr. Rinard (Motorola), 274:13-22). Had Arendi timely disclosed its substantive DOE theories (on which it bears the burden of proof) with factual and/or evidentiary support and explanation (as is required by the rules and by basic fairness), Dr. Rinard most certainly would have included DOE rebuttal opinions and analysis in his report. Dr. Rinard might further have adjusted his opinions on other aspects of non-infringement and provided such testimony at deposition. Ultimately, Arendi chose not to disclose or explain any DOE theory over more than seven years of litigation. It must now accept the consequences of that choice.

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Respectfully,

*/s/ David E. Moore*

David E. Moore

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Enclosure

cc: Counsel of Record (via electronic mail)