

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ARENDI S.A.R.L.,

Plaintiff,

v.

GOOGLE LLC,

Defendant.

C.A. No. 13-919-LPS

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**LETTER TO THE HONORABLE LEONARD P. STARK RESPONDING TO
DEFENDANT'S MOTION TO STRIKE PORTIONS OF DR. TREVOR SMEDLEY'S
EXPERT REPORT REGARDING INFRINGEMENT
OF U.S. PATENT NO. 7,917,843**

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Dated: December 22, 2020

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Dear Chief Judge Stark:

Arendi S.à.r.l. (“Arendi”) and its infringement expert, Dr. Trevor Smedley, put forward the same facts to support theories of literal infringement and infringement under the doctrine of equivalents. Google LLC (“Google”) has long demonstrated its awareness that the doctrine was at issue in its case.



Google accuses Arendi of unfair delay, but it is Google that advanced new theories in its expert report, including novel claim constructions at odds with those previously offered by the Court. Dr. Smedley’s discussion of the doctrine of equivalents in *his reply report* sought to rebut Dr. Rinard’s non-infringement theories based on these new claim interpretations. Google now seeks to prevent Arendi from responding to those theories through its instant motion.

I. Background

On May 22, 2013, Arendi filed its original complaint, alleging that Google infringed the ’843 Patent “literally or under the doctrine of equivalents.” D.I. 1 at ¶ 19. The suit was subsequently stayed on February 27, 2014 to permit Google and Motorola to seek *inter partes review*. D.I. 35. After the Federal Circuit upheld the patentability of the claims-in-suit, *Arendi S.A.R.L. v. Apple Inc. et al.*, 832 F.3d 1355 (Fed. Cir. 2016), the Court granted Arendi leave to amend and/or supplement its complaint on December 19, 2018. D.I. 96. Arendi filed its Amended Complaint on December 21, 2018, again alleging infringement of the ’843 Patent by Google “literally or under the doctrine of equivalents.” D.I. 97 at ¶ 19.

Google raised the doctrine of equivalents only once throughout discovery, in its Interrogatory No. 3. *See* Ex. A, Arendi S.A.R.L.’s Supplemental Objections and Responses to Google LLC’s First Individual Set of Interrogatories, at 7. That interrogatory reflected Google’s understanding that the doctrine of equivalents was at issue and inquired, *inter alia*, “how each element of the ASSERTED CLAIM is satisfied by the DEFENDANT, including all bases for such contention including YOUR construction of claim terms, whether the alleged INFRINGEMENT is literal or under the doctrine of equivalents,” etc. *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.” *Id.* at 8. Arendi supplemented its objection on October 17, 2019, reiterating that the interrogatory “call[ed] for expert opinion prior to the time when expert reports are due” and referred Google, in part, to its initial claim charts. *Id.* at 8. Google did not challenge Arendi’s supplemental response, demand a supplemental response, move to compel, or otherwise seek judicial relief.

Google asserts that Arendi’s Rule 4(a) disclosure of accused instrumentalities and Rule 4(c) claim charts did not use the shibboleths “‘doctrine of equivalents’, ‘equivalent’, ‘function, way, result’, or ‘insubstantial difference.’” D.I. 238, at 3. However, the absence of this language did not mean Arendi’s disclosures were limited to literal infringement. Arendi’s Rule 4(a) disclosure of accused instrumentalities “identif[ied] the accused products and the asserted patent[] they allegedly

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infringe,” pursuant to the requirements of the Default Standard for Discovery. Default Standard for Discovery, Rule 4(a); Ex. B, Arendi’s Section 4(a) Disclosures, dated August 30, 2013; Ex. C, Plaintiff’s Disclosure of Supplemental Accused Products and Asserted Patents, dated November 12, 2018 (disclosing instrumentalities “that infringe one or more claims of” the ’843 Patent); Ex. D, Plaintiff’s Amended Disclosure of Supplemental Accused Products and Asserted Patents, dated February 6, 2019. Neither the phrase “doctrine of equivalents” *nor* “literal infringement” appear. Likewise, Arendi’s Rule 4(c) claim charts did not state that they were limited to literal infringement. D.I. 238, Ex. K, Plaintiff’s Supplemental Initial Claim Charts, dated February 13, 2019, at 2 (“Arendi alleges that Defendant has infringed” listed claims of ’843 Patent); Ex. E, Arendi’s Section 4(A) Disclosures, dated December 6, 2013 (“[R]elating the accused products . . . to the asserted claims those products infringe”). Arendi’s accompanying claim charts demonstrated Arendi’s theory of how each accused product practiced each element of each asserted claim—both literally and under the doctrine of equivalents. *E.g.*, D.I. 238, Ex. K.

Arendi served the first infringement report of its expert, Trevor Smedley, Ph.D., on August 7, 2020. That report laid out in detail Dr. Smedley’s theory *both* of how the Accused Products literally infringe and, in the alternative, how they infringe under the doctrine of equivalents. After laying out the basis of his opinion of literal infringement for each claim limitation, Dr. Smedley emphasized that the *same* evidence would support his alternate opinion that the Accused Products infringed under the doctrine of equivalents. D.I. 238, Ex. A, Expert Report of Dr. Trevor Smedley, ¶ 50 (“To the extent that the foregoing evidence does not demonstrate literal infringement of this preamble, the evidence demonstrates infringement of this element by the Accused Products under the doctrine of equivalents.”); ¶ 55 (same for first claim element); ¶ 132 (same for second claim element); ¶ 273 (same for third claim element); ¶ 278 (same for fourth claim element); ¶ 391 (same for fifth claim element); ¶ 430 (same for sixth claim element); ¶ 464 (same for seventh claim element); ¶ 499 (same for claim 8). That is, just as in Arendi’s claim charts, Dr. Smedley expressed the opinion that the same evidence grounded his opinions of infringement both literally and under the doctrine of equivalents.

Google served Dr. Martin Rinard’s rebuttal non-infringement report on October 20, 2020. D.I. 238, Ex. E, Rebuttal Expert Report of Dr. Martin Rinard. In that report, Dr. Rinard put forward a series of theories of non-infringement arguments based upon novel claim constructions. For example,

[REDACTED]

On December 4, 2020, Arendi served Dr. Smedley’s Second Expert Report. In that report, Dr. Smedley, again emphasized that “all evidence that [he] put forward in support of [his] opinion of direct infringement necessarily supported [his] view that the Accused Products” infringe under the doctrine of equivalents:

After all, if a product actually practices every element of the Asserted Claims, there are not only insubstantial differences but, in fact, no differences between the Asserted Claims and the functionality of the Accused Products. Likewise, to the extent that the Accused Products literally practice each claim limitation, they necessarily perform substantially the same function, in substantially the same way, to obtain the same result. Thus, the evidence that I put forward for literal infringement in the First Infringement Report also supports

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my opinion that, in the alternative, the Accused Products infringe pursuant to the doctrine of equivalents.

D.I. 238, Ex. C, Second Expert Report of Dr. Trevor Smedley, ¶ 35. Dr. Smedley further stated that the non-infringement “theories that Dr. Rinard has now put forward are not ones that would have caused a POSITA to question whether the Accused Products literally infringe”; nevertheless, now that they were offered Dr. Smedley was “able to consider whether—if they are accepted as impediments to literal infringement—the Accused Products would nonetheless infringe under the doctrine of equivalents.” *Id.* at ¶ 36. Dr. Smedley concluded, “For the reasons discussed in both the First Infringement Report and this report, it is my opinion that the Accused Products would infringe under the doctrine of equivalents.” *Id.*

In addressing each of Dr. Rinard’s claim-construction-based non-infringement arguments in his reply report, Dr. Smedley relied on the same evidence to support his opinion that Google Products infringed under the doctrine of equivalents as he used to support his opinion of literal infringement. *Id.* at ¶¶ 92, 149, 152, 164-66, 190-91, 200, 213-14, 218, 223, 240, 242, 246. Each paragraph about which Google complains addressed a different one of Dr. Rinard’s novel misinterpretations of the claim language or the Court’s claim constructions. And none of those paragraphs in Dr. Smedley’s reply report introduce novel evidence.

In his reply report, Dr. Smedley also responded to several alleged non-infringing alternatives that appeared in Dr. Rinard’s expert report. *Id.* at ¶¶ 247 *et seq.* Dr. Smedley opined that several of these would still infringe under the doctrine of equivalents. *Id.* at ¶¶ 264, 268, 273. Dr. Smedley could not have responded to those proposals before they were made by Dr. Rinard.

Arendi took Dr. Rinard’s expert deposition on December 18, 2020—*after* Google had filed its instant motion. [REDACTED]

II. Google’s Motion Should Be Denied

“Courts in the Third Circuit favor resolution of disputes on their merits.” *First Quality Tissue, LLC v. Irving Consumer Prod. Ltd.*, No. 19-428-RGA, 2020 WL 6286862, at *1 (D. Del. Oct. 27, 2020). Excluding important evidence “is considered an ‘extreme’ sanction, not normally to be imposed absent a showing of willful deception or ‘flagrant disregard’ of a court order by the proponent of the evidence.” *Bridgestone Sports Co. v. Acushnet Co.*, No. 05-132 JJF, 2007 WL 521894, at *4 (D. Del. Feb. 15, 2007). Before excluding material under Rule 37(c)(1), courts consider the following factors: “(1) the importance of the information withheld; (2) the prejudice or surprise to the party against whom the evidence is offered; (3) the likelihood of disruption of the trial; (4) the possibility of curing the prejudice; (5) the explanation for the failure to disclose; and (6) the presence of bad faith or willfulness in not disclosing the evidence (the “*Pennypack* factors”).” *Intellectual Ventures I LLC v. AT&T Mobility LLC*, No. CV 13-1668, 2017 WL 658469, at *1 (D. Del. Feb. 14, 2017).

¹ Because Arendi has not yet received the court reporter’s final transcript, excerpts from the rough transcript are submitted as Exhibit F. Arendi will file the final version when it becomes available.

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