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-JLH **Original Version Filed: February 2, 2023** **Public Version Filed: February 9, 2023**

LETTER TO THE HONORABLE JENNIFER L. HALL FROM NEAL BELGAM IN OPPOSTION TO DEFENDANT'S MOTION TO STRIKE EXPERT OPINIONS

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Dated: February 2, 2023

Dear Magistrate Judge Hall:

Google filed an improper and untimely motion to strike the ultimate damages opinion of Arendi's expert witness, Roy Weinstein. D.I. 419. The Court should instead strike Google's motion both for violating the Court's procedural orders and redundantly seeking to exclude an expert opinion that the Court already approved when it denied Google's prior *Daubert* motion.

Google's eve-of-trial request is, in fact, a procedurally improper and substantively meritless stab at summary judgment. The issue Google presents—whether [redacted] Google's user-installed Accused Apps are licensed [redacted] (they are not)—is not amenable to pre-trial resolution on a motion to strike. Google failed to make this argument at the deadline for summary judgment motions (even though it had full notice of the [redacted] agreement), and there is no basis to grant a back-door summary judgment ruling now. In any event, Google's defense would fail on the merits because [redacted]

I. Background

Arendi asserts that Google mobile devices and smartphone applications—such as Google Calendar, Gmail, Chrome, Contacts, Docs, Hangouts, Keep, Messages, News, Sheets, Slides and Tasks—infringe U.S. Patent No. 7,917,843. Judge Stark oversaw discovery and resolved the parties' motions for summary judgment and *Daubert* motions. D.I. 389, 391, 393. Judge Stark granted-in-part and denied-in-part Google's motion for summary judgment of non-infringement, thereby narrowing the scope of Arendi's claims. D.I. 393. He simultaneously denied Google's *Daubert* motion to exclude Mr. Weinstein's damages opinions. D.I. 389.

This case was re-assigned to Your Honor on April 26, 2022. D.I. 408. Although expert discovery and *Daubert* motions were already resolved, the parties agreed to "limited supplementation of damages expert reports (to account for the Court's summary judgment opinions and recent license agreements)." D.I. 410. The Court accordingly entered a Supplemental Scheduling Order governing supplemental expert damages discovery and set trial for April 24, 2023. D.I. 412. The Court's order does ***not*** provide any date, nor even contemplate, another round of dispositive motions or *Daubert* motions.

II. The Court Should Strike Google's Motion for Violating the Scheduling Order

Google's motion is improper. The existing Scheduling Order makes clear that "any objection to expert testimony" ***cannot*** be made after the deadline for dispositive motions "unless otherwise ordered by the Court." D.I. 8; Case No. 13-cv-1595, D.I. 16 § 3(g)(ii).[1] That deadline has come and gone. Google already filed a *Daubert* motion against Mr. Weinstein's testimony, and the Court rejected it. This Court has ***not*** issued any order permitting Google to file a renewed *Daubert* motion against Mr. Weinstein's supplemental expert testimony. The Court's Supplemental Scheduling Order includes no such deadline. D.I. 412.

Google falsely claims that it "raises this issue . . . in accordance with Judge Stark's

[1] When this case was filed, the Court adopted the Scheduling Order that it had entered in several related cases. *See* D.I. 8. As such, the original Scheduling Order in this case appears on the docket in the related case *Arendi S.A.R.L. v. LG Electronics, Inc., et al.*, Case No. 12-1595, at D.I. 16.

procedures for motions to strike." D.I. 419 at 1 n.1. ***Not so***. Google moved in ***contravention*** of the procedures Judge Stark set in this case. His Scheduling Order required (and still requires) any ***discovery dispute*** to be resolved by "contact[ing] chambers . . . to schedule a teleconference" and only allows "the party seeking relief" to file a dispute letter ***if*** the Court grants the conference. *See* D.I. 8; Case No. 13-cv-1595, D.I. 16 § 3(h). Google never contacted the Court for a teleconference and never obtained leave to file a dispute letter. It filed its motion unilaterally. Because Google willfully violated the Court's procedural orders, the Court should strike its motion.

III. The Court Already Upheld Mr. Weinstein's Expert Damages Opinions

Google's motion seeks to relitigate the propriety of expert opinions the Court ***already approved***. Google's motion seeks to exclude Mr. Weinstein's expert opinions "that calculate damages based on Google's Accused Apps [redacted] (D.I. 420 at 1), but Google already had full opportunity to obtain that relief at the deadline for *Daubert* motions in 2021. Mr. Weinstein's original expert reports included equivalent damages calculations—providing total damages figures both including and excluding Google Apps [redacted]

In his original Expert Report dated August 7, 2020, Mr. Weinstein opined that Arendi's damages were [redacted], including Google Apps [redacted] Ex. A ¶ 11. Google's expert criticized the inclusion of such apps. In his original reply, Mr. Weinstein maintained his ultimate damages opinion, but also offered an alternative calculation that excluded them: "if it is assumed, as [Google's expert] claims, that [redacted] are licensed, the total number of accused app downloads would be reduced to approximately [redacted]. Applying a royalty rate [redacted] results in reasonable royalty damages of [redacted]." Ex. B at 10 n.42. Google filed a *Daubert* motion to exclude Mr. Weinstein's damages opinions on March 5, 2021, focusing that motion on other purported defects. D.I. 286-88. Judge Stark denied the motion outright, upholding Mr. Weinstein's opinions. *See* D.I. 398 at 11-13.

Google's attempt now to strike Mr. Weinstein's opinion as to Arendi's total damages for including user-installed Google Apps on [redacted] simply seeks a mulligan. Mr. Weinstein's analysis in his supplemental damages report is no different from what he put forward before—and which Google already attempted to exclude. In his Supplemental Expert Report, Mr. Weinstein merely updated his previous damages calculations to include the royalty rate reflected in the [redacted] license agreement and to reflect a decrease in infringing units as a result of Judge Stark's summary judgment ruling. Mot. Ex. 1 ¶¶ 2-3. Just like the earlier opinions that the Court upheld, Mr. Weinstein's Supplemental Report provides both a total damages figure [redacted] that ***includes*** Google Apps [redacted], and an alternative damages figure [redacted]) "[i]f it is assumed that [redacted] of accused Google apps are licensed" under Arendi's license agreements [redacted]. *See id.* at 6 n.22. Mr. Weinstein's offering of a total damages figure that includes Google Apps [redacted] ***remains the same***.

Google could have made the exact same argument it makes now when it filed its original *Daubert* motion to exclude Mr. Weinstein's opinions. It had full access to [redacted] beginning in 2019. But Google chose not to argue the point in its *Daubert* motion and does not get a do-over now simply because Mr. Weinstein updated his analysis to account for a new license agreement [redacted] and the new unit base following the Court's summary judgment ruling.

IV. Google Failed to Raise its License Defense Based on the [redacted] at Summary Judgment and Cannot Seek a Dispositive Judgment Now

Although framed as a motion to strike expert opinions, Google actually seeks a dispositive ruling on a license defense that Google failed to raise at the dispositive motion deadline.[2] Arendi entered its agreement [redacted] in April 2019, and produced it to Google in July 2019—nearly two years before the dispositive motion deadline in March 2021. *See* Mot. Ex. 3. But Google did not move for summary judgment under its theory that the [redacted]. Google cannot now file a thinly disguised summary judgment brief ***without leave*** to argue that the [redacted] and that there is no material issue for the jury to resolve at trial. *See, e.g.*, *Almirall LLC v. Taro Pharm. Indus.* 2019 WL 316742, at *6 (D. Del. Jan. 24, 2019) (denying motion *in limine* "effectively seeking a merits-based ruling" on an affirmative defense).

V. The Samsung Agreement Does Not License Google Apps

Far from an "unambiguous" license of [redacted] of Google Apps, [redacted] *See* Mot. Ex. 3. [redacted] A contract is only unambiguous if "on its face [it] is reasonably susceptible of only one meaning." *Greenfield v. Philles Records*, 98 N.Y.2d 562, 570 (2002). Conversely, "[a] contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings." *N.Y.C. Off-Track Betting Corp. v. Safe Factory Outlet, Inc.*, 28 A.D.3d 175, 177 (1st Dept. 2006). The existence of ambiguity is determined by examining the "entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed," with the wording to be considered "in the light of the obligation as a whole and the intention of the parties as manifested thereby." *Kass v. Kass*, 91 N.Y.2d 554, 566 (N.Y. 1998).

A. The [redacted] Unambiguously Does *Not* License Google Apps

The [redacted] unambiguously [redacted]

[2] Google also never amended its answer to allege a license under [redacted], and it is far too late to do so now. *Cf. Magsil Corp. v. Seagate Tech.*, 2010 WL 2710472, at *2 (D. Del. July 7, 2010) (denying leave to amend defenses due to "substantial and undue prejudice").

[redacted]

Google's contrary interpretation [redacted] The contract provides no support for this argument. [redacted] Google's only evidence is a single paragraph from Mr. Weinstein's original report that generically described Google's products. *See* Mot. Ex. 5 ¶ 15. [redacted]

[redacted]

[redacted]

[redacted]

3 [redacted]

4 [redacted]

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