IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ARENDI S.A.R.L.,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 13-919-JLH
v.	)	
	)	**JURY TRIAL DEMANDED**
GOOGLE LLC,	)	
	)	**PUBLIC VERSION**
Defendant.	)	

LETTER TO THE HONORABLE JENNIFER L. HALL FROM
DAVID E. MOORE IN SUPPORT OF DEFENDANT'S MOTION TO STRIKE

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10595067 / 12599.00040
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Dear Judge Hall:

To avoid confusion and potential error at trial, Google properly moves to strike Mr. Weinstein's damages calculations for Accused Apps on [redacted] devices, which unambiguously are precluded by the [redacted] Google correctly presents this issue now, as the interpretation of the unambiguous [redacted] "is a legal matter for the court" and Mr. Weinstein recently made clear that he intends to pursue these damages unless the Court orders otherwise. *805 Third Ave. Co. v. M.W. Realty Assoc.*, 448 N.E.2d 445, 451 (N.Y. 1983).

I. Google's Motion Is Procedurally Proper

Google brings its motion to strike at the earliest reasonable opportunity following supplemental expert discovery and mediation (which concluded on December 21, 2022), when it became clear that Mr. Weinstein would improperly calculate damages based on Accused Apps on licensed [redacted] devices, ignore his own alternative calculations excluding those damages, and wait for the Court to order otherwise. (Mot. Ex. 2 ¶ 10, Mot. Ex. 4 at 337:24–338:9.) Before then, Google expected that Arendi and Mr. Weinstein would voluntarily rely only on Mr. Weinstein's alternative calculations and thus avoid the need for Court intervention. Now that the opposite is clear, Google promptly raises this legal issue; the Court's scheduling order did not provide any other procedure or timetable for doing so. Arendi's suggestion that the Court should ignore this live dispute and submit a pure question of law to the jury is baseless and imprudent.

Arendi points to the wrong source for Judge Stark's prior briefing procedures for motions to strike. These procedures were not addressed in the scheduling order Arendi cites, but in Judge Stark's prior chambers procedures requiring that a motion to strike be accompanied by a three-page letter, opposed by a five-page letter, and supported in reply by a two-page letter. This is the procedure the parties previously followed when moving to strike expert reports, which Google therefore adopted for its present motion – as did Arendi in its opposition letter. (*See* D.I. 237, 238, 242, 243 (following this procedure for a prior motion to strike expert opinions), 426 (filing five-page opposition letter).) Arendi also misreads the *Almirall* case in claiming that Google is somehow too late in presenting this issue to the Court. There, the Court denied a motion *in limine* not because it was too late, but because "[f]urther development of the evidence . . . [was] necessary," and it denied the motion "without prejudice to reassertion in a properly supported motion at the close of evidence, at the end of trial, or in a posttrial motion." *Almirall LLC v. Taro Pharm. Indus. LTD*, C.A. No. 17-663-JFB-SRF, 2019 WL 316742, at *6 (D. Del. Jan. 24, 2019). Here, construction of the [redacted] is a straightforward legal issue of contract interpretation requiring no development of the factual record. Ignoring this issue would leave a purely legal question for the jury and create confusion and error at trial. Google therefore properly presents this issue now, well in advance of trial.[1]

II. Mr. Weinstein May Not Calculate Damages for Accused Apps on [redacted] Devices

The [redacted] unambiguously covers [redacted] necessary for infringement and damages, and thus precludes Mr. Weinstein's contrary calculations. Notably, Arendi's opposition letter totally ignores [redacted] and (c) is indisputably required for any alleged infringement here, as

[1] If the Court prefers, it certainly can consider Google's motion as a motion *in limine*, which unquestionably is permitted before trial. This particular motion warrants early consideration

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it includes the code for the very functionalities accused by Arendi. This alone requires Mr. Weinstein to omit damages for Accused Apps on [redacted] devices.

Arendi invents a temporal limitation to exclude Accused Apps that a user installs after purchasing a [redacted] device. But, s[redacted] (Mot. Ex. 3 § 1.6 (emphasis added).) Arendi's made-up limitation further ignores, and does not apply in light of the fact, that most of the Accused Apps and the Android OS come preinstalled on [redacted] Android Devices. Despite their burden to prove damages, Mr. Weinstein and Arendi offer no evidence that Accused Apps are downloaded to [redacted] devices after initial sale (let alone in what quantities), despite Arendi's representation that it does not accuse preinstalled Accused Apps (though Mr. Weinstein's calculations are not so restricted). [redacted]

Arendi argues that the [redacted] does not impact potential infringement liability here because the Agreement [redacted] Arendi's belief that Google must supply extrinsic evidence on these points is wrong and forgets that "[c]onstruction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms." *Beal Sav. Bank v. Sommer*, 865 N.E.2d 1210, 1213–14 (N.Y. 2007).

Arendi's after-the-fact, self-serving declaration from Mr. Atle Hedløy, Arendi's CEO, has no effect. [redacted]

Respectfully,

/s/ David E. Moore

David E. Moore

DEM:nmt/10595067 / 12599.00040
cc: Clerk of the Court (via hand delivery)
Counsel of Record (via electronic mail)

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