IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT DELAWARE

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

LETTER TO THE HONORABLE JENNIFER L. HALL FROM DAVID E. MOORE
RESPONDING TO ARENDI'S FURTHER LETTER ON IPR EVIDENCE

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April 25, 2023

Dear Judge Hall:

Arendi continues to press for its confusing and prejudicial use of IPR evidence that the Court has already ruled outweighs any minimum probative value. Certain of Arendi's arguments are waived, while others reargue positions that the Court has already rejected or overruled—positions that only serve to further demonstrate why IPR evidence should not be admitted under Rule 403 balancing in this case.

First, all of Arendi's arguments regarding Google's opening statements and Mr. Hedløy's testimony are waived. Arendi failed to immediately object or even ask to be heard at sidebar in any of the instances that it complains about. *See* D.I. 486-1 at Ex. A at 104:3–20 (opening), 214:5–20 (Hedløy), 244:23–245:3 (Hedløy); *United States v. DeRosa*, 548 F.2d 464, 472 (3d Cir. 1977) (objections to be made during or immediately after opening).

Second, even if not waived, Google has not opened the door to IPR evidence. Rather, as demonstrated by ***Arendi's own words bolded below***, Arendi is looking for opportunities to introduce IPR evidence for improper, misleading, and prejudicial purposes.

- In response to (i) statements or Mr. Hedløy's testimony that Arendi did not notify Google of the '843 Patent until filing this lawsuit in 2013 or that there was no infringing product at that time; or (ii) statements that Google defended itself throughout the case by raising system prior art, Arendi wants to argue that Google thought the patent posed a "threat" or "potential infringement problem," D.I. 486 at 1–2, such that it went ***"running to the Patent Office within months"*** to file an IPR. Ex. 1 (Trial Tr. Day 1 excerpts) at 146:14–15.

  This is a non sequitur. It is not apparent why any explanation about the timeline of the litigation would somehow require characterizing or speculating about the timing of an IPR petition. Arendi also ignores that it was the one that dropped the accused 2013–2017 period from the case on the eve of trial; it cannot be heard to complain about the hole in the timeline that resulted from that election. Furthermore, the Court offered a solution that Arendi agreed was adequate and would not require reference to IPR: "we can tell the jury that the case was stayed and that it's not your fault that the case was stayed." Ex. 1 (Trial Tr. Day 1) at 29:19–22.[1]

  Arendi's proposed argument in response is far more prejudicial and confusing than relevant. It ignores that there is a one-year statutory deadline for a party to petition for IPR after being served with an infringement complaint. 35 U.S.C. § 315(b). Compliance with that statute is not grounds to misconstrue Google's decision to defend itself.

[1] Arendi's letter claims that Google said it defended itself by relying on "CyberDesk and Apple Data Detectors," D.I. 486 at 1, but Google was actually more clear than that in its opening, saying that Google "point[ed] out the prior art CyberDesk ***systems*** and Apple Data Detectors ***systems***." Ex. 1 (Trial Tr. Day 1) at 104:22–105:4 (emphasis added). The Court already overruled Arendi's late-raised objection to this. *Id.* at 146:8–22, 148:3–21.

- In response to Mr. Hedløy's testimony that Arendi made representations to the Patent Office about printed publications discussing the CyberDesk and Apple Data Detectors systems, Arendi wants to argue that Google ***"had an opportunity to present art"*** or ***"could have"*** clarified Arendi's statements about prior art in an IPR. D.I. 486 at 2.

  However, Google is not suggesting that Arendi's statements about the CyberDesk and Apple Data Detectors publications were somehow incorrect. Nor is Google alleging that there was any breach of a duty of candor to the Patent Office. To the contrary, as the Court recognized, Google is arguing that Arendi correctly told the Patent Office what the publications disclosed—which is less than what the prior art systems were publicly displayed to do—and how Arendi's claimed invention allegedly differed from the prior art. *See* Ex. 1 (Trial Tr. Day 1) at 148:17–19 ("I understood counsel to be saying that the patent examiner didn't have the system art that Google was going to present at trial before it . . . ."). Such points of distinction are important for the jury in assessing whether Arendi invented anything new and nonobvious, as well as in considering *Georgia-Pacific* factor 9 about the utility or advantages of the claimed invention over prior art for a reasonable royalty. Such points of distinction are also directly relevant to showing that the prior art systems disclosed materially more than the publications, which described only some of the systems' features.

  Furthermore, Arendi's proposed rebuttal is misleading, as Google did ***not*** have an "opportunity" to present the CyberDesk or Apple Data Detectors ***systems*** in IPR; to imply otherwise is legally and factually wrong. Whether prior art "could have" been raised in an IPR is a question of IPR estoppel under 35 U.S.C. § 315(e). The Court has already denied IPR estoppel as to the CyberDesk system, and Arendi chose not to invoke IPR estoppel for the Apple Data Detectors system. Ex. 1 (Trial Tr. Day 1) at 10:17–13:5 (ruling that the CyberDesk system could not have been raised in IPR); *see also* D.I. 391 at 18 (noting that Arendi did not challenge Apple Data Detectors system based on IPR estoppel).

Third, there is no need to enter Google's prior proposal for a stipulation and limiting instruction. *See* D.I. 484 at Ex. A. That was an imperfect solution, and it was only submitted to the Court as evidence of Google's effort to reach a compromise. *Id.* at 1 (listed in summary of meet-and-confer, rather than in update of Google's positions). Arendi chose to reject that proposal. Ex. 2 (4/23/23 10:55 PM email from Arendi counsel) at 1. Google's position at that point was that "[t]here is no legitimate argument that IPR evidence should be admissible before the jury, even with a limiting instruction." D.I. 484 at 2; *see also* Ex. 1 (Trial Tr. Day 1) at 19:4–5 ("So we would like just there to be no reference by either side to the IPR proceedings."). Therefore, the prior proposal is no longer viable, especially in view of Arendi's escalating efforts to make misleading and prejudicial arguments about the IPR before the jury.

Having now tried multiple tacks to get the IPR proceedings into the jury trial, it is clear that Arendi does not want to eliminate any true confusion. It wants to try and suggest to the jury that Google already has taken, in Arendi counsel's own words, its "best shot" at invalidating the '843 Patent and lost, Ex. 1 (Trial Tr. Day 1) at 21:25, even though the Court already has ruled that Google did not, and could not, present its system prior art references in the IPR.

The Court properly exercised its discretion in excluding all IPR evidence, and Arendi has raised no legitimate basis to let any of it in under the Court's ruling.

Respectfully,

/s/ *David E. Moore*

David E. Moore

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Enclosures
cc: Clerk of the Court (via hand delivery)
Counsel of Record (via electronic mail)