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: April 23, 2023** **Public Version Filed: May 1, 2023**

LETTER TO THE HONORABLE JENNIFER L. HALL FROM NEAL BELGAM REGARDING ARENDI'S RESPONSE TO GOOGLE'S MAY 23, 2023 LETTER REGARDING DAMAGES AND WILLFULNESS

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Dated: April 23, 2023

Dear Judge Hall:

On Friday, when Google still had eight obviousness combinations, Arendi informed Google it planned to narrow the number of applications accused of infringement that it would present to the jury; specifically, it intended to focus on applications' use of Google's Smart Text Selector (STS). Arendi indicated that it would not pursue certain software functionalities used by the Chrome application (i.e., Content Detectors (CD) and Contextual Search Quick Actions (CSQA) functionalities); would not pursue the News application; and as a result, would not pursue certain devices. That narrowing of the set of accused applications and products lowered the number of units at issue. It did ***not*** change the rates or the methodology used for the damages model.

That same night, Arendi sent highlighted copies of Exhibits from Mr. Weinstein's report showing which accused applications and units were being removed, along with the damages that would come out as a result. Mr. Weinstein had previously disclosed damages on an application-by-application basis so this is a straightforward exercise. This reduced the damages claimed by Arendi to $45.5 million. Ex. A.

Google's claim of prejudice is entirely disingenuous and unfounded. Google's own damages expert ***already*** opined on this very scenario and calculated rebuttal damages for the narrowed case that Arendi now intends to present to the jury. Google had ***already*** done the math in what it called an "alternative scenario":

- "I have also been asked to consider an **alternative scenario in which only STS is found to be properly accused of infringement**, such that the hypothetical negotiation would have taken place around December 5, 2017."[1]

- "I have also been asked to **consider a scenario** in which the date of first alleged infringement was no earlier than December 5, 2017, **when STS was enabled in Android 8**. . . . **It is my opinion that a hypothetical negotiation in or around December 2017** for a non-exclusive license to the '843 Patent encompassing the accused Google devices and **the use of the accused Google apps on all devices (Google and non-Google) would have resulted in an agreement under which Google would make a lump sum payment to Arendi of $500,000."**[2]

Google's motion follows the same path as others; it has turned every pretrial discussion into a purported basis to file new motions and make arguments that it could have raised earlier but never did. Google is now using Arendi's effort to streamline the case to ***again*** try to exclude Arendi's damages expert and strike its willfulness claim. Both arguments are baseless, but more importantly, they rely on theories that existed ***before*** Arendi reduced the scope of its case.

Finally, Arendi is surprised Google seeks these sanctions based on Arendi's effort to reduce the scope of the case, especially given Google's simultaneous narrowing of its invalidity combinations. Google reduced its obviousness combinations from eight to six on Saturday. A day

[1] Ex. B at ¶ 30 (Kidder Supplemental Report 8/26/2022).
[2] *Id.* ¶ 175.

later, on Sunday, Google advised Arendi by email it would be dropping another of its references, further reducing its combinations to four – reducing in half its total combinations over the course of two days. Efforts to focus the case before the jury in a time-limited trial are not the subject of motions or demands for sanctions – especially when Google expressly planned for them.

I. There is No Basis To Exclude Mr. Weinstein

Google's main argument for objecting to Arendi's reduction in scope is that the "hypothetical negotiation date" will shift by "more than five years to late 2017." But Google fails to disclose that Google's *own expert* already adopted a late 2017 hypothetical negotiation date in his supplemental report for his STS-only scenario, and that Arendi's expert Mr. Weinstein already *agreed* that the change to 2017 does not make any difference.

In his supplemental report, Google's damages expert noted Google's view that Arendi could not prove infringement by Content Detectors and "CSQA" in light of the summary judgment order. Ex. B ¶ 20. He explained this would shift the hypothetical negotiation date to late 2017. *Id.* ¶ 23. Arendi has now reduced the scope of its case by dropping "Content Detectors" and "CSQA" and related devices from its infringement claim – exactly what Google advocated for and anticipated.

Google's expert testified that he adopted the late 2017 hypothetical negotiation date as one of two possible negotiation dates:

> And that's based on the point I make in paragraph 98, which is that the term of the hypothetical license would be from **the date of the hypothetical negotiation on December 5, 2017**, until November 10, 2018, or .93 years.[3]

See also Ex. B at ¶ 175. Google's expert testified that he had already done the math using the alternative date based on an assumption that "you now have a negotiation over about an 11-month license for the use of ***STS alone*** across the apps and devices." Ex. C at 134:21-135:11 (emphasis added) (Q. You offer an alternative royalty of $500,000 if the hypothetical negotiation occurred around December 2017; is that right? A. That is correct.").

Arendi's damages expert, Mr. Weinstein, was asked about this in his deposition, and he agreed that a late 2017 hypothetical negotiation date would not change his analysis:

> Q So **when do you believe that the hypothetical negotiation would have occurred** … now in light of the Court's rulings?
>
> A You -- you noted that I don't address that in my reports, and as far as -- as far as I'm concerned, the hypothetical negotiation date is the same for Google given -- given Chrome and infringement of Chrome. Or for Motorola, in my original report, the hypothetical negotiation was around March of 2011. **Given the Court's** -- the Court's **ruling on Linkify and Smart Linkify**, it -- it could be -- **it could be later**. But even **if it were later, such as in 2017**, I -- **I don't believe** that -- **that change**

[3] Ex. C at 28:14-18 (Dep. Tr. of D. Kidder dated Oct. 25, 2022).

> **of the date would change the results of my analysis** insofar as the damages that I've calculated are concerned.[4]

Google's suggestion that a 2017 hypothetical negotiation date changes the landscape of the case is flatly wrong. Indeed, rather than creating greater differences, Arendi's damages expert Mr. Weinstein and Google's expert Mr. Kidder are now more closely aligned on a 2017 hypothetical negotiation date. To the extent there are variations on the precise timing in 2017, this is an issue Google can cross Mr. Weinstein on. But both experts ***already*** had disclosed the possibility of relying on a 2017 date in the very scenario present here. No surprise.

Google also argues that Mr. Weinstein's report is deficient because "it is now critical to distinguish between products using pre-Android 8 operating systems (no longer allegedly infringing by any app) vs. post-Android operating systems (allegedly infringing)." Letter at 2-3. But Google fails to tell the Court that for **11 of the 12 apps** at issue in this case, Arendi had only been accusing post-Android 8 operating systems. To the extent Google contends Mr. Weinstein fails to distinguish between pre- and post-Android 8 apps, this is an argument Google could have raised long ago. It chose not to do so. Perhaps it was never raised because it lacks merit: Mr. Weinstein is simply relying on the data Google produced, and Judge Stark ordered Google to submit to a supplemental deposition to confirm these applications were the accused products. Ex. E at 10, 19 (Oral Order dated Dec. 9, 2019). Again, at best, this is an argument for cross examination. But Arendi's narrowing of the case did not change any argument Google purports to have.

II. Arendi Will Not Argue to the Jury that it is Entitled to Prior Weinstein Numbers

Google next asks this Court to prevent Arendi from (1) telling the jury it is entitled to an award larger than $45.5M based on the higher numbers in Mr. Weinstein's supplemental report, or (2) from asserting that Google's damages expert used an incorrect hypothetical negotiation date. Google never raised these requests in a meet-and-confer, even though the parties held multiple calls about other subjects on Friday night and Saturday night. In any event, the answers are simple: 1) Arendi does not plan to argue or offer affirmative testimony that it could have asked for a larger damages number unless Google opens the doors on that issue; 2) Arendi will not attack Google's damages expert for changing his hypothetical date to the alternative disclosed already in his report. The experts do have a difference of months between their 2017 hypothetical negotiation dates which may be the subject of examination.

III. Google's New Willfulness Argument is Meritless

Finally, Google argues that it should be granted summary judgment on willfulness because Arendi's initial infringement contentions did not chart how STS infringed the patent. But again, this baseless argument is one that Google could have raised at summary judgment if it really thought there was no triable issue of fact. Google did not move on Arendi's willfulness claim because it knew it had no basis to do so. Nothing about Arendi's narrowing of the case changed Google's potential grounds. It has ***always*** been the case that STS was not introduced until 2017, and that Arendi did not chart how STS infringed until 2019. But that does not apply just to STS.

[4] Ex. D at 414:8-21 (Dep. Tr. of R. Weinstein dated Oct. 18, 2022).

The same is true of the CD and CSQA functionalities which Arendi just removed from the case. In other words, if Google wanted to argue that willfulness was not possible because charts for certain new functionalities were only served after the patent expired, it had every opportunity to do so long before today.

The reason Google did not make that argument on summary judgment is that it is inconsistent with the factual inquiry for willfulness and with the procedural history of the case. This case was stayed during Google's unsuccessful IPR; an amended complaint and new charts were not served until the case was unstayed. Arendi cannot be penalized for a stay in the case. More importantly, these arguments cannot defeat willfulness as a matter of law. These are pure factual questions for the jury.

The factors that Google's own jury instructions cite include asking whether Google reasonably believed it did not infringe and whether it made a good-faith effort to avoid infringing the '843 Patent during the patent term. These are pure fact questions.

Google admits that it was on notice of Arendi's patent and how other Google products allegedly infringed the patent in 2013, but suggests the prior charts did not put it on notice of how its new products might infringe given that the old charts related to apps running on "desktop" browsers and the new charts relate to "mobile" apps. Google does not explain how that distinction makes a difference, and it is a fact issue for the jury to decide whether Google deliberately and intentionally infringed the patent based on its applications containing the STS functionality.

Respectfully,

/s/ Neal C. Belgam

Neal C. Belgam (No. 2721)

cc: Clerk of Court (via CM/ECF)
All Counsel of Record (via CM/ECF)