

**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,)	PUBLIC VERSION
)	
Defendant.)	

**LETTER TO THE HONORABLE JENNIFER L. HALL FROM DAVID E. MOORE
REGARDING ARENDI’S NEW DAMAGES AND WILLFULNESS THEORIES**

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Dated: April 23, 2023
Public Version Dated: May 1, 2023

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Dear Judge Hall:

Google respectfully submits this letter to preclude a new damages theory by Arendi as untimely, improper, unreliable, confusing, and highly prejudicial. To prevent Arendi from then perversely benefiting from its lack of admissible expert testimony on damages, the Court should use its discretionary authority to also prevent Arendi from explicitly or implicitly (i) asking for an even higher reasonable royalty than its newly proffered number, or (ii) arguing that Google's damages theories fail to use the proper hypothetical negotiation date. Furthermore, the Court should determine that under Arendi's new theory, there can be no willfulness as a matter of law.

On Friday, April 21 at around 8:10 PM, Arendi informed Google for the first time that it would be dropping Content Detectors ("CD") and Contextual Search Quick Actions ("QA") as accused functionalities, leaving only Smart Text Selection ("STS") in the case. As a result, Arendi is now alleging that infringement starts *not on February 1, 2012 but on August 21, 2017*, when STS was allegedly first released.¹ At 10:53 PM, Arendi confirmed its withdrawal in writing and served revised exhibits from its damages expert, Mr. Weinstein, that disclosed a new [REDACTED] damages ask. Ex. A (email and attachments). Despite streamlining infringement, Arendi's new—and still not fully disclosed—theory has two collateral consequences: (1) as Mr. Weinstein's entire damages theory was premised on the hypothetical negotiation occurring in February 2012—and he failed to provide any alternative theory—Arendi has no permissible damages theory for trial; and (2) because Arendi did not allege infringement related to STS functionality until *after* the '843 Patent expired, Arendi's post-suit allegation of willfulness fails as a matter of law.

Arendi's behavior is particularly egregious. In a case that has been pending for over a decade, Arendi fundamentally changed its damages and willfulness approaches *after* the close of expert discovery, the deadline for *Daubert* motions, the selection of Google's trial witnesses, and even after the empanelment of a jury, on the last business day before openings. As Arendi said before its about-face, "Trial is next week. The time for any kind of obfuscation in hiding the ball is gone." 4/21/23 Draft Tr. at 114:10–11. Yet, Arendi hid the ball on its intended claims and damages demand for trial until the last possible moment. And, Google asked twice over the weekend for Arendi to confirm that willfulness is no longer at issue; Arendi declined. The Court should preclude Arendi's new damages and willfulness theories and prevent it from benefiting from its sanctionable conduct.

I. Legal Standards

Fed. R. Evid. 702 imposes a "special obligation upon a trial judge" to "ensure the reliability and relevancy of expert testimony" by precluding expert opinions that are neither reliable nor tied to the facts and circumstances of the case. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147, 152 (1999). Expert testimony must be more than "unsupported speculation," *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579, 590 (1993), and "[c]ourts look for rigor, not mere 'haphazard, intuitive inquiry,'" *UGI Sunbury LLC v. Permanent Easement*, 949 F.3d 825, 834 (3d Cir. 2020). Under Fed. R. Civ. P. 37(c)(1), a party that fails to comply with Rules 26(a), (e), including expert disclosures, "is not allowed to use that information . . . unless the failure was substantially justified or is harmless." The Court has discretion to sanction a party for violations after considering: (1) prejudice or surprise; (2) possibility of curing the prejudice; (3) potential disruption of orderly and

¹ Google contends that any alleged STS infringement started no earlier than December 5, 2017.

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efficient trial; (4) bad faith or willfulness in failing to disclose evidence; and (5) importance of information withheld. *Sprint Commc'ns Co. L.P. v. Charter Commc'ns, Inc.*, 2021 WL 982731, at *2 (D. Del. Mar. 16, 2021) (citing *Konstantopoulos v. Westvaco Corp.*, 112 F.3d 710 (3d Cir. 1997)). The Court also has inherent authority “to fashion an appropriate sanction for conduct which abuses the judicial process,” such as when a party in bad faith, vexatiously, or wantonly “delays or disrupts the litigation.” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44–46 (1991).

II. The Court Should Preclude Arendi from Presenting Its New Damages Theory

A reasonable royalty calculus examines the patented technology’s value “to the parties *in the marketplace when infringement began.*” *LaserDynamics, Inc. v. Quanta Comput., Inc.*, 694 F.3d 51, 76 (Fed. Cir. 2012) (emphasis added); *Unisplay, S.A. v. Am. Elec. Sign Co.*, 69 F.3d 512, 518 (Fed. Cir. 1995) (warning against “after-the-fact assessment”). Thus, determining the proper date for a hypothetical negotiation is “[t]he first step” and an “essential” inquiry to properly assess reasonable royalties. *Integra Lifesciences I, Ltd. v. Merck KGaA*, 331 F.3d 860, 870 (Fed. Cir. 2003), *vacated on other grounds*, 545 U.S. 193 (2005). Even a one year difference in hypothetical negotiation dates can result in a “drastically different” hypothetical negotiation. *Id.*; *see also LaserDynamics*, 694 F.3d at 76 (remanding for new damages trial where hypothetical negotiation date changed). Mr. Weinstein’s pre-existing opinions use a now-defunct hypothetical negotiation date, which “makes [his] analysis unreliable” and is “not harmless error.” *RSA Protective Techs., LLC v. Delta Sci. Corp.*, 2021 WL 4978462, at *4–5 (C.D. Cal. Oct. 20, 2021).

Arendi must shift the hypothetical negotiation date by *more than five years* to late 2017 under its new infringement theory. *See LaserDynamics*, 694 F.3d at 75 (“In general, the date of the hypothetical negotiation is the date that the infringement began.”). This major change has undetermined and untested ripple effects on the damages analysis. Differences between early 2012 and late 2017 inevitably “change the risks and expectations of the parties,” *Integra*, 331 F.3d at 870, in ways that Mr. Weinstein has not analyzed and render his opinions unreliable. For example: the different market landscape, business practices, and parties’ bargaining positions in view of a quickly evolving technological field (*Georgia-Pacific* factors 3, 4, 5, 12, 15); a dramatically shorter license duration of about one year (late 2017–Nov. 2018) instead of nearly seven years (early 2012–Nov. 2018) (*GP* factors 7, 11, 15); and Google’s consideration of acceptable non-infringing alternatives under the changed circumstances (*GP* factors 9, 15).²

Arendi might try to argue that the parties should forge ahead with the ongoing trial by speculating how these and other factors would or would not impact Mr. Weinstein’s opinions. But that misses the fundamental point that Arendi has deprived Google of an opportunity to take any discovery concerning, or test his analysis of, a late 2017 negotiation over just one accused functionality. Nor does Mr. Weinstein’s attempt to excise 2012-to-late-2017 units from his royalty base fix the issue. The same problems above apply, plus his math is improper. For example, when CD and QA were in the case, the accused functionalities for Chrome spanned all relevant operating system versions, so breaking down the royalty base by operating system version did not matter. However, STS was only enabled starting with the Android 8 mobile operating system, so it is now critical to distinguish between products using pre-Android 8 operating systems (no longer

² For instance, Google might have more seriously relied on non-infringing alternatives Linkify and Smart Linkify (held not to infringe D.I. 393) in the shorter period of alleged infringement

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allegedly infringing by any app) vs. post-Android 8 operating systems (allegedly infringing). Yet Mr. Weinstein has not attempted to do that; his new opinion is further unreliable for violating apportionment principles. *See Finjan, Inc. v. Blue Coat Sys., Inc.*, 879 F.3d 1299, 1309 (Fed. Cir. 2018) (“[U]ltimate combination of royalty base and royalty rate must reflect the value attributable to the infringing features of the product, and no more.” (citation omitted)). The Court should preclude Arendi from presenting expert testimony on damages, whether through Mr. Weinstein or any witness. *See ePlus, Inc. v. Lawson Software, Inc.*, 700 F.3d 509, 523 (Fed. Cir. 2012) (prejudice from changing damages on eve of trial “sufficient basis to preclude [patentee] from presenting any evidence of damages at trial”); *MLC Intell. Prop., LLC v. Micron Tech., Inc.*, 10 F.4th 1358, 1373 (Fed. Cir. 2021) (courts may properly preclude reliance on “computation or evidence” of damages beyond timely disclosures).

III. The Court Should Also Bar Arendi from Benefiting from Its Behavior

Precluding Weinstein’s testimony is necessary and appropriate because that testimony is no longer reliable. Additionally, a targeted sanction is necessary to prevent Arendi perversely from *benefiting* from that preclusion—which it will if it is permitted to suggest, or the jury believes, that it may award *even more* than Mr. Weinstein’s new [REDACTED] number. Arendi’s disclosure came without warning on the eve of trial, was avoidable and thus suggests bad faith, and is extremely prejudicial, as it deprives Google of adequate notice and opportunity to develop critical issues for its defenses. In view of the extremely late disclosure, it is not possible to cure the prejudice, let alone do so without disrupting trial. Thus, the relevant considerations all favor sanctions, and the Court may also invoke its inherent powers. A reasonable and appropriate sanction here would be to ensure that Arendi may not benefit from its behavior and lack of a viable damages theory: Arendi should not be allowed to explicitly or implicitly (1) urge an award larger than [REDACTED]; or (2) assert that Google’s damages expert used an incorrect hypothetical negotiation date, as that would penalize Google for a problem of Arendi’s creation and on which Arendi has the burden of proof.

IV. The Court Should Grant Summary Judgment of No Willfulness

To prevail on willfulness as a matter of law under Fed. R. Civ. P. 56(a), Google need only establish “absence of evidence to support [Arendi’s] case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Arendi’s new willfulness theory fails because it did not provide notice of alleged STS infringement until *after* the ’843 Patent expired—and thus Google could not subsequently have infringed, let alone with the requisite specific intent to infringe. *See* Ex. B (11/12/18 supplemental list of accused products adding Google Pixel mobile devices and Android software that use STS); D.I. 97 (Amended Complaint) ¶ 5 (accusing mobile products using STS). The initial infringement contentions identified “Google Drive, including Google Docs,” and “Gmail,” both in *desktop* browsers. *See* Ex. C (excerpted 12/6/13 Contentions). In contrast, STS is only used with the *Android mobile* operating system. Critically, with the removal of CD and QA, there now is not a single product accused of infringement from the time of the initial 2013 Complaint until late-2017 (when STS was first released), such that a post-complaint willful infringement allegation makes no sense. Even assuming Google knew of the ’843 Patent when it released STS, that knowledge of the patent (and any infringement) is insufficient as a matter of law to establish “deliberate or intentional” infringement with STS. *Bayer Healthcare LLC v. Baxalta Inc.*, 989 F.3d 964, 988 (Fed. Cir. 2021).

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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)