IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

NON-PARTY APPLE INC.'S MOTION FOR SANCTIONS

Non-party Apple Inc. ("Apple"), by and through its attorneys, hereby moves for sanctions of Plaintiff Arendi S.A.R.L. ("Plaintiff"), Plaintiff's counsel Susman Godfrey, and its damages expert Mr. Weinstein because of a flagrant breach of the Protective Order in this matter and in *Arendi S.A.R.L. v. Apple Inc.*, C.A. No. 1:12-cv-01596 (D. Del.) (the "Apple Lawsuit").[1]

I. INTRODUCTION

Apple attended the trial between Plaintiff and Google because of Apple's fears that Plaintiff would disregard the Protective Order and mistreat Apple's confidential business information. And Plaintiff did just that during the re-direct examination of Plaintiff's damages expert, Mr. Roy Weinstein when Mr. Seth Ard (Plaintiff's counsel) elicited, and Mr. Weinstein provided, testimony in open court that divulged details of the Apple Agreement. This exchange also publicly disclosed Apple confidential information from the Apple Lawsuit, violating Plaintiff's obligations under the Protective Orders entered in this case and the Apple Lawsuit.

[1] Apple and Arendi settled that matter on September 15, 2021. While the matter appears to still be open on Pacer, the Honorable Judge Leonard P. Stark is now a United States Judge for the Court of Appeals for the Federal Circuit. This Court was the Magistrate Judge entrusted to hear discovery disputes in the Apple Lawsuit. *See* Apple Lawsuit Dkt. No. 158.

Indeed, Plaintiff did not request to seal the courtroom before eliciting such testimony about the Apple Agreement or the Apple Lawsuit, and did not seek any corrective measures after the fact to mitigate the harm to Apple even after being asked to do so by Apple's counsel.

Apple brings this Motion reluctantly, but given the flagrant violations at issue here, and Plaintiff's inaction to remedy the situation, it is necessary. In particular, Apple respectfully asks the Court to issue an order (i) finding that Plaintiff, Plaintiff's counsel Susman Godfrey, and Plaintiff's damages expert Mr. Weinstein violated the Protective Order in this case by disclosing designated information without authorization, and admonishing them for doing so, and (ii) awarding Apple its fees in connection with filing this Motion and any other fees or costs that the Court sees fit.

II. STATEMENT OF FACTS

The Protective Order governs the production of discovery materials in this matter.[2] Designated material "shall be used by a Receiving Party solely for this case, and shall not be used directly or indirectly for any other purpose whatsoever." *See* Dkt. No. 16-1 at 4. Plaintiff may not share protected material of one defendant with any other defendant "in this litigation or any other litigation initiated by Plaintiff, absent express written permission from the producing Defendant." *Id.*

Apple and Plaintiff (among other licensors) executed the September 13, 2021 Settlement and License Agreement (the "Apple Agreement") to resolve the Apple Lawsuit in 2021 after nearly nine years of litigation. Section 7 of the Apple Agreement requires Plaintiff to keep the

[2] The Protective Order in the present litigation is the same as that entered in the Apple Lawsuit. *Compare* Dkt. No. 16-1 to Apple Lawsuit Dkt. No. 31-1.

terms of the agreement strictly confidential with certain, limited exceptions, none of which are relevant to this Motion. (*See* PX0066, Apple Agreement, § 7.1.)

On September 15, 2021, Plaintiff's counsel contacted Apple in-house counsel and requested Apple's consent to produce the Apple Agreement in all of Plaintiff's litigations in this District, including Plaintiff's litigation with Google. (Declaration of Garrett Sakimae in support of Apple's Motion for Sanctions ("Sakimae Decl.") ¶ 2.) Apple consented to that production provided that Plaintiff designated the document CONFIDENTIAL OUTSIDE COUNSEL ONLY under the Protective Order and agreed to supplemental protections:

- That Arendi would provide Apple with notice and the opportunity to object before it disclosed the Apple Agreement to any experts disclosed under the operative Protective Order;
- That Arendi would provide Apple with notice at the time exhibit lists are first exchanged if the Apple Agreement appeared on a party's exhibit list; and
- That, if the Apple Agreement is used at a hearing or trial, Arendi agreed to use reasonable efforts to seal the courtroom and redact any related transcript portions.

(Id. ¶ 3.) Plaintiff's counsel agreed to both of those conditions that same day, and Plaintiff thereafter produced the Apple Agreement appropriately designated under the Agreed Protective Order. (*Id.* ¶ 4; Dkt. No. 16-1).

On April 4, 2023, Plaintiff indicated to Apple that it intended to use the Apple Agreement at trial in this case, but that "the courtroom will be sealed during discussion of its terms other than the total payment amount." (Declaration of Hannah L. Cannom in support of Motion for Sanctions ("Cannom Declaration") ¶ 2.) Apple's counsel immediately responded and over the course of the weeks leading up to trial, proposed solutions that allowed Plaintiff to not seal the courtroom while also protecting Apple's confidential information, including the amount of consideration Apple paid to Plaintiff in the Apple Agreement. (*Id.*) Unable to agree upon a resolution, Apple's counsel informed Plaintiff's counsel that if Plaintiff intended to disclose the

terms of the Apple Agreement in open court, Apple would raise it with the Court on the first day of trial. (*Id.* ¶ 3.) Apple then had outside counsel and in-house counsel attend the trial to monitor this issue. (*Id.* ¶ 4.) At no point has Apple ever agreed to de-designate or downgrade the confidentiality designation on the Apple Agreement, nor has Apple ever consented to publicly disclosing the monetary terms of the Apple Agreement. (*Id.*)

As this Court knows, on the first morning of trial, the parties agreed that they would give the jury printouts of the slides that disclosed the amount of the Apple Agreement so the jury could privately understand the monetary terms while avoiding their publication to the world. While not perfect, Apple accepted this solution. Nevertheless, during the April 26 redirect examination of Plaintiff's damages expert, Mr. Roy Weinstein, Plaintiff elicited, and Mr. Weinstein provided, testimony that publicly disclosed the monetary terms of the Apple Agreement, without requesting that the courtroom be sealed, violating their obligations under the Protective Order.

In particular, in response to questions from Plaintiff's counsel, Mr. Weinstein (despite his own obligations under the Protective Order) openly testified about the Apple Agreement and disclosed its monetary terms. (*See* 4/26/23 Transcript at 641:23-24.) Plaintiff's counsel did not ask to seal the courtroom either before or after Mr. Weinstein's disclosure of Apple confidential information. Instead, Plaintiff's counsel pursued further questioning in which Plaintiff's counsel disclosed *additional* Apple confidential information — namely, the total amount of damages Mr. Weinstein opined Apple would owe Plaintiff should it have prevailed in the Apple Lawsuit —and elicited further testimony from Mr. Weinstein about his damages analysis in the Apple Lawsuit. (*See id.* at 642:15-19.) This further testimony also violated the Protective Order in the Apple Lawsuit. As a non-party to this litigation—and having been outside of the courtroom for

the sealed part of Mr. Weinstein's testimony— Apple's counsel had no ability to anticipate that Plaintiff and Mr. Weinstein would publicly disclose Apple confidential information. (Cannom Decl. ¶ 5.)

Plaintiff still failed to take any corrective measures after Mr. Weinstein's additional testimony, despite being asked to do so by counsel for Apple. During the break, when counsel for Apple approached Plaintiff's counsel about improperly disclosing Apple confidential information, Mr. Ard said he would "deal with this later." (*Id*. ¶ 6.) Plaintiff's counsel never, however, "deal[t] with" the unauthorized disclosure. Instead, it was *Apple's* counsel, monitoring trial to protect against just this type of violation, who asked the Court to seal the portions of the transcript in which Mr. Weinstein and Plaintiff's counsel disclosed Apple confidential information (which the Court conditionally approved), and thereafter Apple filed a motion to seal the same (which remains pending, *see* Dkt. No. 491).

III. ARGUMENT

"Civil contempt is a sanction to enforce compliance with a court order or to compensate for losses or damages sustained by noncompliance." *See Invista North America S.A.R.L. v. M&G USA Corp.*, Case No. 11-cv-1007-SLR-CJB, 2014 WL 1908286, *4 (D. Del. Apr. 25, 2014). Where the United States Magistrate Judge exercises consent jurisdiction in civil cases under 28 U.S.C. § 636(c), the Magistrate Judge may enter an order of civil contempt. *Id*. In addition, federal courts have inherent power to impose sanctions for a party's misconduct. *See In re Intel Corp. Microprocessor Antitrust Litig.*, 562 F. Supp. 2d at 610-11; *see also Citrix Sys., Inc. v. Workspot, Inc.*, No. CV 18-588-LPS, 2020 WL 5884970, at *6 (D. Del. Sept. 25, 2020). When exercising discretion under its inherent sanction powers, a court is guided by the considerations including: (1) the nature and quality of the conduct at issue; (2) whether the attorney or the client

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