IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

GOOGLE'S MOTION FOR JUDGMENT AS A MATTER OF LAW FOR NO DAMAGES OR, IN THE ALTERNATIVE, NOMINAL OR LIMITED DAMAGES

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Google moves pursuant to Federal Rule of Civil Procedure 50(a) for judgment as a matter of law ("JMOL") of no damages, or in the alternative nominal damages.

I. LEGAL STANDARD

Although 35 U.S.C. § 284 provides that upon a finding of infringement, "the court shall award . . . damages adequate to compensate for the infringement" "in an amount no less than a reasonable royalty," *Dow Chem. Co. v. Mee Indus., Inc.*, 341 F.3d 1370, 1381 (Fed. Cir. 2003), the patentee bears the burden of presenting sufficient evidence thereof, *TecSec, Inc. v. Adobe Inc.*, 978 F.3d 1278, 1291 (Fed. Cir. 2020). Accordingly, "[t]he statute does not require an award of damages if none are proven that adequately tie a dollar amount to the infringing acts." *Id.* The statute is also satisfied by awarding nominal damages. *See AOS Holding Co. v. Bradford White Corp.*, 2021 WL 5411103, at *38 (D. Del. Mar. 31, 2021), *aff'd*, 2022 WL 3053891 (Fed. Cir. 2022) ($1 award for direct infringement); *Info-Hold, Inc. v. Muzak LLC*, 783 F.3d 1365, 1372 (Fed. Cir. 2015) ("Where the patentee's proof is weak, the court may award nominal damages.").

Under apportionment principles, the "ultimate combination of royalty base and royalty rate must reflect the value attributable to the infringing features of the product, and no more." *Finjan, Inc. v. Blue Coat Sys., Inc.*, 879 F.3d 1299, 1309 (Fed. Cir. 2018) (citation omitted). Although a "reasonable royalty analysis 'necessarily involves an element of approximation and uncertainty, a trier of fact must have some factual basis for a determination of a reasonable royalty.'" *Id.* at 1312 (vacating denial of damages JMOL); *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1336 (Fed. Cir. 2009) (vacating denial of damages JMOL where "no reasonable jury could have found that [patentee] carried its burden"). "The Court must determine not whether there is literally no evidence supporting the non-moving party, but whether there is evidence upon which the jury could properly find for the non-moving party." *Stewart v. Walbridge, Aldinger Co.*, 882 F. Supp.

1441, 1443 (D. Del. 1995). When an expert presents "little more than conclusory evidence," the record lacks substantial evidence. *Wechsler v. Macke Int'l Trade, Inc.*, 486 F.3d 1286, 1294 (Fed. Cir. 2007) (reversing denial of damages JMOL).

II. ARGUMENT

To obtain his proposed reasonable royalty, Mr. Weinstein uses four Settlement Agreements—the "Microsoft License," (PX0075); the "Samsung License," (PX0077); "Microsoft Mobile License" (PX0078); and the "Apple License," (PX0066)—to calculate an effective royalty rate (10 cents per Google app download and 48 cents per Google device sale); multiplies that rate by a royalty base (number of Google app downloads or Google device sales); and then adjusts the result upward, using a 4X multiplier that supposedly represents litigation risk. Mr. Weinstein's reasonable royalty opinions are not legally sufficient evidence to support a damages verdict for multiple reasons: (1) his royalty base includes Google apps and devices[1] that *cannot* infringe because they were not updated with the accused Smart Text Selection ("STS") functionality in Android 8.0 or later operating systems; (2) he failed to properly apportion the settlement agreements used to obtain his royalty rates; and (3) his 4X multiplier is not supported by any legitimate basis. Arendi has waived any right to recover under alternative theories of infringement. Even if there is no waiver, the lack of substantial evidence can only support a finding of nominal damages.

[1] The "Accused Products" are the instrumentalities accused of infringement, including (1) the "Accused Apps," which are Google Calendar, Chrome, Contacts, Docs, Gmail, Hangouts, Inbox, Keep, Messages, Sheets, Slides, and Tasks; and (2) the "Accused Devices," which are Pixel 2, Pixel 2 XL, Pixel 3, Pixel 3 XL, and Pixel C.

A. There is no legally sufficient evidence to support Arendi's damages theory

1. Arendi's royalty base sweeps in apps and devices that cannot infringe

The inclusion of non-infringing instrumentalities in infringement damages violates 35 U.S.C. § 284. It also constitutes improper application of the hypothetical negotiation framework and apportionment principles because the assertion that the defendant would pay for noninfringing features "runs contrary to what common sense indicates a reasonable licensor would pay for the patents at issue." *Rembrandt Soc. Media, LP v. Facebook, Inc.*, 22 F. Supp. 3d 585, 595 (E.D. Va. 2013).

Arendi's infringement theories are premised on accused STS functionality that first became available in late 2017 via the Android 8.0 update release.[2] *See* 4/26/23 Trial Tr. (Smedley) at 547:8–13 (confirming that "[i]f this code didn't exist in Android 8, then the 12 apps would not infringe"); *id.* (Smedley) at 556:5–7 ("Android 7 doesn't have the code for Smart Text Selection built into the framework"). So as Mr. Weinstein conceded, it was "very important that [he] accurately count only those apps that are actually installed on devices with Android 8 or 9," and that "it would be a mistake to include" Google apps installed on an earlier version of Android. 4/26/23 Trial Tr. (Weinstein) at 602:18–603:3.

However, Mr. Weinstein failed to accurately limit his royalty base to the Google apps installed on, and Google devices sold with, Android 8 or 9. He relied on data representing ***all*** downloads of the Google apps and ***all*** sales of Google devices between late 2017 and patent expiration (November 10, 2018). *See* DTX-0581; 4/26/23 Trial Tr. (Weinstein) at 607:24–609:1, 614:23–615:10. He simply "assumed" that they all had Android 8 or 9, even though they did not identify any Android version breakdown. 4/26/23 Trial Tr. (Weinstein) at 605:9–11, 608:16–20

[2] Google disputes the starting date of alleged infringement.

(agreeing that "the source that [he] used to calculate the number of apps that were downloaded did not identify which apps went to Android 6, Android 7, Android 8, or Android 9"). He did "nothing" to determine if his assumption was accurate. *See, e.g.*, 4/26/23 Trial Tr. (Weinstein) at 610:18–610:22 (confirming he "did nothing to try to understand the conversion curve of how users were upgrading their products from Android 7 to Android 8"); *id.* at 612:17–613:7, 615:4–14, 633:13–634:2. Although he relied on Arendi's infringement expert Dr. Smedley to form some of his opinions, Dr. Smedley did not do this critical analysis either. *See* 4/26/23 Trial Tr. (Smedley) at 558:7–10 (agreeing he had not "analyzed how many of the accused applications were actually installed on phones with Android 8 or 9").

Indeed, there can be no genuine dispute that Mr. Weinstein's assumption is incorrect. The roll-out of Android 8 (and STS) did not take place "right away" in late 2017 but, rather, slowly over time potentially years or even never for certain devices. 4/26/23 Trial Tr. (Elbouchikhi) at 682:3–685:13; 4/27/23 Trial Tr. (Choc) at 791:18–792:3, 815:5–9 (roll-out could take years or even "never"); *id.* (Choc) at 814:18–21 (Weinstein's numbers would be "massively" off); *see also* 4/26/23 Trial Tr. (Toki) at 738:11–740:11. Mr. Weinstein tried to provide three excuses for his failure to apportion his royalty base. 4/26/23 Trial Tr. (Weinstein) at 634:10–635:1. None are availing.

First, he claims that STS is the only accused functionality in the case, so it was reasonable for him to assume that the unit numbers were specific to that functionality. That is demonstrably false. When he prepared his expert report, there were other accused functionalities still in the case besides STS—namely Linkify, Smart Linkify, Content Detectors ("CD"), and Contextual Search Quick Actions ("QA"). Since these functionalities spanned *all* relevant Android versions, not just Android 8 and later, breaking down the royalty base by Android version did not matter at the time,

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