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,	**Original Version Filed: May 18, 2023**
Defendant.	**Public Version Filed: May 25, 2023**

ARENDI S.A.R.L.'s OPPOSITION TO NON-PARTY APPLE INC.'S MOTION FOR SANCTIONS

The Court should deny non-party Apple Inc.'s motion for sanctions because there is nothing improper—let alone sanctionable—about the way Arendi, its counsel, or its damages expert handled confidential information at trial. To the contrary, as the Court saw firsthand, Arendi took special precautions throughout trial to safeguard the information Apple and other entities sought to keep confidential.

Apple's motion advances unfounded and harmful speculation about a single witness's inadvertent, unsolicited, and momentary disclosure of two dollar figures during spontaneous redirect examination. Neither disclosure violated any Court order, and neither figure has since become public information. The accusations against Arendi's counsel are refuted by the record itself, given that the question preceding the disclosure plainly did not call for the witness to reveal any confidential information. The relevant question is bolded below:

> Q. You were asked several questions about the difference between the actual license rates that were agreed to with Samsung and Apple and hypothetical rates you are opining on. Do you recall that?
>
> A. I do.

> Q. **Do the differences between the real-world rates that were agreed to and the hypothetical rates impact your assessment of whether your multiplier was conservative?**
>
> A. Actually I think [it] supports my position that the multiplier was conservative. The analysis I did in connection with the Apple license that produced an estimate on my part of [Damages Figure] as the result of a hypothetical negotiations, versus the [Settlement Amount] license, which resulted from a real-world negotiation, demonstrates to me the significant differences that exist in the real-world-negotiation where there are other terms and other assumptions from a hypothetical negotiation where there are very strict rules about what's assumed and what information is available to the parties.

Decl. of Seth Ard ("Ard Decl."), Ex. A at 641:11-642:5. That Apple seeks sanctions for the bolded question above is bewildering and worse is that it would ascribe some improper motivation to Arendi's counsel in asking it. The question was general in nature and about the impact of differences between real-world and hypothetical negotiations. It in no way sought or intended to elicit confidential information.

By contrast, every single time that Arendi anticipated a question might call for confidential information, including on two separate occasions during the *direct* examination of Mr. Weinstein, Arendi duly sought permission to close the courtroom. *Id.* at 575:24-576:1, 588:23-589:3. In its opening and closing examinations, to avoid having to seal the courtroom, Arendi's counsel worked with Apple's counsel, Google's counsel and the Court on an agreed protocol: namely that demonstratives reflecting the value of the license agreements would be printed and handed out to the jury to avoid having those demonstratives placed on the screen viewable to the public. With this protocol, Arendi's counsel could then refer the jury to the demonstrative in argument without having to say those numbers in open court. Arendi did this even though the other three licensees – Samsung, MMI and Microsoft – did not take the position that the public should be shielded from this information during an open trial. Only Apple did. Though there is a fundamental question

about whether Apple's position comports with the access to courts required by the Constitution, Arendi nonetheless went to great lengths to comply with Apple's request.

Arendi also followed this protocol in the direct examination of the relevant expert witness, closing the courtroom on two separate occasions when counsel anticipated that his answers might reveal confidential information. In the attached declaration, the expert witness explains what should be obvious from the context: his disclosure during a single question on spontaneous redirect was inadvertently made while the courtroom was unsealed. *See* Decl. of Roy Weinstein.

Critically, the inadvertent disclosure was quickly remedied, and Apple has never argued otherwise: in the break following the inadvertent disclosure, the Court conditionally sealed the trial transcript without opposition from Arendi. The transcript section—including the momentarily disclosed figures at issue in this motion—has remained under seal ever since. That should have ended the matter. Notably, Apple has *never* identified any other remedy it thinks is appropriate to address the inadvertent reference beyond sealing the record. Apple has also not substantiated any harm from the disclosure—nor could it given the conditional sealing of the record and lack of evidence that anyone was in the courtroom who was not affiliated with the case. *Cf.* Trial Tr. (4/26) at 512:17-513:11 ("So based on what I've seen so far here, we've had no one from the public that is not associated with this case in some way that's been excluded from the courtroom.").

Instead of letting the Court's cure bring this issue to a close, in contrast to the prompt efforts Arendi's counsel went through, Apple waited until the day after the jury rendered its verdict—a full week after the events above transpired—and then pursued a highly publicized attack against Arendi and its counsel, filing a sanctions motion premised on a wild and completely unsubstantiated allegation about "bad faith" motives of Arendi and its counsel:

> On the other hand, Plaintiff and its counsel have strong motivations to push the envelope on "inadvertently" disclosing Apple's confidential information so that the

> public can know how much Apple paid to license Plaintiff's patents, to the ultimate benefit of Plaintiff's licensing regime and Plaintiff's counsel's litigation strategy in this and other cases.

Dkt. 538 at 8. Apple's accusation that Arendi and its counsel intentionally disclosed the licensing information to support their "litigation strategy in this and other cases" has no basis—Apple offers not a single citation to anything in support of this baseless claim, which is extremely dangerous and appears to be a threat to counsel who may be adverse to Apple elsewhere. It is also contradicted by Arendi's conduct. Arendi sought to seal the courtroom on six different occasions when the licensing or other confidential information arose. *See* Ard Decl., Ex. A at 154:13-15, 244:1-6, 245:7-16, 434:16-18, 575:24-576:1, 588:23-589:3; 1337:15-16. Arendi did not object to conditional sealing of the record above. *Id.* at 655:8.

Apple's argument that Arendi's counsel improperly repeated Mr. Weinstein's Damages Figure in a follow-up question is equally baseless. This disclosure was inadvertently made while the Court room was unsealed, in response to testimony that had just mentioned the same number. Further, the disclosure is expressly permitted by the Protective Order. This Damages Figure is not confidential Apple information, nor does it not reveal any confidential information of Apple. Rather, it is a number that Arendi's expert reached in his *own* damages opinion against Apple based on his own analysis. It was simply his opinion on damages. The Protective Order does not "prevent or restrict a Producing Party's own disclosure or use of its own Protected Material for any purpose." D.I. 16-1 at § 4(B); *see also* D.I. 16-1 at § 10(F) ("Nothing in this Order shall restrict in any way a Producing Party's use or disclosure of its own Protected Material.").

Notwithstanding the lack of any actual public disclosure or harm to Apple, Apple has improperly moved for sanctions against Arendi. The motion should be summarily denied as procedurally improper: Apple did not move to intervene in this action in which it is not a party; it

did not obtain leave of Court to do so; and it did not even give notice to Arendi of this motion or seek to meet and confer. Aside from those concerning procedural flaws, Apple's motion lacks any merit. The motion appears to be driven by other goals and motivation (particularly given its extensive coverage in the press), not evidence. Apple's unsupported and false allegations about the motives of Arendi and its counsel should be the real focus of improper conduct.

I. BACKGROUND

Nearly ten years ago, the Court entered an Agreed Protective Order in this case. D.I. 16. It allows information to be designated "CONFIDENTIAL OUTSIDE COUNSEL ONLY" only if it is "extremely confidential and/or sensitive in nature" and "the Producing Party reasonably believes" its disclosure outside of a narrowly-defined group "is likely to cause economic harm or significant competitive disadvantage." D.I. 16-1 at § 6(D)(1). The Protective Order does not "prevent or restrict a Producing Party's own disclosure or use of its own Protected Material for any purpose." D.I. 16-1 at § 4(B); *see also* D.I. 16-1 at § 10(F) ("Nothing in this Order shall restrict in any way a Producing Party's use or disclosure of its own Protected Material.").

In September 2021, Arendi and Apple entered into a Settlement and License Agreement (hereafter, the "Apple Agreement") to resolve a separate lawsuit between Arendi and Apple. The Apple Agreement included a dollar figure payment term (the "Settlement Amount"). PX0066 (Apple Agreement). As publicly disclosed in Apple's motion, Section 7.1 of the Agreement required ***both*** parties to keep the Agreement's terms confidential; however, Section 7.1 permitted disclosure "during the course of litigation," so long as the disclosure was subject to a protective order, limited to outside counsel, and followed written notice. *Id.* Arendi complied with those terms and disclosed the Apple Agreement to Google's outside counsel on November 17, 2021.

Before Arendi and Apple settled in 2021, Arendi had served an expert damages report by Roy Weinstein in its case against Apple. In that report, Mr. Weinstein had opined that a reasonable

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