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 REPLY IN SUPPORT OF MOTION FOR SANCTIONS

Plaintiff Arendi S.A.R.L.'s ("Plaintiff") Opposition misstates the law and facts, ignores the harm to Apple resulting from the public disclosure of Apple confidential information by Plaintiff's counsel and expert during trial, and ignores *Plaintiff's counsel's failure to take any action regarding the disclosure after it occurred*. Plaintiff's arguments are misplaced, and the Court should award Apple sanctions as requested in its Motion.

I. The Conduct of Plaintiff's Counsel and Expert Warrant Sanctions.

Plaintiff first argues that "an inadvertent disclosure that was promptly corrected does not warrant sanctions." (Opp. at pp. 8-13.) This argument fails as an initial matter because it suggests that a heightened bad faith standard applies and must be met to support a sanctions award. However, as the Third Circuit explained in *Republic of Philippines v. Westinghouse Elec. Corp.*:

> Although we stated in *Landon v. Hunt*, 938 F.2d 450 (3d Cir.1991), that a prerequisite for the exercise of the district court's inherent power to sanction is a finding of bad faith conduct" (*id*. at 454), that statement should not be read to require a finding of bad faith in every case, regardless of the sanction contemplated. … [A] court need not always find bad faith before sanctioning under its inherent powers: "[s]ince necessity does not depend upon a litigant's state of mind, the

> inherent sanctioning power must extend to situations involving less than bad faith." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991).

Republic of Philippines v. Westinghouse Elec. Corp., 43 F.3d 65, n. 11 (3rd Cir. 1994). Here, the Court is empowered by the law of this Circuit to fashion an appropriate remedy based on its inherent powers to sanction. *Id.* at 74. Moreover, while "a pattern of wrongdoing may require a stiffer sanction than an isolated incident," nothing prohibits the Court from sanctioning a party or its counsel for a singular action. *Id.* Applying this standard, the facts here demonstrate more than sufficient wrongdoing by Plaintiff. This is because the disclosure was neither entirely "inadvertent," nor was it "promptly corrected" through any action *by Plaintiff*.

First, even if one were to agree that Mr. Weinstein's disclosure of the Settlement Amount (as defined in the Opposition) during his redirect testimony was "spontaneous," (though Apple disputes this) the balance of the disclosure complained of by Apple was unquestionably not. Rather than halting Mr. Weinstein's redirect testimony at that point and seeking to seal the courtroom, Plaintiff's counsel proceeded with an immediate follow-up line of questioning in which he disclosed the Damages Figure and elicited additional testimony from Mr. Weinstein regarding his damages analysis with respect to Apple. (*See* 4/26/23 Transcript at 641:20 to 642:22.) Such conduct is not inadvertent, and it is mere luck that Mr. Weinstein did not "spontaneously" reveal any additional Apple confidential information in response to Plaintiff's counsel's follow-up questioning.[1]

Even if Mr. Weinstein's statement was a spontaneous utterance over which counsel had no control, thereafter Plaintiff failed to undertake any actions to rectify the situation. Instead of

[1] It is also mere luck for Arendi that there were no members of the public in the courtroom at the time of this disclosure. Notably, Plaintiff's counsel failed to confirm this fact. Rather, it was Apple's counsel who asked all unknown participants in the courtroom to confirm their affiliation with the parties.

"promptly tak[ing] all reasonable measures to retrieve the improperly disclosed Discovery material and [] ensur[ing] that no further or greater unauthorized disclosure and/or use thereof is made" as required by the Protective Order, Plaintiff's counsel merely stated to Apple's counsel that he would "deal with it later" and then took no action. Plaintiff's argument amounts to "no harm, no foul," while conveniently ignoring that any perceived lack of harm to Apple is attributable entirely to Apple's corrective measures—not Plaintiff.[2] Had Apple's counsel not been in Court to monitor Plaintiff's use of Apple confidential information, this violation of the Protective Order would have persisted without correction. But Apple cannot attend every trial where its confidential information is presented and it must be able to depend on signatories to a Protective Order that they will abide by such protections. Plaintiff failed to do so here, and sanctions are warranted.

II. Plaintiff Violated the Protective Order, as Well as Its Supplemental Agreement with Apple and the Confidentiality Provisions of the Apple Agreement.

Plaintiff designated the Apple Agreement as "CONFIDENTIAL OUTSIDE COUNSEL ONLY" at the time it produced the Apple Agreement pursuant to the Protective Order and agreed to the supplemental protections that Apple requested. (ECF No. 540 (Sakimae Declaration) ¶ 3.) At no point during discovery or at trial did Plaintiff seek to de-designate the Apple Agreement. Indeed, when Apple told Plaintiff that it would monitor trial, Plaintiff tacitly acknowledged that public disclosure would be improper and agreed to measures to protect the Apple Agreement from public disclosure while discussing the information contained therein the

[2] Plaintiff states that "Apple has not identified anything else that Arendi should have done." (Opp. at 12.) At a minimum, Plaintiff should have determined if anyone else was in the Courtroom at the time of its disclosure and worked with them to "ensure that no further or greater unauthorized disclosure and/or use thereof [was] made." (ECF No. 16-1 at ¶ 13(A).) Plaintiff did not do this; Apple did.

with the jury. (*See* Opp. at 13.) Plaintiff's argument that it didn't violate the Protective Order here is disingenuous and should be rejected.

But even if the Court were to determine the Plaintiff did not technically violate the Protective Order, that would not be fatal to this motion for sanctions as violation of a Court order is not a necessary threshold to a sanctions award. Rather, in addition to their civil contempt power, 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). Here, even setting aside the Protective Order, Plaintiff does not dispute in its Opposition that it violated its supplemental agreement with Apple regarding the treatment of the Apple Agreement at trial in this action as well its confidentiality obligations to Apple under the Apple Agreement. Any of these violations is, and certainly all of these violations taken together are, sufficient misconduct to award sanctions against Plaintiff.

III. Apple Suffered Indisputable Prejudice as a Result of Plaintiff's Public Disclosure of Apple Confidential Information.

Plaintiff willfully ignores the real prejudice suffered by Apple here. Not only did it have to station two attorneys in the courtroom for over a week to monitor trial, but it also had to rectify the disclosure once it had occurred because Plaintiff was unwilling to do so. Plaintiff's statement that there is no prejudice because "Apple voluntarily allowed the Settlement Amount to be made available to its competitor, Google, ***without consulting Arendi***" is absurd. (Opp. at 6 (emphasis in original); Opp. at 16.) Google's corporate representative, Mr. Choc, was in the courtroom at the time that Mr. Weinstein disclosed the Settlement Amount because Plaintiff failed to seal the Courtroom. (Second Declaration of Hannah L. Cannom in support of Non-Party Apple Inc.'s Motion for Sanctions ¶ 2, Ex. A.) It was only because Mr. Choc had already heard

the Settlement Amount as a result of Plaintiff's improper disclosure that Apple consented to his attending the closing, subject to certain conditions, which he satisfied. (*Id.*) Plaintiff cannot credibly claim that Apple's consent to Mr. Choc's attendance at closing—after Plaintiff's improper disclosure of Apple's confidential information in public court—demonstrates an indifference or lack of diligence with respect to its, or Arendi's, confidential information. Again it was Plaintiff, *not Apple*, who should have remediated the Protective Order disclosure with Mr. Choc. (ECF No. 16-1 at ¶ 13(A).)

Plaintiff argues that Apple's timing and choice to file its Motion was driven by some nefarious motivation, but it was not. (*See* Opp. at 3-4.) Apple waited more than a week to file its Motion so as to let the trial conclude and to confirm that there were no additional Protective Order violations with respect to Apple confidential information. In the interim, and to rectify the immediate violation of the Protective Order, Apple promptly filed a motion to seal as requested by the Court. (ECF No. [].) Apple seeks sanctions, not as a threat, but as a means to correct Plaintiff's failure to comply with the Protective Order and to proactively protect the Apple confidential information that it had previously agreed to keep confidential.

IV. Apple's Motion Is Procedurally Proper.

None of the case law cited by Plaintiff indicates that Apple must be a party to the litigation in order to protect its confidential information and/or seek an award of sanctions here. For example, *Krumwiede v. Brighton Assocs., L.L.C.*, merely found that the plaintiff lacked standing to challenge the defendant's use of a non-party's protected information where the non-party attempted to "go through [the plaintiff] to vicariously attack [the defendant's] use of [the non-party's] documents." Case No. 05-cv-3003, 2006 WL 2644952, at *3 (N.D. Ill. Sept. 12, 2006); *see also Burton Mech. Contractors, Inc. v Foreman*, 48 F.R.D. 230, 234 (N.D. Ind. 1992) (finding that plaintiff did not have standing to assert the confidentiality rights of non-parties).

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