IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ARENDI S.A.R.L., Plaintiff, v. GOOGLE LLC, Defendant.	C.A. No. 13-919-JLH **Original Version Filed: July 21, 2023** **Public Version Filed: July 28, 2023**

ARENDI S.A.R.L.'S REPLY IN SUPPORT OF ITS RENEWED MOTIONS FOR JUDGMENT AS A MATTER OF LAW AND MOTION FOR A NEW TRIAL

Google's brief confirms its failure to prove invalidity. First, Google does not (and cannot) identify element-by-element expert testimony. Instead, it pretends none is required. Second, Google fails to explain how exhibits and fact witnesses could fill the gaps in expert testimony. Its argument ignores claim limitations. Its "*see, e.g.*" approach cites evidence with no apparent connection to its theories and illustrates the need for expert analysis. Finally, Google relies on estopped prior art. Arendi is thus entitled to judgment as a matter of law or a new trial.

I. GOOGLE LACKS EXPERT TESTIMONY TO SUPPORT INVALIDITY

Rather than identify expert testimony to establish invalidity, Google provides two out-of-context soundbites to suggest such testimony was not needed. D.I. 576 at 1. Both cases Google quotes undercut its position and confirm the general requirement of expert testimony to support a finding of invalidity. *E.g.*, *Koito Mfg. Co. v. Turn-Key-Tech, LLC*, 381 F.3d 1142, 1152 (Fed. Cir. 2004). Exceptions to that rule are limited to inapposite cases concerning simple technologies. *E.g.*, *Id*. at n.4; *Alexsam, Inc. v. IDT Corp.*, 715 F.3d 1336, 1347-48 (Fed. Cir. 2013).

First, Google claims "[t]here is no invariable requirement that a prior art reference be accompanied by expert testimony." D.I. 576 at 1 (quoting *In re Brimonidine Patent Litig.*, 643 F.3d 1366, 1376 (Fed. Cir. 2011)). Google ignores the case's next sentence: "But it is well within a trial judge's discretion to require expert testimony supporting technical references that are relied on to establish obviousness." 643 F.3d at 1376. And in *In re Brimonidine*, the district court did just that, granting JMOL of non-obviousness partly due to a lack of expert testimony. *Id*. at 1368, 1376. The Federal Circuit then upheld the district court's "refus[al] to consider" allegedly invalidating references "in light of the absence of testimony explaining their relevance." *Id*. at 1376.

Second, Google quotes *Perfect Web Techs., Inc. v. InfoUSA, Inc.*, 587 F.3d 1324, 1329 (Fed. Cir. 2009), for the point that "a jury's deliberation 'may include recourse to logic, judgment, and common sense available to the person of ordinary skill that do not necessarily require

explication in any reference or expert opinion.'" D.I. 576 at 1. But *Perfect Web* acknowledged that "[i]f the relevant technology were complex, the court might require expert opinions." *Id.* at 1330. And Google omits that the Federal Circuit already rejected Google's reliance on *Perfect Web* when Google ***previously*** tried to invalidate the Asserted Claims:

> [I]n *Perfect Web*, the only case Appellees identifies [*sic*] in which common sense was invoked to supply a limitation that was admittedly *missing* from the prior art, the limitation in question was unusually simple and the technology particularly straightforward.… By contrast, the missing search at issue here "plays a major role in the subject matter claimed" and "affects much more than step (i)." … **Thus, the facts in *Perfect Web* are distinguishable from the case at bar and ought to be treated as the exception**, rather than the rule.

Arendi S.A.R.L. v. Apple Inc., 832 F.3d 1355, 1362 (Fed. Cir. 2016) (citations omitted).

Just as *Perfect Web* does not warrant using common sense to supply limitations of the Asserted Claims, it does not justify dispensing with expert testimony. *Perfect Web* involved an admittedly simple technology and dispute: "the parties agreed that ordinary skill in the relevant art required only a high school education and limited marketing and computer experience," and they disputed only whether it was obvious to *repeat* prior (and stipulated-to-be-obvious) steps. 587 F.3d at 1330. Unlike *Perfect Web*, the Asserted Claims depend on the complex internal workings of computer systems. Google repeatedly asserted that jurors must "look under the hood" since the claims require "that under the hood these computer systems work in a very particular way," 4/24 Tr. (Opening Arg.) 89:3-18:

> [U]nder the hood is where all the difference lies. Because if all you looked at was what the user sees, you would see that what a user sees using something that Arendi said was in this patent, is identical to what existed with Apple Data Detectors and CyberDesk, and other things. What makes anything different is what's under the hood in this system.

Id. at 89:19-25. Looking "under the hood," Google's infringement expert, Dr. Rinard, testified that the structure and locus of source code determines whether limitations are met. 4/27 Tr. (Rinard)

915:4-917:4. Arendi's infringement expert, Dr. Smedley, explained complex code for hours. *E.g.*, 4/25 Tr. (Smedley) 295:5-297:4. And both parties presented expert testimony on invalidity.

Any "claim that the technology is simple is belied by the fact that both sides believed it necessary to introduce extensive expert testimony regarding the content of the prior art." *Alexsam*, 715 F.3d at 1348 (holding expert testimony required). Exhibits relied on in Google's invalidity case also included technical descriptions of software architecture. *E.g.*, DTX-0017.002 (describing parameters passed into method calls and supported APIs comprising CyberDesk); DTX-0190 (code for alleged "write a letter w. e-mail addr" script used to support ADD). And whereas the POSITA in *Perfect Web* had only "a high school education and limited marketing and computer experience," a POSITA here had a B.S. in computer science or engineering and about two years of work experience designing user applications and software. 4/25 Tr. (Smedley) 304:12-16.

The facts of this action not only make it unlike *Perfect Web* but also place it among cases that insisted on detailed expert testimony. In *Koito*, 381 F.3d at 1152 n.4, the "district court erred in concluding that explanatory testimony … was unnecessary because of this Court's decision[] in *Union Carbide Corp. v. American Can Co.,* 724 F.2d 1567 (Fed.Cir.1984)." *Union Carbide* had upheld invalidity of a patent for a "very simple means and method of dispensing plastic bags" despite lacking expert analysis. *Id*. The Federal Circuit limited *Union Carbide* to that context: "[W]e found anticipation because the references and the patent were "easily understandable" and the *patentee,* rather than the alleged infringer, provided explanatory analysis regarding the prior art references." *Id*. But the *Koito* patent was "not an 'easily understandable' patent" and, like the '843 Patent, could not be invalidated without expert testimony. *Id*. Likewise, *Proveris Sci. Corp. v. Innovasystems, Inc.*, 536 F.3d 1256, 1267 (Fed. Cir. 2008), affirmed JMOL of no-invalidity where the infringer lacked expert testimony because the "subject matter [was] sufficiently complex

to fall beyond the grasp of an ordinary layperson." And in *Carrier Corp. v. Goodman Glob., Inc.*, 64 F. Supp. 3d 602, 616 (D. Del. 2014), this Court required expert opinion to prove anticipation of a patent involving "complex technology, i.e., controlling HVAC systems using algorithms."

Google challenges, in note 2, only one case Arendi cited, *Schumer v. Lab. Comp. Sys., Inc.*, 308 F.3d 1304 (Fed. Cir. 2002)—urging the Court to ignore *Schumer* because it "concerned summary judgment" rather than JMOL. But *Schumer* isn't about whether to credit experts; rather, it confirms detailed expert testimony is generally required to invalidate a patent. Indeed, the Federal Circuit has explicitly applied *Schumer*'s requirement to post-trial motions. *Koito*, 381 F.3d at 1144, 1152; *see also Inline Connection Corp. v. EarthLink, Inc.*, 684 F. Supp. 2d 496, 515 (D. Del. 2010) (granting JMOL of no-anticipation). Google does not even mention the remaining authority Arendi cited that requires detailed expert testimony. *E.g.*, D.I. 560 at 8-9, 12.

As Arendi showed in its opening brief, Dr. Fox's testimony is conclusory, ignores claim limitations, and does not provide sufficient evidence of invalidity. Google's opposition does not rebut these characterizations. Google does not identify testimony by Dr. Fox that it alleges would explain each limitation. Rather, Google sticks to its faulty position that expert testimony is not required and argues that some amalgam of other evidence was enough. It was not.

II. GOOGLE'S "*SEE, E.G.,*" BRIEF DOES NOT ESTABLISH INVALIDITY.

Even were expert testimony unnecessary, Google's woolly "*see, e.g.,*" string-cites do not plug the holes in its evidence. "It is not the trial judge's burden to search through lengthy technological documents for possible evidence" of invalidity. *Biotec Biologische v. Biocorp, Inc.*, 249 F.3d 1341, 1353 (Fed. Cir. 2001). Many string-cites do not correspond to Google's assertions, which themselves ignore limitations and advance inconsistent theories of invalidity.

Google's treatment of limitations relating to first and second computer programs illustrates these shortcomings. Google offers a one-sentence retort to Arendi's argument that Dr. Fox ignored

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