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November 29, 2018

VIA ELECTRONIC FILING

The Honorable Leonard P. Stark
U.S. District Court for the District of Delaware
J. Caleb Boggs Federal Building
844 N. King Street
Wilmington, DE 19801

Re: *Arendi S.A.R.L. v. Google LLC*, C.A. No. 13-919-LPS

Dear Chief Judge Stark:

This letter responds to, and opposes, Arendi S.A.R.L.'s ("Arendi") November 19, 2018 motion requesting leave to supplement and amend its complaint against Google LLC, previously Google Inc., ("Google") pursuant to Rules 15(a)(2) and 15(d) of the Federal Rules of Procedure. (D.I. 89, 89-8.) Arendi's undue delay in seeking to amend its complaint to add 33 previously unasserted claims against Google is prejudicial and should be denied. The entire purpose of the four-year stay of this case was to permit completion of *inter partes* review proceedings ("IPRs") relating to the claims previously asserted by Arendi against Google so that this litigation could be substantially streamlined (if not eliminated altogether). Now that the IPRs are complete and *almost all* of the previously asserted claims have been invalidated, Arendi seeks a "do over" by adding claims that it deliberately elected *not* to pursue prior to the stay. Permitting Arendi to amend its complaint not only would prejudice Google; it also would wholly frustrate and contravene the stipulated rationale for the stay. Arendi's argument that it could not assert the additional patent claims at an earlier time due to the stay is demonstrably false, as all of the claims that Arendi now seeks to add (and certain products corresponding to what Arendi now wishes to accuse) were in existence at the outset of this litigation, ***and Arendi elected not to add those pre-existing claims prior to the original deadline to amend, which passed before the stay was entered on February 27, 2014.***

Arendi's proposed amended complaint also is futile because it is generic, non-specific, and fails to state a claim upon which relief can be granted. Nowhere in its proposed amended complaint does Arendi provide even the most rudimentary explanation of how the laundry list of newly identified Google products might actually infringe any of the previously unasserted patent claims, leaving Google entirely in the dark as to how to defend itself and/or how reasonably to approach discovery. Pursuant to its Rule 11 obligations, Arendi must have conducted an investigation and come to some conclusions as to how and why the newly identified Google products allegedly infringe; yet, Arendi provides absolutely no relevant details in its proposed amended complaint. This violates even the most liberal pleading standards.

Factual Background

On May 22, 2013, Arendi filed its original complaint against Google, which asserted infringement of claims 1, 7, 10, 13, 15, 17, 19, 23, 29, 32, 35, 37, 39, 40, and 41 of U.S. Patent No.

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7,917,843 (the “’843 patent”); claims 1-3, 6-9, 12-15, 18, 20, 25, 26, 31, 32, 36-40, 43-47, 50-54, 57, 58, 70, 71, 73, 74, 79, 80, 85, 93, 94, 96, 98, 99, and 101 of U.S. Patent No. 7,496,854 (the “’854 patent”); claims 1, 10, 11, 13-16, 46, 65, 66, 76, 77, and 79 of U.S. Patent No. 6,323,853 (the “’853 patent”); and claims 1, 7, 11, 12, 16, 19, and 20 of U.S. Patent No. 7,921,356 (the “’356 patent”). In its subsequent Section 4(a) Disclosures and Infringement Contentions, Arendi elected to pursue only some of these pled claims. On June 7, 2013, a Scheduling Order was entered in Arendi’s related Delaware cases (though the Order did not yet apply to the recently-filed Google case). (C.A. No. 12-1596, D.I. 18). On July 12, 2013, a Joint Stipulation and Proposed Order to Amend the June 7, 2013 Scheduling Order was entered to account for “Arendi’s filing of additional, separate lawsuits against Google and Yahoo!” (D.I. 8). The Amended Scheduling Order set February 4, 2014, as the deadline for a “Motion to join other parties, Amend.” *Id.* Between entry of the Amended Scheduling Order and the deadline for pleading amendments, the parties exchanged interrogatory responses (D.I. 20, 21, 28, and 29), Google produced Core Technical Documents (D.I. 30), and all defendants served Joint Initial Invalidity Contentions (D.I. 32). The February 4, 2014, deadline for pleading amendments passed without any effort by Arendi to amend its complaint or its Section 4(a) Disclosures. Then, on February 27, 2014—*after the deadline to amend had passed*—the parties entered into a Joint Stipulation to Stay pending completion of IPRs relating to the asserted patents. (D.I. 35).

In August 2018, after the Federal Circuit issued decisions on those pending IPRs that were appealed, the parties began discussing lifting the stay and negotiating an amended case scheduling order. (D.I. 85). As part of the negotiations, Arendi explicitly represented that it would only seek to assert against Google (a) previously asserted claims of the ’843 patent (that survived the IPRs), and (b) claims from the previously unasserted ’993 patent. (Ex. A, Ard to Unikel, 10/16/2018 Email). Arendi made crystal clear that it was not intending to add any previously unasserted claims from the ’843 patent, or to litigate the ’356 and ’854 patents at all. Though Google reserved its right to object to Arendi’s proposed addition of the ’993 patent, Google negotiated a case schedule based on Arendi’s explicit representation that the only potentially new patent claims might be those from the ’993 patent (and that the ’356 and ’854 patents would be removed from the case entirely). In fact, in the Amended Case Scheduling Order, Arendi stipulated “to seek no further amendment to the Complaints or to add additional asserted claims to those identified in the initial infringement contentions of December 6, 2013,” a carve out for Google intended only to permit Arendi’s possible motion for leave to add ’993 patent claims. (D.I. 85).

On November 2, 2018, in advance of Arendi’s Monday, November 12, 2018 deadline to file motions for leave to amend, Google requested an advanced draft of Arendi’s proposed amended complaint, which Arendi provided at the end of the business day on Thursday, November 8, 2018. Only when it received this draft did Google become aware that, despite Arendi’s previous representations to the contrary, Arendi was attempting to add 12 previously unasserted claims from the ’356, ’854 and ’843 patents, in addition to 21 previously unasserted ’993 patent claims. On November 9 and 12, 2018, the parties met-and-conferred, at which time Google expressed its objections (a) to the proposed addition of numerous previously unasserted claims, and (b) to the total lack of specificity in Arendi’s proposed amendments. (Ex. B, Meet and Confer Invitations). Arendi made some insufficient efforts to address Google’s specificity concerns, and on November 16, 2018, provided Google with revised infringement allegations that remained generic and unclear. (Ex. C, Lahad to Unikel, 11/16/2018 Email). On November

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19, 2018, Google notified Arendi that it should file its motion to amend, which Google would oppose. (Ex. D, Unikel to Lahad, 11/19/2018 Email).

Argument

I. Arendi's Proposed Amendments are Futile and Improper Because They Violate Basic Pleading Requirements

Arendi's proposed amended complaint does nothing more than (a) in a single paragraph, list a huge number of Google products as allegedly infringing (D.I. 89-1 at ¶ 5),¹ and (b) make conclusory assertions of infringement of each patent without providing any specificity as to how the identified products might infringe each patent (*e.g.*, D.I. 89-1 at ¶¶ 19, 29, 39, 49). Such bare bone allegations do not meet the pleading requirements of Fed. R. Civ. P. 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Raindance Techs., Inc. v. 10x Genomics, Inc.*, C.A. No. 15-152-RGA, 2016 WL 927143, at *2 (D. Del. Mar. 4, 2016) (applying the *Twombly/Iqbal* standard to claims of direct patent infringement filed subsequent to December 2015 abrogation of Federal Rule of Civil Procedure 84 and patent pleading Form 18). Although Arendi's factual allegations need not be elaborate, at the very least they must provide more than labels, conclusions and/or a "formulaic recitation" of the patents' claim elements together with a list of accused products. *Twombly*, 550 U.S. at 555-56 ("[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)"). Arendi's proposed amended complaint simply "pleads facts that are merely consistent with the defendant's liability, [and therefore] it stops short of the line between possibility and [the required showing of] plausibility of entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The problem with Arendi's completely non-specific pleading is evident, for example, in Arendi's identification of Google Pixel devices and Google Translate as allegedly infringing products. (*e.g.*, D.I. 89-1 at ¶ 5). The Pixel phone (a Google "device") is capable of running hundreds of possible apps and/or programs and also is capable of thousands of possible functionalities. Simply identifying the device as allegedly infringing provides no guidance whatsoever as to the specific combinations of phone and app(s)/program(s) that are the actual source of the accused infringement. Similarly, Arendi remains wholly silent as to which particular Google Translate functionalities are accused of infringement, and how they allegedly infringe. This makes it impossible for Google to assess Arendi's infringement claims, engage in meaningful and targeted discovery, and devise litigation strategy, and is exactly what *Twombly* and *Iqbal*'s pleading requirements are intended to protect against. *Twombly*, 550 U.S. 544; *Iqbal*, 556 U.S. 662; *see also Promos Techs. Inc. v. Samsung Elecs. Co.*, C.A. No. 18-307-RGA, 2018 WL 5630585, at *1-2, *4 (D. Del. Oct. 31, 2018) (finding insufficient pleading of direct infringement where plaintiff did not explain *why* defendant's accused products infringe, but instead limited the allegations of direct infringement to mere legal conclusions stating that accused products comprise all elements of asserted claims); *North Star Innovations, Inc. v. Micron Tech., Inc.*, C.A. No. 17-506-LPS-CJB, 2017 WL 5501489, at *1-3 (D. Del. Nov. 16, 2017) (recommending dismissal of direct infringement claim because simply (a) identifying

¹ Arendi's amended complaint further attempts to accuse products that are not even named in the pleading. (D.I. 89-1 at ¶ 5 ("and other products and devices containing the same or similar information handling technology disclosed in the asserted patents. . . ."))

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accused product, (b) parroting claim language, and (c) making conclusory statements that accused product meets claim limitations, was insufficient to make plausible claim of infringement); *Modern Telecomm. Sys., LLC v. TCL Corp.*, C.A. No. 17-583-LPS-CJB, 2017 WL 6524526, at *3 (D. Del. Dec. 21, 2017) (instructing that “there needs to be some facts alleged that articulate *why* it is plausible that the other party's product infringes that patent claim—not just the patentee asserting, in a take-my-word-for-it fashion, that it is so”). Particularly given the circumstances of this case and the lateness of Arendi’s request to amend, Arendi’s proposed amendments are futile in their failure to provide Google with some true understanding of exactly what combinations of products and programs/apps Arendi intends to accuse, so that discovery can be appropriately targeted and Google can formulate appropriate defenses.²

II. Arendi’s Proposed Amendments are Untimely, Prejudicial and Undermine the Purposes of the Stipulated Stay

In an apparent effort to bolster its weakened case against Google, Arendi’s proposed amended complaint attempts to add 12 *previously unasserted* claims from the ’356, ’854, and ’843 patents because the majority of the claims previously asserted by Arendi were invalidated in the IPRs. Arendi’s proposed amended complaint also seeks to add 21 claims from a patent that previously was unasserted against Google, the ’993 patent. All of the claims that Arendi now wishes to assert could have been added before the original deadline for amendments (February 4, 2014), but Arendi elected not to assert these claims at that time, before the parties filed their Joint Stipulation to Stay the case (on February 24, 2014). (D.I. 35). As noted, Arendi’s intention to add previously unasserted claims from the ’356, ’854 and ’843 patents came as a surprise to Google because during negotiations concerning the post-stay case schedule, Arendi specifically represented that it would seek leave to proceed only on (a) previously asserted claims of the ’843 patent, and (b) certain, specified claims of the ’993 patent. (Ex. A, Ard to Unikel, 10/16/2018 Email). Google objected to the proposed addition of the ’993 patent (as well as to the addition of any previously unasserted claims). However, based on Arendi’s explicit representations as to the potential scope of the case (focused only on the previously asserted ’843 claims and, potentially, the identified ’993 claims), the parties agreed to a stipulated, Amended Case Schedule. In the filed Stipulation, Arendi agreed that it would not seek to add any previously unasserted patent claims other than those of the ’993 patent that it had specifically “identified” to Google (and Yahoo!) prior to the Stipulation. (*See* D.I. 85, p. 2, n. 3, “[o]ther than these *identified amendments* for which Arendi may seek leave, Arendi has agreed to seek no further amendment to the Complaints or to add additional asserted claims to those identified in the initial infringement contentions of December 6, 2013.”). At a minimum, Arendi should now be held to the representations it made to the Court and to Google in order to secure a case schedule: to seek to proceed only based on previously asserted claims identified in the initial infringement contentions—1, 8, 13, 15, 17, 18, 19, 23, and 30 of the ’843 patent, and on claims 1, 2, 4-10, 12-18, and 20-24 of the ’993 patent, and *not* to proceed based on any previously unasserted claims

² Again, given that (a) Arendi’s infringement accusations necessarily depend on the combined operation of specific apps running on a particular device, and (b) there are literally thousands of apps (offered by hundreds of companies) that can be run on any device (made by any one of tens of companies), Arendi must provide some concrete guidance as to what specific combinations it is accusing of infringement (based on its Rule 11 investigations).

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of the '356 and '854 patents. (Ex. A, Ard to Unikel, 10/16/2018 Email).³

Arendi should further be held to its decision *not* to seek amendment of its complaint or Section 4(a) Disclosures prior to the original, pre-stay amendment deadline (February 4, 2014). Allowing Arendi a “do over” to now bring suit on patent claims that it could have asserted before the stay, but deliberately did not, would defeat the entire purpose of the stay, which was to simplify the case and narrow issues concerning the previously asserted claims. Indeed, the Joint Stipulation to Stay clearly reflects the expectation that the parties’ interests “would best be served by staying the present litigation pending the PTAB’s decision . . . because . . . *staying these cases would simplify the issues for trial.*” (D.I. 35, p. 5) (emphasis added). *See Neste Oil Oyj v. Dynamic Fuels, LLC*, C.A. No. 12-1744-GMS, 2013 WL 3353984, at *1–2 (D. Del. July 2, 2013) (identifying simplification of the issues at hand as a principal requirement for entry of a stay); *Softview LLC v. Apple Inc. et al.*, C.A. No. 10-389-LPS, 2013 WL 4757831, at *1 (D. Del. Sept. 4, 2013) (granting stay during pendency of IPR proceeding, noting that “should even some of the asserted claims be found invalid, that finding would reduce the number of issues left to be litigated.”)⁴ Applying the results of the IPRs, removing from the case the previously asserted, invalidated claims, and permitting Arendi now to proceed on only previously asserted '843 claims that that survived IPR, is precisely what both the Court and the parties intended when agreeing to the stipulated stay. Neither Google nor any other defendant ever presumed when agreeing to the stay that if Arendi’s asserted claims were invalidated (and thus removed from the case) that Arendi would simply seek to replace the invalidated/removed claims with new ones, sending the whole litigation back to square one. Therefore, Google respectfully requests that the Court deny Arendi’s motion for leave to amend/supplement the complaint against Google.

Respectfully,

/s/ David E. Moore

David E. Moore

³ During the parties’ case schedule negotiations, Arendi agreed (a) that the damages period as to the '993 claims (for purposes of 35 USC § 286) should be calculated from the date on which any permitted amended complaint is entered, and (b) that Google is entitled to full discovery on Arendi’s new '993 claims—just as if Arendi filed a brand new case/complaint against Google.

To the extent that Arendi is permitted to add *any* previously unasserted claims, Google is entitled to an order establishing that (a) the damages period as to these claims (for purposes of 35 USC § 286) is calculated from the date on which any permitted amended complaint is entered—just as would be the case if Arendi filed a new complaint against Google, and (b) Google is entitled to full discovery on Arendi’s new claims. *See Anza Techs., Inc. v. Mushkin, Inc.*, No. 17-cv-03135-MEH, 2018 WL 4095113, at *3-4 (D. Colo. Aug. 28, 2018).

⁴ That the Joint Stipulation to Stay (a) contemplated that the case could/would proceed only on previously asserted claims that survived IPR, and (b) provided real benefit to Arendi from this contemplated agreement, is demonstrated by the Stipulation’s provision that “each of the Defendants who did not file or join in the petition or that *inter partes* review proceeding agrees, on a claim-by-claim basis *as to those claims asserted against that Defendant in Plaintiff’s Disclosures Pursuant to the Delaware Default Standard on Discovery Rule 4(c)*, not to assert that such claim is invalid on any ground of unpatentability presented to the PTAB and decided in the PTAB’s final written decision for the claim.” (D.I. 35, p. 4) (emphasis added).

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