

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

|                                  |   |                            |
|----------------------------------|---|----------------------------|
| PERSONALIZED USER MODEL, L.L.P., | ) |                            |
|                                  | ) |                            |
| Plaintiff,                       | ) |                            |
|                                  | ) |                            |
| v.                               | ) | C.A. No. 09-525-LPS        |
|                                  | ) |                            |
| GOOGLE INC.,                     | ) |                            |
|                                  | ) |                            |
| Defendant.                       | ) | <b>JURY TRIAL DEMANDED</b> |
|                                  | ) |                            |
| <hr/>                            |   |                            |
| GOOGLE, INC.                     | ) |                            |
|                                  | ) |                            |
| Counterclaimant,                 | ) |                            |
|                                  | ) |                            |
| v.                               | ) |                            |
|                                  | ) |                            |
| PERSONALIZED USER MODEL, LLP and | ) |                            |
| YOCHAI KONIG                     | ) |                            |
|                                  | ) |                            |
| Counterdefendants.               | ) |                            |

**GOOGLE’S REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE  
MOTION FOR SUMMARY JUDGMENT**

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Dated: March 16, 2011  
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## **Introduction**

In its motion for leave, Google demonstrates that its proposed summary judgment motion concerns threshold jurisdictional and ownership issues and that, if granted, it would avoid unnecessary expenditure of resources on claim construction, expert discovery, and the remainder of this case. PUM's Opposition fails to rebut that this is precisely the type of summary judgment motion that is appropriate to consider before the summary judgment deadline, which is currently triggered off of a claim construction ruling and completion of expert discovery, neither of which have anything to do with Google's proposed motion for summary judgment.

Instead, PUM argues that its request for a Rule 30(b)(6) deposition from Google and another from SRI warrant denial of Google's motion. But Google offered to produce its Rule 30(b)(6) witness on this topic on February 7, and PUM refused to proceed on that date. In any event, the deposition is scheduled for March 17, so that point is now moot. As for PUM's subpoena for a SRI Rule 30(b)(6) deposition on March 21, PUM did not even bother to serve this subpoena until March 10—the day before it filed its Opposition. PUM should not be able to use its own lack of diligence in seeking discovery to preclude Google from pursuing summary judgment on the indisputably threshold issues of ownership and standing.

PUM also raises numerous purported reasons why Google's proposed motion for summary judgment should be denied. It is no surprise that PUM will oppose Google's motion. But that is not a basis to deny Google's request for leave. If it were, then a party would never be able to file an early motion for summary judgment. Google will respond to PUM's substantive arguments at the appropriate time during the summary judgment briefing, not now.

Accordingly, Google's motion for leave to file an early motion for summary judgment should be granted.

## ARGUMENT

### **I. PLAINTIFF IS AT FAULT FOR ITS FAILURE TO TAKE THE TWO DEPOSITIONS IT CLAIMS IT NEEDS TO RESPOND TO GOOGLE'S MOTION FOR SUMMARY JUDGMENT.**

While PUM does much hand-waving as to the supposedly premature nature of Google's motion for summary judgment, the only discovery that PUM contends it still needs is a Google Rule 30(b)(6) deposition and a Rule 30(b)(6) deposition of SRI, Konig's former employer who sold its rights to the patents-in-suit to Google. Neither warrants denial of Google's motion for leave.

PUM's Rule 30(b)(6) deposition notice, served January 21, concerns facts and circumstances surrounding Google's purchase of SRI's rights to the patents-in-suit. Google offered to make a witness available to testify on this topic February 7. Even though Google noted that the witness's availability after February 7 was limited and that Google might not be able to get him in the following weeks, PUM refused to go forward with his deposition at that time. (Ex. 1). PUM should not be heard to complain about the need to take a deposition for which a witness was made available weeks ago. In any event, as PUM admits, PUM is scheduled to take this deposition on March 17, 2011, one day from now. Thus, this is a moot issue.

PUM also says it is serving a Rule "30(6)(6) deposition notice and subpoena duces tecum on SRI." (Opp. at 2). Initially PUM's reference to a "subpoena duces tecum" as something it will be serving in the future is incorrect. PUM already subpoenaed SRI for documents on January 21. PUM received SRI's production of documents weeks ago.<sup>1</sup>

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<sup>1</sup> Google had previously subpoenaed SRI for documents on December 20, 2010. SRI produced documents to Google on or about January 10, and Google promptly provided them to PUM. (Ex. 2). The only documents provided in response to the PUM subpoena that had not been (footnote continued)

As to the SRI Rule 30(b)(6) deposition it has subpoenaed for March 21, any blame for delay in this deposition lies with PUM. Google first informed PUM about its agreement to purchase SRI's rights to the patents-in-suit on January 19, 2011, the day after the agreement was signed. (Ex. 3). Google provided to PUM a draft of the amended answer, which has all the salient facts relied on in Google's motion for summary judgment, on January 27, 2011. (Ex. 4). Then, Google informed Plaintiff it intended to move for early summary judgment on February 3, 2011. (Ex. 5). Yet, it was not until the day before PUM's Opposition was due that PUM first sought SRI's deposition.<sup>2</sup> Indeed, it appears that PUM may have intentionally waited to serve this deposition notice as long as possible to manufacture an argument against Google's motion for leave. In any event, PUM should not be able to use its own failure to diligently seek the SRI deposition to preclude Google from seeking early summary judgment.

PUM states in footnote 2 that it “expects to file a Rule 56(d) declaration.” (*See Opp.* at 3, n.2). To justify delay of resolution of a motion for summary judgment under Rule 56(f), however, the nonmovant must demonstrate what the additional discovery will show and that it has been diligent in seeking such discovery. *Bradley v. United States*, 299 F.3d 197, 206 (3d Cir. 2002) (nonmovant must identify “with specificity what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained.” (citation omitted)). As PUM gives no indication that a Rule 56(f) declaration would say

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part of SRI's production to Google were SRI's communications and agreement with Google, which Google had provided to PUM on January 19, 2011.

<sup>2</sup> After the Court conducted a call with the parties to discuss staying the case, Google asked PUM if it opposed an early motion for summary judgment and whether it would agree to expedited briefing of Google's motion for leave. PUM said it opposed an expedited briefing schedule, but would attempt to file its opposition as quickly as possible. (Ex. 6). PUM filed its opposition on the last day to do so.

anything different from what is already in its Opposition, any request for additional discovery under Rule 56(f) would fail for the same reasons.

PUM also points to Google's agreement that additional discovery may be served on ownership issues and to an extended discovery period as some sort of admission that Google's motion is premature. (Opp. at 1, 3 (citing D.I. 179)). This is a red herring. PUM demanded that as a condition to PUM's consent for leave for Google to file its amended counterclaims that Google agree to additional discovery on ownership and an extended discovery period. (Ex. 7). That Google did not object to PUM's request in no way shows, as PUM suggests, Google's concession that any underlying issues would not be ripe until the discovery period is over. (Opp. at 1, 3 (citing D.I. 179)). PUM certainly did not ask Google to agree to that, and Google would not have done so.

In sum, PUM has failed to show that any discovery issues warrant delay of the resolution of Google's motion for summary judgment.

**II. PUM'S ARGUMENTS ON THE MERITS DO NOT DEMONSTRATE GOOGLE'S MOTION SHOULD BE DENIED.**

Rather than addressing the merits of Google's motion for leave, PUM spends most of its Opposition recounting the various arguments it intends to raise to oppose Google's motion for summary judgment. PUM also attaches two declarations and pages of exhibits, much of which PUM has never previously produced to Google in this case. These formulated arguments and cited evidence serve only to show that PUM already has any information it needs to respond to Google's motion for summary judgment.

Further, Google's motion for leave is not the method to determine whether Google's motion for summary judgment should be granted. Of course, PUM is free to make each of these arguments in its Opposition to Google's motion for summary judgment, and Google will respond

to them at the appropriate time – during summary judgment briefing, not now. It is of no import, however, that PUM will oppose Google’s motion for summary judgment. What is important is that Google’s proposed motion for summary judgment is appropriate for early resolution, which PUM has not substantively rebutted.

**CONCLUSION**

For the foregoing reasons, Google’s Motion for leave to File Motion for Summary Judgment should be granted.

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**CERTIFICATE OF SERVICE**

I, David E. Moore, hereby certify that on March 16, 2011, the attached document was electronically filed with the Clerk of the Court using CM/ECF which will send notification to the registered attorney(s) of record that the document has been filed and is available for viewing and downloading.

I further certify that on March 16, 2011, the attached document was Electronically

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