

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PERSONALIZED USER MODEL, L.L.P.,)
)
Plaintiff,)
)
v.)
)
GOOGLE INC.,)
)
Defendant.)

GOOGLE, INC.)
)
Counterclaimant,)
)
v.)
)
PERSONALIZED USER MODEL, LLP and)
YOCHAI KONIG)
)
Counterdefendants.)

C.A. No. 09-525-LPS

JURY TRIAL DEMANDED

PUBLIC VERSION

**LETTER TO THE HONORABLE LEONARD P. STARK DATED APRIL 1, 2011
FROM RICHARD L. HORWITZ**

Richard L. Horwitz (#2246)
David E. Moore (#3983)
POTTER ANDERSON & CORROON LLP
Hercules Plaza, 6th Floor
1313 N. Market Street
Wilmington, DE 19801
Tel: (302) 984-6000
rhorwitz@potteranderson.com
dmoore@potteranderson.com

Personalized User Model LLP v. Google Inc. Doc. 242
Enclosures

cc: Clerk of the Court (via hand delivery)
Counsel of Record (via electronic mail)

Dated: April 1, 2011
Public Version Dated: April 8, 2011
1008297/ 34638

Attorneys for Defendant Google Inc.



1313 North Market Street
P.O. Box 951
Wilmington, DE 19899-0951
302 984 6000

www.potteranderson.com

April 1, 2011; Public Version Dated: April 8, 2011

Richard L. Horwitz
Partner
Attorney at Law
rhorwitz@potteranderson.com
302 984-6027 Direct Phone
302 658-1192 Fax

The Honorable Leonard Stark
United States District Court
844 King Street
Wilmington, DE 19801

PUBLIC VERSION

Re: *Personalized User Model, LLP v. Google Inc., C.A. No. 09-00525-LPS*

Dear Judge Stark:

Defendant Google Inc. (“Google”) respectfully files this letter brief in response to Plaintiff Personalized User Model, LLC’s (“PUM’s”) March 31, 2011 letter.

PUM presents no valid reason for Google to produce Aitan Weinberg for a second deposition. On March 2, PUM deposed Google employee Aitan Wienberg in New York City. Google’s counsel came from California and PUM’s attorney taking the deposition came from Texas.

[REDACTED]

The deposition ended at 2:23 p.m. and PUM’s counsel did not contact the Court to see if the dispute could be resolved during the deposition. PUM, however, now seeks to bring everyone back to have this deposition continue for a second day.

PUM argues that Google is trying to generally cloak business communications in weekly meetings with Brin and Page as privileged. This is incorrect.

[REDACTED] (*Id.*, 125:2-10, 117:12-20.) Google did not instruct Weinberg not to answer as to any other meetings beyond these few. PUM also cites *SIPCA Holdings S.A. v. Optical Coating Lab.*, 1996 WL 577143 (Del. Ch. Sept. 23, 1996) for the unremarkable proposition that just because lawyers are present at a meeting does not mean that what is discussed is privileged. PUM does not dispute, however, that when lawyers are present to provide legal advice communications with them are privileged, or that attorneys were present at Weinberg’s few meetings with Brin and Page for that very purpose.

The testimony PUM seeks is also irrelevant.

[REDACTED] (Ex. A, 117:7-11, Ex. 6.) Google’s consideration of privacy issues and how each

of the founders feels about them has nothing to do with whether Google infringes PUM's patents, or any other issue in this case. Rather, it appears that PUM is merely trying to take discovery on matters that may be embarrassing to Google. PUM's request for Weinberg and Google's counsel to sit for further deposition on privileged communications and irrelevant issues, when it did not even try to resolve the issue with the Court while all the parties were present, should be denied.

PUM's request for further 30(b)(6) depositions is meritless. PUM deposed Shankar Ponnekanti on October 7, 2010 and Karthik Gopalratnam on October 8. PUM deposed Bryan Horling on November 12. Following the Horling deposition, PUM stated that Horling was not adequately prepared, and Google provided a substantive response to PUM's complaints on February 4, 2011. (Exs. B-C.) Since these depositions, PUM deposed seven more Google witnesses, two of which were designated to testify as corporate deponents under Rule 30(b)(6).

On March 29, just three days ago, PUM sent Google a letter claiming for the first time that Ponnekanti and Gopalratnam were not prepared for their depositions that occurred months ago. (Ex. D.) PUM again claimed that Horling was unprepared, and demanded additional time with each witness. PUM demanded that Google respond that day and meet and confer the following day. (*Id.*) Google advised PUM that it would provide a response later in the week, but due to scheduling conflicts and the very substantive nature of PUM's request, including citation to numerous pages of deposition transcripts (many of which PUM told Google were incorrect one hour before PUM filed its letter), Google could not meet PUM's unreasonable demand that Google effectively provide an immediate response. (Exs. E-F.) PUM refused to wait, requiring Google to expend resources responding to PUM's letter to the Court, rather than substantively analyzing PUM's concerns about the deponents' testimony. PUM's refusal to meet and confer in good faith alone demonstrates that PUM's demand for further depositions should be denied.¹

Further, PUM has made no showing that it is entitled to additional time with these witnesses. PUM does not identify questions that the witnesses were unable to answer or even what the deposition topics were for which the witnesses were supposedly unprepared. And while PUM complains that the witnesses did not spend enough time preparing for their depositions, Horling is the development manager and technical lead for Personalized Search. Also, Ponnekanti and Gopalratnam were, respectively, the current and former tech leads for the functionalities on which they were designated to testify. Thus, they all already had intimate knowledge of these accused products. The mere fact that they were unable to answer every single question on PUM's extremely broad topics shows nothing. If it did, then a Rule 30(b)(6) deposition would never end as long as the witness was unable to answer a question.

Moreover, had PUM identified the issues it purports to have with Ponnekanti, Gopalratnam, and Horling's testimony prior to this week, Google might have been able to designate one of its other witnesses to testify as a 30(b)(6) witness. For example, PUM complains that Ponnekanti was not prepared to testify as to when IBA launched, but Weinberg

¹ Notably, although Google had given PUM several days' notice of its concerns regarding PUM's improper claims of privilege, Google agreed not to raise the issue in connection with the February 22 discovery teleconference, because PUM indicated it needed more time to investigate the issue. (Ex. G.) Yet, PUM has not given Google that same professional courtesy, even though PUM's purported concerns with Google's witnesses could have been raised months ago.

provided that very information. (Ex. D, Ex. A, 62:12-63:2.) And last Thursday, Google produced Jonathan Alferness, a product manager with broad knowledge of Google's ads systems, as a 30(b)(6) witness on other ads-related topics. Had Google known that PUM contended Ponnekanti and Gopalratnam were not prepared to testify on ads-related issues, Google could have designated Alferness to fill in the gaps. Instead, PUM deposed him for only four hours or so. And in the upcoming weeks, there are three additional depositions of Google employees or former employees that could provide the information PUM supposedly seeks. PUM's rush to Court precluded any of these options. Its request for additional depositions should be denied.

PUM should not be permitted to continue fact discovery after the fact discovery cut-off. On February 22, this Court rejected PUM's request to have access to all of Google's source code at Google as inconsistent with the agreed terms regarding the production of source code in the Protective Order. Just two weeks later, PUM demanded that Google agree to continue making its source code available for inspection after the fact discovery cut-off and through trial.

PUM, however, points to nothing in the Protective Order requiring Google to continue making its source code available for inspection after the close of fact discovery. Further, Rule 34(a) allows a party to request the other party produce and permit the requesting party to inspect documents. Google makes its code available for inspection pursuant to Rule 34 and the specific procedures in the Protective Order. Google then produces the files PUM's experts print. Just as PUM is not entitled to demand that Google produce new categories of documents after the close of fact discovery, it is not entitled to demand that Google continue to make its source code available for inspection after that date. *See Papyrus Technology Corp. v. New York Stock Exchange, Inc.*, 2005 U.S. Dist. LEXIS 13659 (S.D. N.Y. July 6, 2005) (denying plaintiff's demand for additional production of code after the close of fact discovery).

PUM also complains the agreed Protective Order precludes it from printing more than 50 pages from one source code file. But PUM ignores that it may request permission to print more than 50 pages and that Google may not unreasonably withhold consent. (Dkt. 38, at 17-18.) PUM has never made such a request. Last Saturday, however, PUM's expert printed [REDACTED] pages from one source code file without consent. Google has asked PUM to explain the need to exceed the 50-page limit, but indicated the [REDACTED] pages would not be unreasonably withheld. (Ex. H.) Further, while PUM contends that it has only printed 5% of the source code files available for inspection, and will lose access to 95% of the "relevant" source code after the close of fact discovery, the vast majority of the actual source code made available for inspection is not relevant to any functionality actually accused in this case. This is why PUM has the ability to print and keep for use in this case the portions of the code PUM feels it needs for the case.

Finally, requiring Google to continue making its source code available for inspection and production is a burden. PUM's expert has spent at least 17 days inspecting Google's code. Many of those days were weekends or after-hours. Google has produced over [REDACTED] pages of source code printouts, far exceeding the presumptive 1500-page limit. (Dkt no. 38, at 17-18.) Requiring Google to continue accommodating PUM to make its code available for inspection, and to continue producing more printouts after all other fact discovery closes is unfairly burdensome to Google. PUM's offer to inspect Google's code in PUM's counsel's or expert's offices (*see fn. 2*) only serves to demonstrate PUM's lack of concern for the importance of source code, and security thereof, to Google.

Respectfully,

/s/ Richard L. Horwitz

Richard L. Horwitz

RLH/nmt
1008297/ 34638

Enclosures

cc: Clerk of the Court (via hand delivery)
Counsel of Record (via electronic mail)