MORRIS, NICHOLS, ARSHT & TUNNELL LLP

1201 NORTH MARKET STREET
P.O. BOX 1347
WILMINGTON, DELAWARE 19899-1347

302 658 9200
302 658 3989 FAX

JEREMY A. TIGAN
302 351 9106
302 425 3096 FAX
jtigan@mnat.com

PUBLIC VERSION

March 31, 2011

Confidential Version Filed: March 31, 2011

Public Version Filed: April 12, 2011

The Honorable Leonard P. Stark
United States District Court
for the District of Delaware
844 North King Street
Wilmington, DE 19801

Re: *Personalized User Model, L.L.P. v. Google, Inc.* C.A. No. 09-525 (LPS)

Dear Judge Stark:

We write in advance of the April 6, 2011 conference (D.I. 211) regarding Google, Inc.'s ("Google") (i) refusal to continue to make its source code production available after the close of fact discovery, (ii) refusal to make its previously unprepared Rule 30(b)(6) designees available for four additional hours of deposition testimony, and (iii) refusal to allow Mr. Weinberg to testify during his deposition regarding non-privileged business discussions simply because counsel was present.

Google's Attempt To Take Back Its Source Code Production Should Be Rejected. Pursuant to the Protective Order, Google made portions of its source code available for inspection on a stand alone computer. Without justification, Google now indicates that it will cease to make that code available once discovery closes. Google's position, although never fully articulated, is that its "production" is only the paper copies of the source code that Personalized User Model, L.L.P. ("P.U.M.") elected to print during the discovery period, not the remainder of the source code that Google made available electronically. Google's position should be rejected because it is contrary to the Protective Order, the earlier position taken by Google before this Court in relation to PUM's request for an on-site inspection of the code, and normal discovery practices, and, further, because it would severely prejudice P.U.M.

Google's position is directly contradicted by the Protective Order in this case. That Order (D.I. 38) states that "[t]he printed pages shall constitute part [not all] of the source code production in this case." D.I. 38, ¶19(B)(7) at 18 (emphasis added). The remainder of the production is the source code residing on the stand alone computer. This conclusion is supported by paragraph B, which applies to the "production of source code" encompassing the treatment of both the electronically available code and the printed code. *See* D.I. 38, at 14-21. Google, moreover, admitted that the code residing on the stand alone computer constituted its production. During the February 22, 2011 hearing when Google argued against permitting P.U.M. to inspect

the code at Google's facilities, Google stated: "Rule 34 concerns the production of electronically stored information … it says … that a party need not produce the same electronically stored information in more than one form…". Ex. 1, at 10. Google's counsel argued that it had produced the code once -- in electronic form on a stand alone computer pursuant to the Protective Order -- and thus should not have to produce it again by permitting inspection. *Id.* at 10-11. Finally, and contrary to Google's position, the Protective Order does not state (or contemplate) that access to the stand alone computer portion of the source code production shall end with the close of fact discovery. The Protective Order provides that the code "shall be made available during regular business hours local time, Monday through Friday …". D.I. 38, ¶19(B)(3) at 15. Nothing in the Protective Order even remotely supports Google's position. Google cannot "produce" the code in electronic form only to take that "production" away at the close of fact discovery.

The provisions of the Protective Order that limit the number of source code pages to be printed and the number of pages of source code that can be consecutively printed further support P.U.M.'s position. *See* D.I. 38, at 17-18. P.U.M. agreed to such limits because P.U.M. understood that it would continue to have access to the source code in electronic form (and the search tools to search such code) after the close of fact discovery just as P.U.M. continues to have access to the remainder of Google's non-source code production after fact discovery closes.[1] To date, P.U.M. has printed REDACTED of the code Google has produced. *See* Pazzani Decl., ¶2. If P.U.M. is now denied access to the electronic portion of Google's source code production, P.U.M. will lose access to REDACTED of Google's relevant source code. Such loss of access will materially prejudice P.U.M.'s ability to prepare its expert report(s), and prepare and present its case. *Id.* Additionally, due to a restriction in the Protective Order that limits printing more than 50 consecutive pages, P.U.M. can print only portions of large source code files, including some of the most important files that are more than 50 pages. *Id.* Google's attempt to take back its production would preclude P.U.M. from having access to the remaining portions of these large files that Google has produced. The prejudice on P.U.M. would be further compounded because Google recently supplemented its production with source code that has only been available to P.U.M. for a few weeks. *See* Ex. 2.

Google's counterarguments are unavailing. *See* Ex. 3. As stated above, the Protective Order appropriately contemplates that the source code on the stand alone computer would remain available after the close of fact discovery. Nor would the continued availability of the source code be overly burdensome[2]: it was Google that elected to implement the process that it now criticizes as burdensome.

---

[1] It essential that Google's source code remains available in electronic format. If it does not, P.U.M.'s expert will be precluded from running any searches across Google's source code production, which he frequently does to efficiently navigate the source code files and find the definition of functions in code. *See* Pazzani Decl., ¶3.

[2] Any burden can also be easily removed by simply making the code available on a stand alone computer at the offices of P.U.M.'s counsel, or at the office of P.U.M.'s expert, subject to similar safeguards that are currently in place.

<u>Google Must Adequately Prepare And Then Reproduce Certain Of Its 30(b)(6) Deponents.</u> As the attached testimony demonstrates, Google's 30(b)(6) witnesses Ponnekanti (AdSense), Golpalratnam (AdWords), and Horling (Search) were not adequately prepared to testify about many areas of the technical subject matter for which they were designated. *See* Exs. 4-7. REDACTED

REDACTED

It is black letter law that a party is obligated to prepare its 30(b)(6) designees so that they can give knowledgeable and binding answers. *Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 304 (3d Cir. 2000) (ordering sanctions due to unprepared corporate witness); *see also Teles AG Informationstechnologien v. Cisco*, 2009 WL 5251537, at *2 (D. Del. Dec. 28, 2009) (ordering parties to reproduce better prepared 30(b)(6) witnesses); *In re Neurontin Antitrust Litig.*, 2011 WL 253434, at *15 (D.N.J. Jan. 25, 2011) (ordering unprepared witness be re-deposed and awarding sanctions).

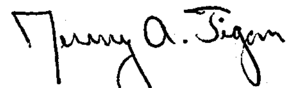
Google's failure to adequately prepare these witnesses resulted in P.U.M. spending additional time trying to elicit testimony on several key technical areas from 30(b)(1) witnesses. While these witnesses were able to answer questions in certain instances, there remain a number of technical areas where Google has yet to provide witnesses who can adequately answer important technical questions. This prejudice to P.U.M. is magnified because Google produced additional technical documents and source code that are relevant to the topics for which these witnesses were noticed and expected to testify earlier <u>after</u> these witnesses were produced. Exs. 2, 8-10. Given the deficient testimony and continued production of documents and source code, P.U.M. respectfully requests that the Court order Google to reproduce each of these witnesses for up to four more hours of 30(b)(6) deposition testimony after each has been properly prepared or, alternatively, that Google provide additional witnesses who are better prepared and/or more knowledgeable to testify on the noticed topics, including the calculations involved in the personalization aspects of the AdSense, AdWords, and personal search systems.

<u>Google Cannot Assert Privilege Over Business Discussions.</u> Google should be ordered to produce Aitan Weinberg for a further deposition regarding weekly business meetings with Google's founders over which Google has asserted a blanket attorney-client privilege. REDACTED

REDACTED

The presence of in-house counsel at a business meeting does not convert business communications among non-lawyers into a privileged attorney-client communication. *SIPCA Holdings S.A. v. Optical Coating Lab.*, 1996 WL 577143, at *2 (Del. Ch. Sept. 23, 1996) ("the presence of a lawyer at a business meeting called to consider a problem that has legal implications does not itself shield the communications that occur at that meeting").

Respectfully,



Jeremy A. Tigan (#5239)

JAT/cht
cc: Clerk of the Court (by hand)(w/enc.)
All Counsel of Record (by email)(w/enc.)
4168064