IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PERSONALIZED USER MODEL, L.L.P., Plaintiff, v. GOOGLE, INC., Defendant.	C.A. No. 09-525 (LPS)
GOOGLE, INC., Counterclaimant, v. PERSONALIZED USER MODEL, L.L.P. and YOCHAI KONIG, Counterclaim-Defendants.	**PUBLIC VERSION**

ANSWERING BRIEF IN OPPOSITION TO GOOGLE INC'S MOTION TO DISMISS PERSONALIZED USER MODEL, LLP'S PATENT INFRINGEMENT CLAIMS FOR LACK OF SUBJECT MATTER JURISDICTION AND OPENING BRIEF IN SUPPORT OF PUM'S ALTERNATIVE CROSS-MOTION

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NATURE AND STAGE OF PROCEEDINGS

On July 16, 2009, Personalized User Model L.L.P. ("PUM") filed a Complaint against Google, Inc. ("Google") alleging that Google had infringed, and was continuing to infringe, PUM's U.S. Patent No. 6,981,040 (the "'040 Patent") and U.S. Patent No. 7,320,031. Several months later, on April 13, 2010, PUM amended its Complaint to add a claim that Google also infringes PUM's U.S. Patent No. 7,685,276 (the "'276 Patent"). Now, more than two years after this lawsuit was filed, and on the heels of the Court's denial of Google's request to file an early motion for summary judgment based on its alleged purchase of rights to the patents-in-suit, Google again attempts to avoid having this case heard on its merits based on the issue of PUM's standing. This is PUM's opposition to that motion.

SUMMARY OF ARGUMENT

The cornerstone of Google's hypertechnical argument is that the assignment of the patents-in-suit to PUM by the Cyprus corporation Levino Ltd. ("Levino") did not grant PUM legal title to the patents because PUM had not yet filed its Certificate of Formation with the Texas Secretary of State. Based on this alleged lack-of-legal-title, Google argues that PUM lacked standing at the time this lawsuit was filed and, as a result, Google should have a free ride on its infringement of the patents-in-suit because any title deficiency cannot be fixed. Google's arguments are legally wrong and its motion to dismiss should be denied.

First, the Patent and Intellectual Property Assignment Agreement between Levino and PUM ("the Assignment") did transfer legal title to PUM no later than the date on which PUM's Certification of Formation was filed—nearly two years before this lawsuit was brought. Under well-established legal principles, including under controlling Texas law, a transfer of property rights to an entity that is not yet officially formed passes legal title upon the entity's formation. Thus, once the ministerial act of filing PUM's Certificate of Formation was

completed, all of the rights contained in the earlier and uncontested Assignment became lawfully vested in PUM.

Second, under equally-well-established legal principles, both PUM and its general partner Levino have ratified the Assignment by recording it with the United States Patent and Trademark Office ("PTO") and by numerous other post-assignment actions. The Assignment is valid for this reason as well.

Finally, if the Court were to find that the incorrect plaintiff was named in this action because legal title to the patents was not transferred to PUM (which the Court should not do), that outcome can and should be cured by substituting Levino, the assignor and a general partner of PUM, as a party plaintiff. Therefore, PUM has filed an alternative cross-motion under FED. R. CIV. P. 17(a)(3) to have Levino substituted as a party plaintiff should the Court find that PUM lacks standing.

STATEMENT OF FACTS

The facts detailing the timeline of the ownership of the patents-in-suit and the formation of PUM are as follows:

- **REDACTED**

- **REDACTED**

[1] **REDACTED**

[2] **REDACTED**

- **REDACTED**

Levino and PUM share a significantly overlapping ownership.[5]

- **REDACTED**

- **REDACTED**

- **REDACTED**

[3] **REDACTED**

[4] **REDACTED**

[5] Levino is a general partner of PUM. **REDACTED**

[6] **REDACTED**

[7] **REDACTED**

[8] **REDACTED**

[9] **REDACTED**

[10] **REDACTED**

REDACTED

- On August 14, 2007, the Texas Secretary of State issued a Certificate of Filing, effective August 14, 2007, formally recognizing PUM as a limited partnership.[13]

- Approximately five months later, on January 8, 2008, PUM recorded the Assignment in the PTO.[14] Also on January 8, 2008, PUM filed U.S. Patent Application No. 12/008,148 as a continuation of the application that became the '040 Patent.[15] This application eventually issued as the '276 Patent.

- **REDACTED**

- On July 16, 2009 - one and one-half years after the Assignment was recorded and almost ***two years*** after PUM was formally recognized as a limited partnership, PUM filed this lawsuit.[17] Now, some two years later, Google files the present motion to dismiss.

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11 **REDACTED**

12 **REDACTED**

13 **REDACTED**

14 **REDACTED**

15 PTO Filing Receipt, Needham Decl., Exhibit 4.

16 **REDACTED**

17 Complaint for Patent Infringement, D.I. 1.

ARGUMENT

I. THIS COURT HAS SUBJECT MATTER JURISDICTION BECAUSE THE ASSIGNMENT VALIDLY TRANSFERRED LEGAL TITLE TO THE PATENTS-IN-SUIT TO PUM, GIVING PUM STANDING AS OF THE DATE THIS SUIT WAS FILED.

This Court has subject matter jurisdiction over PUM's patent infringement claims. *Carl Zeiss Meditec, Inc. v. Optovue, Inc.*, No. 10-084-GMS, 2011 WL 1419714, at *3 (D. Del. Apr. 13, 2011) ("Any federal district court possesses subject matter jurisdiction over federal patent law claims") (citing 28 U.S.C. §§ 1331 and 1338). Google challenges subject matter jurisdiction solely by alleging that PUM lacks standing because PUM and Levino executed the Assignment before PUM's Certificate of Formation was filed with the Texas Secretary of State. *See* Google Brief, D.I. 302, at 6. Contrary to Google's assertions, however, the Assignment validly transferred all right, title, and interest to the patents-in-suit to PUM no later than the date that PUM was officially formed, well before the filing of this suit.

It is fundamental that a party who owns a patent by issuance or assignment has standing to file a patent infringement lawsuit. *Speedplay, Inc. v. Bebop, Inc.*, 211 F.3d 1245, 1249-50 (Fed. Cir. 2000); *see also* 35 U.S.C. § 281 (2006) ("A patentee shall have remedy by civil action for infringement of his patent"); 35 U.S.C. § 100(d) (2006) ("The word 'patentee' includes not only the patentee to whom the patent was issued but also the successors in title to the patentee."). Patents are personal property and are "assignable in law by an instrument in writing." 35 U.S.C. § 261 (2006). Because the Assignment effectively transferred legal title to the rights to the '040 and '276 Patents to PUM on August 14, 2007 – nearly two years before the filing of this lawsuit – PUM had and has standing to maintain its patent infringement claims.

A. The Assignment from Levino to PUM Transferred Valid, Legal Title to PUM.

The cornerstone of Google's challenge is its unsupportable argument that the Assignment from Levino to PUM could not transfer legal title to the patent because at the time of the Assignment PUM had yet to complete the ministerial act of filing its Certificate of Formation. Google maintains that under such circumstances the assignment should be treated as an assignment to a "fictitious person." *See* D.I. 302, at 5. Even assuming the facts as Google alleges them, Google is wrong legally.

PUM is not (and never was) a fictitious entity. Rather, PUM became a legal entity no later than August 14, 2007 – the date it filed its Certificate of Formation in Texas. TEX. BUS. ORGS. CODE § 3.001(c). Legions of courts throughout the country hold that a conveyance made to an entity before its legal formation effectively passes title upon that entity's formation. *E.g.*, *Luna v. Brownell*, 110 Cal. Rptr. 3d 573, 577 (Cal. Ct. App. 2010) (holding that a deed of trust to convey property to a trust that did not yet exist was valid and was deemed legally delivered on the day that the trust was created); *Heartland, L.L.C. v. McIntosh Racing Stable, L.L.C.*, 632 S.E.2d 296, 303 (W. Va. 2006) ("[T]his Court holds that a deed drawn and executed in anticipation of the creation of the grantee . . . legal entity . . . is not invalidated because the grantee entity had not been established as required by law at the time of such execution, if the entity is in fact created thereafter in compliance with the requirements of law"); *Cmty. Credit Union Servs., Inc. v. Fed. Express Servs. Corp.*, 534 A.2d 331, 334 (D.C. 1987) ("A deed conveying property to an incipient 'corporation' that has not yet been incorporated passes title to the corporation as of the time of incorporation, i.e., when the corporation becomes a legal entity."); *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 450 P.2d 166, 170 (Wash. 1969) (holding that a "deed to a corporation made prior to its organization, is valid between the

parties. Title passes when the corporation is legally incorporated."); *see also Framingham Sav. Bank v. Szabo*, 617 F.2d 897, 899 (1st Cir. 1980) (holding that a pre-incorporation agreement constitutes a continuing offer that the corporation may accept upon formation); *see also Joyner v. Alban Group, Inc.*, 541 S.W.2d 292, 293 (Tex. Civ. App. 1976) (holding that Alban Group, Inc., could sue on a cause of action that accrued before it was incorporated).

Texas courts follow this well-established principle. Indeed, in *Lighthouse Church of Cloverleaf v. Texas Bank*, 889 S.W.2d 595 (Tex. App.—Houston [14th Dist] 1994), a case that Google cites, a Texas court adopted this very reasoning. There, Lighthouse Church ("Church" as used in the opinion) and Texas Bank executed a deed while the Church was defunct for failing to pay corporate franchise taxes. *Id.* at 598. Texas Bank argued that it owned legal title to the property because the deed was void for lack of a grantee. *Id.* at 600. The court disagreed, holding that the Church had legal title, because a deed to a defunct corporation is valid. *Id.* at 601. Relying on the Washington Supreme Court's reasoning in *John Davis & Co. v. Cedar Glen No. Four, Inc*., *supra*, the *Lighthouse* court explained:

> [t]here is really very little difference between a corporation not yet fully incorporated and one which has had its corporate charter revoked for failing to pay franchise taxes, and which can get that charter reinstated at any time by simply paying taxes. *Id.*

The *John Davis* case is analogous to the instant case. There, real property was transferred by deed to Cedar Glen No. 4 ("Cedar Glen") four days before Cedar Glen legally became a corporation. *John Davis*, 450 P.2d at 169-70.[18] Appellants contended that the deed was void because the grantee Cedar Glen was not a legal entity at the time of the conveyance.

[18] The articles of incorporation for Cedar Glen were executed on December 3, 1962, but were not filed until January 7, 1963. *Id.* at 168-169. In the interim, on January 3, 1963, real property was deeded to Cedar Glen. *Id.* at 170.

Id. at 220. The Washington Supreme Court flatly rejected appellants' position: "A deed to a corporation made prior to its organization is valid between the parties. Title passes when the corporation is legally incorporated." *Id.* at 170. The corporation, Cedar Glen, became a legal entity on January 7, 1963 (the date its articles of incorporation were filed), and thus was deemed to have acquired valid legal title on that date. *Id.* at 169-70.[19] In *Lighthouse Church*, the Texas court embraced this principle.

The cases that Google cites are not inconsistent with *Lighthouse Church* and *John Davis*. Rather, Google's cited cases stand for the unremarkable proposition that conveyances to entities that never formed (*i.e.*, "fictitious entities") are not effective. Google Brief, D.I. 302, at 5.[20] Google also relies on *Wilson v. Dearing, Inc.*, 415 S.W.2d 475, 477 (Tex. Civ. App.—Eastland 1967). But a close reading of *Wilson* reveals that it supports PUM's position. The grantor in *Wilson* deeded property to a deceased person, but intended to deed to the property to the deceased person's heir. *Id.* at 478. The court held that the deed effectively transferred legal title to the heir, because the law will not "deprive the grantee of his rights where it was the grantor's intention to invest him with title." *Id.* at 479 (quoting *Taylor v. Sanford*, 193 S.W. 661 (Tex. 1917)). *Wilson* is thus consistent with the principle articulated in *Lighthouse Church* and *John Davis* giving effect to the parties' intent to transfer property even if the entity was later-formed, or in the case of *Wilson*, not alive at the time of transfer. *Id.* at 477. None of Google's

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19 The *John Davis* decision has been cited favorably by numerous courts. *See, e.g.*, *Luna*, 110 Cal. Rptr. 3d at 577 (California); *Heartland*, 632 S.E.2d at 303 (West Virginia); *Cmty. Credit Union Servs.*, 534 A.2d at 334 (District of Columbia); *Corporate Dissolution of Ocean Shores Park, Inc. v. Rawson-Sweet*, 134 P.3d 1188, 1194 (Wash. Ct. App. 2006).

20 *Moffat v. U.S.*, 112 U.S. 24, 24 (1884) (sham land patent to **fictitious person** to defraud U.S. government); *Gross v. U.S.*, No. 96-S-392, 1996 WL 469082, at *2 (D. Colo. June 25, 1996) (deed to entity that **never existed**); *Lester Assocs. v. Commonwealth*, 816 A.2d 394, 396 (Pa. Commw. Ct. 2003) (deed to entity that **never existed**).

cases apply here because PUM was duly formed and exists as a limited partnership, an entity capable of receiving legal title.

Here, Levino plainly demonstrated its intent to transfer the rights of the patents-in-suit to PUM by executing the Assignment. PUM acquired legal title to the patents no later than August 14, 2007 – the date the Texas Secretary of State issued a Certificate of Filing. *See Lighthouse Church*, 889 S.W.2d at 603, *John Davis*, 450 P.2d at 170. PUM, therefore, had legal title and thus standing well before this lawsuit was filed in 2009.

B. PUM's Ratification of the Assignment Also Effected Transfer of Legal Title to the Patents to PUM.

Even if the Assignment did not grant legal title on PUM's formation (which it did), the parties' ratification of the Assignment accomplished the transfer of legal title to PUM. Under Texas law, a party ratifies a contract by performing under it or affirmatively acknowledging it. *Wetzel v. Sullivan, King & Sabom, P.C.*, 745 S.W.2d 78, 81 (Tex. App.—Houston [1st Dist] 1988). Once ratified, a contract is given legal effect and binds the contracting parties. *Broussard v. San Juan Prods.*, 273 S.W.3d 400, 406 (Tex. App.—Beaumont 2008).

It is well-established under Texas law that a business organization may ratify pre-organization contracts made on its behalf, and will be bound by those contracts. *E.g., Coastal Shutters and Insulation, Inc. v. Derr*, 809 S.W.2d 916, 920 (Tex. App.—Houston [14th Dist] 1991) ("In Texas an entity not yet incorporated will still be held liable for pre-incorporation acts that are ratified or from which the entity derives benefit."); *Moore v. Dallas Post Card Co.*, 215 S.W.2d 398, 401 (Tex. Civ. App. Dallas 1948) (holding that the act of bringing a lawsuit based on pre-formation contractual rights ratifies the contract); *Lancaster Gin & Compress Co. v. Murray Ginning-System Co.*, 47 S.W. 387, 389 (Tex. 1898) (holding that a corporation's acceptance of the benefits of a pre-incorporation contract ratifies the contract, making the

contract the corporation's contract).[21] This principle has also been followed by courts throughout the country.[22]

Ratification may either be express or implied from conduct. *Barker v. Roelke*, 105 S.W.3d 75, 84 (Tex. App.—Eastland 2003). A party impliedly ratifies a contract by accepting the benefits of the contract with full knowledge of the agreement. *Land Title Co. of Dallas, Inc. v. F.M. Stigler, Inc.*, 609 S.W.2d 754, 756 (Tex. 1980). Any act inconsistent with the intent to avoid the contract has the effect of ratifying the contract. *Barker*, 105 S.W.2d at 85.

Here, PUM (and its general partner, Levino) expressly ratified the Assignment by recording the document in the PTO on January 8, 2009. PUM has also taken several actions demonstrating its intent to accept the benefits of the patent rights under the Assignment.

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PUM also ratified the Assignment by filing a continuation patent application based upon the '040 Patent and, finally, by filing this lawsuit asserting ownership of the patents. Neither Levino nor PUM have engaged in any conduct that would lead any person or entity to believe that the Assignment did not transfer the patents to

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21 *See also W. Secs. Corp. v. Eternal Techs. Group, Inc.*, 303 Fed. Appx. 173, 173 (5th Cir. 2008) ("Texas courts regularly allow plaintiffs to invoke the doctrine of ratification in contract actions."); *Evans v. Comm'r of Internal Revenue*, 557 F.2d 1095, 1100 n.6 (5th Cir. 1977) ("Texas recognizes the corporate adoption of preincorporation contracts").

22 *E.g., 02 Dev., LLC v. 607 S. Park, LLC*, 71 Cal. Rptr. 3d 608 (Cal. Ct. App. 2008) ("It is hornbook law that a corporation can enforce preincorporation contracts made in its behalf, as long as the corporation 'has adopted the contract or otherwise succeeded to it," and applying it to an LLC's purchase of a hotel); *Framingham Savings Bank v. Szabo*, 617 F.2d 897, 898 (1st Cir. 1980) ("Most states hold that a corporation can be bound to a pre-incorporation agreement by some signal of knowing ratification or adoption of the contract"); *see also Heritage Nat'l Assocs. Ltd. P'Ship v. 21st Investment Group L.L.C.*, No. 05-99-00317-cv, 2000 WL 426437 (Tex. App.—Dallas Apr. 19, 2000) (holding that an L.L.C. was bound by a pre-formation real estate contract under Oklahoma law) (not designated for publication).

PUM. Because PUM, as well as its general partner Levino, have ratified the Assignment, PUM had legal title and, as a result, standing as of the filing of the lawsuit.

II. IF THE COURT FINDS THAT PUM LACKED LEGAL TITLE TO THE PATENTS, RULE 17(A)(3) REQUIRES THAT THE COURT GRANT LEAVE TO FILE AN AMENDED COMPLAINT SUBSTITUTING LEVINO AS PLAINTIFF.

If the Court, nonetheless, is inclined to grant Google's motion to dismiss, it should grant PUM leave to substitute Levino as a party plaintiff in this action under Federal Rule of Civil Procedure 17(a)(3).

Federal Rule of Civil Procedure 17(a)(3) states:

> The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

FED. R. CIV. P. 17(a)(3) permits the substitution of a plaintiff when the suit was mistakenly filed in the name of a person or entity who is not the real party in interest.[23] 6A CHARLES ALAN WRIGHT, ARTHUR R MILLER, MARY KAY KANE, & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 1555 (3d ed. 2011). The provision is designed "to avoid forfeiture and injustice when an understandable mistake has been made in selecting the party in whose name the action should be brought." *Id.* A party substituted or joined under FED. R. CIV. P. 17(a)(3) relates back to the filing of the lawsuit, and permits the action to proceed as if the substituted

[23] This case, therefore, is different from cases seeking to cure standing by amendment under Rule 15 where the original patent holder filed suit *after* it had transferred title away to another entity. *E.g., Bhandari v. Cadence Design Sys., Inc.*, 485 F. Supp. 2d 747, 750 (E.D. Tex. 2007); *Mars, Inc. v. JCM Am. Corp.*, Civ. No. 05-3165, 2008 WL 5401604, at *3 (D.N.J. Dec. 23, 2008) (affirmed in *Mars, Inc. v. JCM Am. Corp.*, 364 Fed. Appx. 648 (Fed. Cir. 2010)). They did not involve circumstances where – as here – suit was brought by the party believed in good faith to be the assignee of the patent rights.

plaintiff had originally filed the lawsuit. *BCP Liquidating LLC v. Union Tank Car Co.*, No. 03-52532, 2004 WL 632867, at *2 (D. Del. Bankr. Mar. 30, 2004).

Thus, if the Court concludes that PUM is not the real party in interest, leave should be granted to substitute Levino as plaintiff in this action. If PUM lacks standing because the Assignment was not effective, Levino, who would then own the patent rights, is the real party in interest and must be accorded an opportunity to be substituted as plaintiff.

The U.S. District Court for Southern District of New York recently applied FED. R. CIV. P. 17(a)(3) in a patent action, permitting the substitution of a plaintiff due to a mistake made in naming the incorrect plaintiff at the time the action was filed. *See Park B. Smith, Inc. v. CHF Industries Inc.*, No. 06 Civ. 869, 2011 WL 2714205 (S.D.N.Y. July 12, 2011). There, PBS, Inc. filed a patent infringement suit, but later realized that PBS Ltd., not PBS, Inc., owned the patents-in-suit. *Id.* at *3. In response to a motion to dismiss for a lack of standing filed several years into the case, PBS, Inc., moved under Fed. R. Civ. P. 17(a)(3) to substitute PBS, Ltd. for PBS, Inc. *Id.* The court noted that such substitutions are liberally allowed when the ownership defect was caused by mistake and the substitution does not unfairly prejudice defendants. *Id.* at *5. The court then held that substitution was warranted because there was no evidence of bad faith or intent to deceive, nor was there any prejudice because the subject matter of the claims remains identical. *Id.* at *5-6. The court also held this substitution cured the standing defect. *Id.* at *4.

If the Court concludes that PUM does not hold title to the patents-in-suit and, thus, lacks standing (which it should not), the Court should grant PUM leave to file and serve a second Amended Complaint substituting Levino as the plaintiff under Rule 17(a)(3) and the reasoning of *Park B. Smith.* If PUM does not have standing, then Levino does. As in *Park B.*

Smith, there is no evidence that PUM's filing of this lawsuit was in bad faith or with intent to deceive. *See id.* at *5 (holding that the mistake prong is met absent evidence of bad faith or the intent to deceive). As demonstrated in Section I, there are numerous reasons why PUM had a good faith belief that it owned legal title to the patents-in-suit.

Also, this substitution would be "merely formal and in no way alter the [First Amended] complaint's factual allegations." *Id.* If substituted, Levino would make precisely the same patent infringement claims against Google. Thus, Google would suffer no prejudice because the claims against it would be identical. Moreover, there would no need for additional discovery because Google has been aware that Levino was a general partner of PUM through PUM's limited partnership agreement, and Google has deposed Jack Banks, an officer of Levino. The depositions Google took of witnesses such as inventors Roy Twersky, Yochai Konig, and Michael Berthold, as well as the depositions of the various law firms involved with the prosecution and other transfers of the patents-in-suit, are equally applicable regardless of whether PUM or Levino is the plaintiff. As the *Park B. Smith* court reasoned, it is more efficient to permit the substitution of parties than to create the unnecessary expense and delay of dismissing the suit, only to have it be refiled the following day. *Id.* at *5.

To be clear, PUM's position is that it has standing to maintain this action by virtue of the Assignment. But should the Court find that it lacks standing, the Court should grant leave to PUM to substitute Levino as plaintiff.

CONCLUSION

For the reasons stated above, Google's Motion to Dismiss should be denied. Alternatively, if the Court finds that PUM lacks standing, the Court should grant leave to substitute Levino, Ltd. in place of PUM.

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August 12, 2011
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CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2011, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF which will send electronic notification of such filing to all registered participants.

Additionally, I hereby certify that true and correct copies of the foregoing were caused to be served on August 18, 2011, upon the following individuals in the manner indicated:

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