

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

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

**REPLY BRIEF IN SUPPORT OF PERSONALIZED USER MODEL, L.L.P.’s  
ALTERNATIVE CROSS-MOTION TO SUBSTITUTE LEVINO LTD. AS PLAINTIFF**

MORRIS, NICHOLS, ARSHT & TUNNELL LLP  
Karen Jacobs Louden (#2881)  
Jeremy A. Tigan (#5239)  
1201 N. Market Street  
P.O. Box 1347  
Wilmington, DE 19899-1347  
(302) 658-9200  
klouden@mnat.com  
jtigan@mnat.com

*Attorneys for Personalized User Model, L.L.P  
and Yochai Konig*

**Confidential Version Filed: September 16, 2011**

**Public Version Filed: September 21, 2011**

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
TABLE OF AUTHORITIES.....	ii
SUMMARY OF ARGUMENT .....	1
ARGUMENT.....	1
I.    RULE 17(A) IS BROADLY APPLIED .....	1
II.   IF THE COURT FINDS THAT PUM LACKS STANDING, IT SHOULD UTILIZE RULE 17(A) AND SUBSTITUTE LEVINO AS PLAINTIFF .....	2
A.   This Court Has Jurisdiction To Substitute Levino.....	2
B.   Levino Agrees To Join This Motion.....	5
C.   Substitution Should Be Permitted Because Any Defect Resulted From a Mistake and Because There Has Been No Unfair Prejudice .....	5
1.   The mistake prong is satisfied – naming PUM as Plaintiff was not done deceptively or in bad faith, or to unfairly prejudice Google.....	5
2.   The prejudice prong is also satisfied – the substitution of Levino as plaintiff will not cause unfair prejudice.....	8
CONCLUSION.....	10

**TABLE OF AUTHORITIES**

	<b><u>Page(s)</u></b>
<b>Cases</b>	
<i>Advanced Magnetics, Inc. v. Bayfront Partners, Inc.</i> , 106 F.3d 11 (2d Cir. 1997) .....	<i>passim</i>
<i>Cnty. Credit Union Servs., Inc. v. Fed. Express Servs. Corp.</i> , 534 A.2d 331 (D.C. 1987) .....	7
<i>Delta Coal Program v. Libman</i> , 743 F.2d 852 (11th Cir. 1984) .....	3
<i>Goodman v. U.S.</i> , 298 F.3d 1048 (9th Cir. 2002) .....	2
<i>Green Edge Enters., LLC v. Rubber Mulch Etc., LLC</i> 620 F.3d 1287 (Fed. Cir. 2010).....	3
<i>In re Corporate Dissolution of Ocean Shores Park, Inc.</i> 134 P.3d 1188 (Wash. Ct. App. 2006) .....	7
<i>In re the Estate of O’Brien</i> , 749 P.2d 154 (1988).....	7
<i>John Davis &amp; Co. v. Cedar Glen No. Four, Inc.</i> , 450 P.2d 166 (Wash. 1969) .....	6-7
<i>Lighthouse Church of Cloverleaf v. Texas Bank</i> , 889 S.W.2d 595 (Tex. App.—Houston [14th Dist.] 1994) .....	6-7
<i>Luna v. Brownell</i> , 110 Cal. Rptr. 3d 573 (Cal. App. 2010) .....	6
<i>Miller v. Longacre</i> , 172 F.3d 44 (4th Cir. 1999) .....	3
<i>Park Smith, Inc. v. CHF Indus., Inc.</i> , No. 6 Civ. 869 (LMM), 2011 WL 2714205 (S.D.N.Y. July 12, 2011).....	<i>passim</i>
<i>Puckett v. Puckett</i> , 185 P.2d 131 (1947) .....	7
<i>Renteria-Villegas v. Metro. Gov’t of Nashville and Davidson Cnty.</i> , No. 3:11-00218, 2011 WL 2471585 (M.D. Tenn. June 21, 2011) .....	4

<i>Schering Corp. v. Amgen</i> , 969 F. Supp. 258 (D. Del. 1997).....	4
<i>Staren v. Am. Nat’l Bank and Trust Co. of Chicago</i> , 529 F.2d 1257 (7th Cir. 1976) .....	1-2
<i>Wieburg v. GTE Sw., Inc.</i> , 272 F.3d 302 (5th Cir. 2001) .....	2
<i>Wiwa v. Royal Dutch Petroleum Co.</i> , No. 96-8386, 2009 WL 464946 (S.D.N.Y. Feb. 29, 2009) .....	6, 8
<i>Wolfe v. Gilmour Mfg. Co.</i> , 143 F.3d 1122 (8th Cir. 1998) .....	3
<i>Zurich Insurance Co. v. Logitrans</i> , 297 F.3d 528 (6th Cir. 2002) .....	4-5
<b>Other Authorities</b>	
Fed. R. Civ. P. 17.....	<i>passim</i>
6A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 1555 (2d ed. 1990).....	2
13A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531 (3d ed. 2010).....	4

## **SUMMARY OF ARGUMENT**

PUM has standing. Under Texas law, it acquired legal title to the patents-in-suit two years before it filed this infringement action. PUM acquired legal title when it filed its Certificate of Formation with the Texas Secretary of State. It also acquired legal title by ratifying the patent assignment. As a result, PUM enjoyed all the incidents of legal title, including the right to sue infringers like Google.

If the Court nonetheless were to find that the assignment from Levino did not pass legal title to PUM (which it should not do), it should permit the substitution of Levino as plaintiff under Fed. R. Civ. P. 17(a)(3). This Rule was designed to provide a remedy precisely in situations such as here where, if PUM lacks standing, a good-faith mistake would have been made in naming PUM as plaintiff.

Google's arguments against substitution are flawed and, if adopted, would waste both the parties' and the Court's resources by requiring Levino to file a new case with identical patent infringement claims – an outcome that Rule 17(a) is designed to avoid. Moreover, Google has not demonstrated that substituting Levino would in any way alter the actual issues in dispute (namely, the patent infringement claims), unfairly prejudice Google, or delay this proceeding (neither an expert report date nor a trial date has been set). Thus, if the Court were to determine that PUM did not acquire legal title, then PUM's alternative cross-motion to substitute Levino as plaintiff should be granted.

## **ARGUMENT**

### **I. RULE 17(A) IS BROADLY APPLIED**

“[T]he Federal Rules of Civil Procedure are to be liberally construed to effectuate the general purpose of seeing that cases are tried on the merits and to dispense with technical procedural problems.” *Staren v. Am. Nat'l Bank and Trust Co. of Chicago*, 529 F.2d 1257, 1263

(7th Cir. 1976). To further this purpose, Rule 17(a) “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.” *Goodman v. U.S.*, 298 F.3d 1048, 1053 (9th Cir. 2002) (quoting 6A Charles Alan Wright *et al.*, FEDERAL PRACTICE AND PROCEDURE § 1555 (2d ed. 1990)). Accordingly, a court should not dismiss an action where the less drastic alternative of Rule 17(a) substitution is permitted. *See Wieburg v. GTE Sw., Inc.*, 272 F.3d 302, 309 (5th Cir. 2001); *Park Smith, Inc. v. CHF Indus., Inc.*, No. 6 Civ. 869 (LMM), 2011 WL 2714205, at \*5 (S.D.N.Y. July 12, 2011) (citing *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 20 (2d Cir. 1997)). Rule 17(a) substitution, therefore, should be permitted where, as here, “a mistake has been made as to the person entitled to bring the suit and such substitution will not alter the substance of the action.” *Park Smith*, 2011 WL 2714205, at \*4; *Advanced Magnetics*, 106 F.3d at 20.

## **II. IF THE COURT FINDS THAT PUM LACKS STANDING, IT SHOULD UTILIZE RULE 17(A) AND SUBSTITUTE LEVINO AS PLAINTIFF**

Google argues that Rule 17(a) substitution is impermissible because (i) PUM lacks standing to seek substitution, (ii) Levino has not joined in PUM’s motion, (iii) PUM has not justified substituting Levino as plaintiff because no “mistake” has been made and (iv) Google will be prejudiced by such substitution. (D.I. 320, at 6-10). None of these arguments has merit.

### **A. This Court Has Jurisdiction To Substitute Levino**

Initially, Google argues that the Court cannot even address the merits of PUM’s Rule 17(a)(3) motion because PUM does not have constitutional standing to invoke Rule 17(a). (D.I. 320, at 6). Google is incorrect.

First, Google’s new standing argument should be rejected because it would frustrate the very policy Rule 17(a) is designed to advance. If adopted, Google’s argument would result in a “do-over” with Levino filing suit “in its own name and the parties ... back in the same place.”

*Park Smith*, 2011 WL 2714205, at \*5. Not surprisingly, most courts that have considered similar facts permit substitution, as opposed to dismissing for lack of standing, because substitution conserves both the court’s and the parties’ resources: “[A]llowing substitution [despite lack of standing] ‘is the wiser answer to the problem of expediting trials and avoiding unnecessary delay and expense of requiring an action to be started anew where a substitution is desired though the subject matter of the actions remains identical.’” *Id.*; *Accord Advanced Magnetics*, 106 F.3d at 20 (permitting substitution).<sup>1</sup> As the Advisory Committee said in its Comment to Rule 17(a), “[i]t is intended to prevent forfeiture when determination of the proper party to sue is difficult *or when an understandable mistake has been made.*” (emphasis added).

The reasoning of *Advanced Magnetics* is instructive. There, plaintiff AMI asserted claims it had acquired through an assignment agreement from various shareholders, which turned out to be invalid. The alleged infringer fought AMI’s motion to amend to add shareholders as plaintiffs by characterizing their initial omission not as a mistake, but as “tactical” and “strategic.” The *Advanced Magnetics* court rejected this argument, stating “[t]here plainly was a mistake as to the legal effectiveness of the documents to permit AMI to sue as assignee.” *Id.* The court held that, absent evidence that the incorrect interpretation of the documents was itself deliberate or tactical, or that the assignment was undertaken in bad faith, the proposed

---

<sup>1</sup> The majority of circuits that have addressed this issue agree that Rule 17 can be used to correct standing issues. *E.g.*, *Miller v. Longacre*, 172 F.3d 44, 1999 WL 34977, at \*1 (4th Cir. 1999) (“[Rule 17] clearly contemplates that actions filed by persons lacking standing should not be dismissed where the proper party can be found and substituted or joined in the action.”); *Wolfe v. Gilmour Mfg. Co.*, 143 F.3d 1122, 1126-27 (8th Cir. 1998) (holding that Rule 17(a)(3) substitution may be used to correct Article III standing); *Delta Coal Program v. Libman*, 743 F.2d 852, 857 n.6 (11th Cir. 1984) (holding that the district court’s substitution was permissible, because “the operative facts and cause of action are not changed” and “Rule 17(a) was intended to extend to precisely this kind of situation”); *Green Edge Enters., LLC v. Rubber Mulch Etc., LLC*, 620 F.3d 1287, 1301 (Fed. Cir. 2010) (finding declaratory jurisdiction on the grounds that “if Green Edge is ultimately found not to have standing to pursue its infringement claim, International Mulch may be in a position to be substituted for Green Edge as the real party in interest”).

amendment should have been allowed. *Id.* at 21. This District Court endorsed *Advanced Magnetics* in *Schering Corp. v. Amgen*, 969 F. Supp. 258, 268-69 (D. Del. 1997) (holding that a complaint amended to add a second plaintiff ‘related back’ and endorsing the reasoning used in *Advanced Magnetics* to correct good-faith mistakes in naming the proper parties to an action). Likewise, here there is no evidence that the assignment was in bad faith, or that it was incorrectly interpreted by the parties, if at all, deliberately or for tactical reasons.

Second, even under *Zurich Insurance Co. v. Logitrans*, 297 F.3d 528 (6th Cir. 2002), on which Google relies, PUM has constitutional standing to raise its substitution argument. There, plaintiff, Zurich Switzerland, filed suit as a subrogee of the insured, even though Zurich Switzerland had never issued an insurance policy or paid any money to the insured. *Id.* at 530. The court denied Zurich Switzerland’s request to substitute the actual subrogee (American Guarantee) because it was clear from the outset that Zurich Switzerland never had a good faith belief that it was a proper plaintiff. Indeed, Zurich Switzerland admitted this, and that it did not suffer injury. *Id.* at 531. Thus, *Zurich Insurance* is in stark contrast to the instant case, where PUM had (and still has) a justifiable good-faith belief that it acquired legal title to the patents-in-suit and has suffered injury.<sup>2</sup> As a result, even under *Zurich Insurance*, PUM has standing to invoke Rule 17(a) should the Court find it never acquired legal title to the patents-in-suit.

Finally, taken to its logical conclusion, Google’s Rule 17(a) standing argument, if accepted, would mean that an improperly named plaintiff could never move for substitution

---

<sup>2</sup> Additionally, the *Zurich* decision has been criticized as overly rigid (*see, e.g.*, 13A Charles Alan Wright *et al.*, FED. PRACTICE AND PROCEDURE § 3531 (3d ed. 2010) (“[A] focus on standing may lead a court to refuse application of ameliorating rules ...”), and has not been interpreted to foreclose the ability to use Rule 17 to correct a standing issue under all circumstances. *See Renteria-Villegas v. Metro. Gov’t of Nashville and Davidson Cnty.*, No. 3:11-00218, 2011 WL 2471585, at \*5 (M.D. Tenn. June 21, 2011) (“[T]he underlying premise that a court can never allow a Motion to Amend to correct a perceived standing problem is incorrect.”).

under Rule 17(a). This clearly is contrary to the majority view and the *Zurich Insurance* case, and would violate the very policy that Rule 17(a) advances. Indeed, such a conclusion would render the word “substitution” in Rule 17(a)(3) meaningless.

**B. Levino Agrees To Join This Motion**

Google makes much of the fact that Levino did not join the original motion. (D.I. 320, at 7). This is meritless. If the Court were to find PUM lacks standing, Levino agrees to be substituted as plaintiff. Levy Benaim, an owner of both PUM and Levino, has provided a declaration expressing Levino’s consent to be the plaintiff in this action. Mr. Benaim’s Declaration also establishes that Levino continues to exist, and is in good standing, under the laws of the Republic of Cyprus. A copy of Mr. Benaim’s Declaration is attached as Ex. 1.

**C. Substitution Should Be Permitted Because Any Defect Resulted From a Mistake and Because There Has Been No Unfair Prejudice**

A district court should permit leave to substitute if “(1) the defect in the named plaintiff[] plausibly resulted from mistake (‘mistake’ prong), and (2) correcting this defect w[ill] not unfairly prejudice [the] defendant[] by changing the particulars of the claim[] against [it] (‘prejudice’ prong).” *Park Smith*, 2011 WL 2714205, at \*5 (citing *Wiwa v. Royal Dutch Petroleum Co.*, No. 96-8386, 2009 WL 464946, at \*10 (S.D.N.Y. Feb. 25, 2009)). Further, “the bar for granting leave to join real parties is low.” *Wiwa*, 2009 WL 464946, at \*10. Both the mistake and prejudice prongs are satisfied here.

**1. The mistake prong is satisfied – naming PUM as Plaintiff was not done deceptively or in bad faith, or to unfairly prejudice Google**

Google side-steps the issue of “mistake” by simply arguing that Rule 17(a) is inapplicable because PUM maintains that it has standing and, thus, does not admit that a mistake has been made. (D.I. 320, at 7-8). Nothing in Rule 17(a) or the Advisory Committee’s

Comment requires that a plaintiff have confessed its mistake before Rule 17(a) can be invoked. The reasoning of *Advanced Magnetics* is again instructive. The plaintiff-assignee contended that an assignment of a right of recovery permitted it to bring suit. 106 F.3d at 14, 18. The court disagreed: “There plainly was a mistake as to the legal effectiveness of the documents to permit AMI to sue as assignee.” *Id.* at 16, 20. The court, however, permitted substitution under Rule 17 because there was no evidence suggesting the mistake itself was deliberate, tactical, or undertaken in bad faith. *Id.* at 20-21.

The same arguments exist in this case. There has been no suggestion of bad faith, or deliberate or tactical chicanery concerning the assignments; nor did PUM act with bad faith or intent to deceive in filing this action as plaintiff. Under the *Lighthouse Church* and *John Davis* line of cases set forth in PUM’s earlier brief, PUM acquired legal title to the patents, both as a result of its formation and its ratification of the assignment, two years before it filed suit. (*See* D.I. 310, at 6-9). Once vested with legal title, PUM had standing to enjoy the incidents of that ownership and could assert its rights against third party infringers just as the owner of legal title to realty can assert rights against a trespasser. *See, e.g., Luna v. Brownell*, 110 Cal. Rptr. 3d 573, 578 (Cal. App. 2010) (holding quitclaim deed to a pre-formed trust valid upon the trust’s formation to cut off the rights of third party claimants to the subject property), citing *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 450 P.2d 166 (Wash. 1969) with approval.

In its brief (D.I. 320, at 3-6), Google cherry-picks phrases from PUM’s cited cases to contend that PUM’s title cannot be asserted against third parties. Google is wrong. The cited phrases addressed the enforceability of deeds against third parties *before corporate formation*, not the enforceability of those deeds post-formation. Otherwise, where equitable title becomes legal title, such legal title to realty (not to mention any patent, contract, or other rights transferred

under similar circumstances) would be permanently clouded and near valueless, which is absurd. To the contrary, a deed to land, for example, is fully enforceable against third parties once the grantee is legally formed. This rule was summarized in *In re Corporate Dissolution of Ocean Shores Park, Inc.*, which relied on the *John Davis* line of cases:

A deed to a corporation **made before its organization** is valid between the parties but is void when asserted against third parties. *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wash. 2d 214, 220, 450 P.2d 166 (1969); *Cnty. Credit Union Servs., Inc. v. Fed. Express Servs. Corp.*, 534 A.2d 331, 334 (1987). Title passes when the corporation is legally incorporated. *John Davis*, 75 Wash. 2d at 220-21, 450 P.2d 166; *Cnty. Credit*, 534 A.2d at 334. Delivery of the deed, along with the grantor's intent to deliver, is still necessary for the deed to be operative. *In re the Estate of O'Brien*, 109 Wash. 2d 913, 918, 749 P.2d 154 (1988); *Puckett v. Puckett*, 29 Wash. 2d 15, 18, 185 P.2d 131 (1947).

134 P.3d 1188, 1194 (Wash. Ct. App. 2006) (emphasis added); *accord Lighthouse Church of Cloverleaf v. Texas Bank*, 889 S.W.2d 595, 602 (Tex. App.—Houston [14th Dist.] 1994) (“Furthermore, we find at least two jurisdictions which, under principles of equity, hold that a **void deed** is valid between the grantor and grantee, but void when asserted against third parties.”)(emphasis added); *Cnty. Credit Union Serv., Inc. v. Federal Express Serv. Corp.*, 534 A.2d 331, 334 (D.C. App. 1987); *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 450 P.2d 166, 170 (1969).

Here, the assignment to PUM is neither a pre-formation agreement nor void. The assignment passed legal title to the patents-in-suit to PUM when PUM filed its Certificate of Formation in Texas or, alternatively, when it ratified the assignment by, among others things, recording it in the PTO. Therefore, there was no mistake made in naming PUM as plaintiff and PUM has standing. But even if this Court were to reject the reasoning of these cases, there is no evidence that the attempted assignment was “undertaken in bad faith or in an effort to deceive or prejudice” Google. *Advanced Magnetics*, 106 F.3d at 21. The mistake prong is thus satisfied.

**2. The prejudice prong is also satisfied – the substitution of Levino as plaintiff will not cause unfair prejudice**

Google attempts to manufacture “great prejudice” by citing to the supposed difficulty in obtaining discovery about Levino. (D.I. 320, at 8-10). This argument misunderstands the prejudice analysis. The prejudice analysis is prospective and “focuses on whether, despite joinder of the real parties, [d]efendant[] will have had sufficient notice of the claim against [it].” *Wiwa*, 2009 WL 464946, at \*12. Stated another way, the heart of the prejudice analysis is whether the claims against a defendant will change if substitution occurs: “Where defendants had notice in the original complaint of the nature of the claims against them, substitution does not unfairly prejudice them.” *Park Smith*, 2011 WL 2714205, at \*6 (citing *Wiwa*, 2009 WL 464946, at \*10); *see also Advanced Magnetics*, 106 F.3d at 20-21. Here, Google has been aware of the patent infringement claims against it since this suit was filed. The substitution of Levino for PUM will not change the nature of those claims, regardless of whether PUM or Levino is the plaintiff. Google’s unfair prejudice argument thus fails at the outset.

Google’s unfair prejudice argument also fails because Google cannot otherwise demonstrate that it will suffer any prejudice if substitution is permitted. Google’s argument, seemingly, is not that it did not take full discovery of Levino, but rather that it did not get satisfactory answers to its questions. (D.I. 320, at 9-10). Google has been aware of Levino’s existence in the chain of title of the patents-in-suit from the outset of this lawsuit, and Google has already taken significant discovery of Levino. Of the six original owners involved with both Levino and PUM, Google has deposed four: Roy Twersky (twice), Yochai Konig (twice and a third time to be scheduled), Jack Benquessous, Utopy (by deposing Roy Twersky, Yochai Konig, David Konig), and Ari Gal, Esq., an attorney for Levino and PUM. All of these depositions, save for the deposition of David Konig, included substantial questioning about Levino. A fifth

owner, Shimon Twersky, has passed away. In addition, PUM has produced the relevant non-privileged Levino-related documents that Shimon Twersky and Levy Benaim, two more owners, possessed. PUM produced relevant Levino-related documents from Roy Twersky, Yochai Konig, Ari Gal, Esq. and Reuben Benquessous.<sup>3</sup> Google further obtained documents from and deposed Dorin Aspitz, Utopy's former CEO, and Philip Black, a former board member and creditor of Utopy, both of whom were asked many questions about the assignment from Utopy to Levino. Google, therefore, has had a full opportunity (and incentive) to take discovery concerning Levino regarding the chain of title to the patents-in-suit.<sup>4</sup>

Finally, Google attempts to further manufacture prejudice when it overreaches, referring to Levino as a "shell" corporation about which no one has been able to answer questions with certainty (D.I. 320, at 10), and attempts to warp the record by hand selecting quotes from one witness while omitting testimony from others. Google is wrong. Many of the so-called unanswered questions concerning Levino were, in fact, answered by other deponents and are wholly irrelevant to the claims or defenses in this lawsuit in any event. For example, questions such as why Levino was formed in Cyprus and who owns what shares of Levino have no bearing on whether Google infringes the patents-in-suit or Google's defenses. **REDACTED**

**REDACTED**

---

<sup>3</sup> D.I. 320, Ex. 9, at 3 (collecting documents from Shimon Twersky, Levy Benaim, and Reuben Benquessous).

<sup>4</sup> Moreover, to the extent Google wants to depose Levy Benaim and Reuben Benquessous if Levino is substituted, PUM will not object.

<sup>5</sup>

**REDACTED**

**REDACTED**

And although Google speculates in footnote 3 that it “may be impossible to take complete discovery about Levino,” its sole basis for this purported prejudice is that Google did not depose three investors (Shimon Twersky, Levy Benaim and Reuben Benquessos). However, each of them had “very limited information relevant to the lawsuit,” “including very limited, if any, knowledge of the technology claimed in the patents-in-suit,” and would not be called at trial. (D.I. 320, Ex. 10).<sup>7</sup> Simply stated, Google fails to demonstrate how it would be unfairly prejudiced should Levino be the plaintiff.

**CONCLUSION**

For the reasons stated above and in PUM’s Opposition (D.I. 310), Google’s Motion should be denied. But, if the Court finds that PUM lacks standing, the Court should grant leave to substitute Levino, Ltd. for PUM as plaintiff.

---

**REDACTED**

<sup>6</sup> **REDACTED**

<sup>7</sup> Ironically, except with respect to Shimon Twersky who was terminally ill, it was Google who elected to forego these depositions. If Levino is substituted, PUM is willing to offer Mr. Benaim and Reuben Benquessos for deposition should Google so desire.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

*/s/ Karen Jacobs Louden*

---

Karen Jacobs Louden (#2881)  
Jeremy A. Tigan (#5239)  
1201 N. Market Street  
P.O. Box 1347  
Wilmington, DE 19899-1347  
(302) 658-9200  
klouden@mnat.com  
jtigan@mnat.com

OF COUNSEL:

*Attorneys for Personalized User Model, L.L.P.  
and Yochai Konig*

Marc S. Friedman  
SNR Denton US LLP  
1221 Avenue of the Americas  
New York, NY 10020-1089  
(212) 768-6700

Mark C. Nelson  
Robert J. Needham  
SNR Denton US LLP  
2000 McKinney Avenue, Suite 1900  
Dallas, TX 75201  
(214) 259-0900

September 16, 2011  
4494670.2

**CERTIFICATE OF SERVICE**

I hereby certify that on September 21, 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 September 21, 2011, upon the following individuals in the manner indicated:

**BY E-MAIL**

Richard L. Horwitz  
David E. Moore  
POTTER ANDERSON & CORROON LLP  
1313 N. Market St., 6th Floor  
Wilmington, DE 19801

**BY E-MAIL**

Brian C. Cannon  
QUINN EMANUEL URQUHART  
& SULLIVAN, LLP  
555 Twin Dolphin Dr., 5th Floor  
Redwood Shores, CA 94065

Charles K. Verhoeven  
David A. Perlson  
Antonio R. Sistos  
Andrea Pallios Roberts  
Joshua Lee Sohn  
QUINN EMANUEL URQUHART  
& SULLIVAN, LLP  
50 California Street, 22nd Floor  
San Francisco, CA 94111

*/s/ Jeremy A. Tigan*

---

Jeremy A. Tigan (#5239)