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VIA ELECTRONIC FILING

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

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

Dear Judge Stark:

I write of behalf of Defendant Google Inc. ("Google") in response to Plaintiff's recent request for a trial date in the above-captioned case (D.I. 369). Google believes that it would be wasteful and inefficient to set a trial date at the present time, for several reasons.

First, as explained in Google's pending Motion to Dismiss (D.I. 301), Google respectfully submits that the Court lacks subject-matter jurisdiction over this Action due to the fact that the asserted patents were purportedly transferred to Plaintiff before Plaintiff came into corporate existence. While Plaintiff unsurprisingly disputes this subject-matter defect and opposes Google's Motion to Dismiss, it would be inefficient and potentially wasteful for the Court to set a trial date while the Court's threshold jurisdiction over this Action remains unresolved.

Second, Google has filed *inter partes* re-examination requests for both asserted patents in the U.S. PTO. On February 10, 2012, the PTO issued an Action Closing Prosecution (ACP) finding each asserted '276 claim invalid on seven separate grounds. On April 19, 2012, the PTO issued an ACP finding each asserted '040 claim invalid on four separate grounds. The parties have submitted their briefs in response to both ACPs, and the PTO's website shows both re-examinations as "Ready for Examiner Action after ACP." Thus, the Final Office Action in each re-examination could come at any time.

Google submits that it would be inefficient and wasteful to set a trial date for this Action while the validity of the asserted claims remains in such jeopardy before the PTO. Given that each asserted claim stands rejected on 4-7 separate grounds at the ACP stage, there is a high likelihood that the upcoming Final Office Actions will reject the asserted claims as well. Thus,

rather than setting a trial date, the more appropriate action would be to stay the litigation until the completion of the re-examinations, for which Google intends to formally move upon receipt of the expected Final Office Action(s). *See, e.g., Belden Tech. Inc. v. Superior Essex Comm'ns LP*, No. 08-63-SLR, 2010 WL 3522327, *3 (D. Del. Sept. 2, 2010) (stating that the status of a re-examination weighs in favor of a litigation stay once a Final Office Action has issued and an appeal docketed before the BPAI).

Moreover, while Plaintiff states that not setting a trial date would "benefit Google to the detriment of P.U.M.," it provides no support for this statement. Nor could it. Plaintiff is not a competitor of Google, nor does it practice the asserted patents. Thus, at most, Plaintiff's remedy would be limited to money damages. And while Plaintiff states that it "is the spin-off of a small company (Utopy) that developed this technology" as supposed support for its claim of prejudice, this statement is simply untrue. Years before this litigation was filed, Utopy transferred the asserted patents to a Cyprus entity, Levino, Ltd. Plaintiff then purported to acquire the asserted patents from Levino on May 23, 2007 (though Plaintiff did not actually come into existence until August 14, 2007). Plaintiff then waited almost two more years to bring suit.

Also, contrary to Plaintiff's implication, several of the extensions to the case schedule were granted at Plaintiff's own request. For example, the February 2, 2012 Stipulation regarding Expert Discovery (D.I. 353) – pushing back expert discovery and dispositive motions by roughly one month – was suggested by Plaintiff. The July 16, 2012 Stipulation Regarding Expert Discovery (D.I. 367) – pushing back expert discovery and dispositive motions by 5-6 weeks – was occasioned by Plaintiff's insistence that fact discovery be re-opened so that it could take discovery into a new Google functionality. Even the extensions referred to in Plaintiff's request for a trial date (D.I. 364 and 366) were enacted not only to accommodate Google and its expert, but also to facilitate Plaintiff's discovery into the new Google functionality. Plaintiff's own efforts to re-open fact discovery and push back other case deadlines undercuts Plaintiff's stated concerns about the pace of this litigation.

Finally, setting trial for March 2013 (as Plaintiff requests) would be impractical. Dispositive motions in this case are not due until November 7, 2012 and will not be fully briefed until, at the earliest, November 28, 2012 – barely three months before Plaintiff's proposed trial date. Given that Plaintiff has accused five Google products of infringing 12 claims from two different patents, it would be impractical to schedule trial for just three months after dispositive motions are fully briefed. Under this schedule, the dispositive motions would likely not be adjudicated until very soon before the trial date, meaning that counsel for both parties would need to begin their final trial preparations without knowing which (if any) of the myriad claims and accused products will survive dispositive motions and remain in the case for trial. Several of Google's counsel of record also have another trial currently set for March 2013 in the Eastern District of Texas, which makes a March 2013 trial in this Action even more impractical from Google's perspective.

For the foregoing reasons, Google respectfully opposes Plaintiff's request to set a trial date at the present time.

Respectfully,

/s/ David E. Moore

David E. Moore

DEM/msb/1069107/34638

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