



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

David E. Moore
 Partner
 Attorney at Law
 dmoore@potteranderson.com
 302 984-6147 Direct Phone
 302 658-1192 Fax

August 17, 2012

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 on behalf of defendant Google Inc. to respectfully request an immediate alternate hearing date for Google's request to strike plaintiff Personalized User Model's ("PUM") supplemental expert report, served on August 10, 2012. Yesterday, the parties contacted chambers and were informed that the next available hearing date was August 31. For the reasons set forth below, Google respectfully requests an earlier hearing date for this dispute.

On July 13, 2012, the parties entered a stipulation by which Google consented for fact discovery to reopen, at PUM's request, concerning Google's "Portrait" project and for a supplemental report by PUM regarding Portrait.¹ As the stipulation states explicitly, both the discovery and expert report were to relate "solely" to Portrait:

| <u>Activity</u> | <u>Former Date</u> | <u>New Date</u> |
|-------------------------------------------------------------------------------------------------|--------------------|-------------------|
| Google to make source code for the "Portrait" functionality available by | | July 27, 2012 |
| Rule 30(b)(6) deposition of technical topics relating solely to "Portrait" functionality | | July 31, 2012 |
| Supplemental infringement report relating solely to "Portrait" functionality | | August 10, 2012 |
| Rebuttal reports due | August 3, 2012 | September 7, 2012 |

¹ Portrait launched in early 2012, which was after the close of fact discovery in this case.

(D.I. 367 (emphasis added).) The parties were to serve rebuttal reports on September 7, 2012. The stipulation stated that “[n]o other expert reports are permitted without consent of all parties or leave of the Court.” (*Id.* at 1, n.1)

Despite the parties’ explicit agreement, PUM’s supplemental report does not relate “solely to ‘Portrait’ functionality.” Instead, its supplemental expert report also purports to add two entirely new products to the case: Google Plus and YouTube Videos. Neither product has previously been accused of infringing the asserted claims in discovery responses or otherwise, and accordingly neither product has been the subject of discovery in this case.²

PUM’s attempt to add new products—in direct contravention to the parties’ stipulation entered by the Court—causes severe prejudice to Google. Google and its counsel would have to locate and interview relevant witnesses, locate and analyze documents, and review source code all in advance of drafting a rebuttal report for these two new products.³ The prejudice caused by the introduction of these new products is all the greater given that Google’s rebuttal report is due September 7, too soon to provide its expert sufficient time to learn about and address these new products.

Google expressed these concerns the same day PUM served its report, Friday, August 10, and requested that the parties meet and confer on Monday, August 13. PUM, however, refused to meet and confer until after close of the business August 15, such that Google was unable to contact the Court until August 16. At the meet and confer, PUM refused to withdraw its supplemental report and further refused to allow Google additional time to address the allegations as to these newly accused products. By that time, however, the earliest date the Court could provide for a hearing was August 31, only one week before Google’s rebuttal report is presently due.

Accordingly, Google respectfully requests the Court provide Google an immediate hearing on its request to strike PUM’s supplemental report. Given that Google’s Rebuttal Report is due September 7, an August 31 hearing date would not address the prejudice to Google from PUM’s violation of the parties’ stipulation, but would in fact enhance it. A hearing on August 31 would leave only one week before the rebuttal report would be due, and as such Google, its counsel, and its expert would have already undertaken a substantial investigation and analysis of the functionality of the new products Google Plus and YouTube Videos in order to have any possibility of preparing a rebuttal report on these new products by September 7, albeit a report which would almost certainly be hindered by lack of adequate time to address the new products. This effort should also be entirely unnecessary given that PUM’s supplemental report adding allegations against these two new products was not authorized in the first place.

² PUM’s previous infringement report accused Google Search, AdWords, Content Ads, YouTube Ads, and Google News of infringing the asserted claims.

³ Google’s lead in-house counsel handling this case is currently on paternity leave which further complicates issues.

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If the Court is unable to accommodate an immediate hearing, Google requests, as an interim measure, that the due date for its rebuttal report be extended until four weeks after the Court's ruling. This will save Google the burden of unnecessarily preparing a rebuttal report to PUM's improper supplemental report, given the timing of when its rebuttal report is currently due. The remaining dates for expert depositions (October 2), and case dispositive motions (November 7)—should correspondingly be vacated and the parties ordered to meet and confer regarding appropriate new dates after the Court's ruling.

PUM can point to no prejudice to either an immediate hearing on Google's request to strike its improper supplemental report, or the interim alternative relief Google seeks. Yet, denial of Google's requested relief would cause significant prejudice to Google as detailed above.

Counsel remain available to discuss this matter at the Court's convenience.

Respectfully,

/s/ David E. Moore

David E. Moore

DEM/msb/1071341/34638

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