MORRIS, NICHOLS, ARSHT & TUNNELL LLP

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

302 658 9200
302 658 3989 FAX

KAREN JACOBS LOUDEN
302 351 9227
302 425 4681 FAX
klouden@mnat.com

August 30, 2012

BY E-FILING

PUBLIC VERSION

Confidential Version Filed: August 30, 2012
Public Version Filed: September 6, 2012

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 response to Google's August 29, 2012 letter (D.I. 381) regarding the issues to be discussed at tomorrow's teleconference.

1. The Court Should Not Strike PUM's Supplemental Expert Report.

Google advances two arguments for striking PUM's expert report. Both are wrong. [redacted] For example, when negotiating the revised schedule, Google stated "if we are not able to reach agreement, we intend to proceed on the previously stipulated schedule *with the products currently accused in the case*"; [redacted] "[w]e hope we can come to an agreement regarding PUM's demands for a reopening of fact discovery through further document requests and an additional deposition regarding *products not accused* as of the close of fact discovery". (Ex. 8) (emphases added). YouTube, moreover, is already an accused product. Notably, Google offers no explanation why the parties would have agreed to this additional discovery if it could not be used to assert infringement. Google's "new product" argument should be rejected.

Second, Google claims it will be severely prejudiced if the report is not stricken because "Google now needs to locate and interview relevant witnesses, analyze relevant documents, and review source code regarding these products, including the functionalities identified above". (D.I. 381 at p. 2). To begin, Google fails to identify a single witness or document that has not already been the subject of discovery. Further, if there is additional discovery, Google does not

explain why it did not provide it in the first place. PUM specifically asked for all documents regarding the use of Portrait over ten times for a period of five months. (Ex. 1-8). [redacted] Google should not be permitted to use its own dilatory conduct and discovery failures as a sword to strike PUM's report or to further delay this case.

2. This Court Should Set a Trial Date

This case has been pending for three years. A trial date should be set to keep this case on track and avoid the repeated delays that Google has sought to impose on the schedule. Google essentially argues that the Court should rule in its favor on both its motion to dismiss and on a motion to stay that it has not yet filed. Although PUM does not believe that either motion has any merit, the Court will decide these motions in due course, and should not prevent the setting of a trial date that, if required, can then be adjusted. Were it otherwise, few trials would ever be scheduled and defendants would be incentivized to file multiple motions to simply avoid the setting of a trial date. Moreover, the reexamination proceedings are far from over. For example, in the '040 patent proceeding, the Examiner is considering the parties' latest round of papers and PUM believes is likely to re-open reexamination based on the arguments and evidence recently submitted by PUM. And in the '276 proceeding, although the Examiner issued a Notice of a Right of Appeal, PUM will file a Notice of Appeal, followed by appellate briefing from both sides and a response from the Board, which itself can take many months, followed by a hearing and the Board's decision, which is likely to take a year itself. Regardless of the ruling, a Federal Circuit Appeal would likely result. Thus, any final resolution in the '276 proceeding is likely to take many years. Google also argues that March 2013 is impractical because of the multiple motions it wants to file and its counsel's schedule in another case. As the Court recognized, however, limits need to be placed on the motions that are filed. Further, PUM did not insist on a March 2013 trial date (as Google contends), but requested that a trial be set at the Court's earliest convenience. That Google's counsel are involved in another trial in March is not a basis not to schedule ***any trial date***. This case has been pending more than three years and it is time to bring at least the first phase of this case to resolution.

---

[1] [redacted] Google also limited PUM to taking a single Rule 30(b)(6) deposition as part of the parties' agreement.

Respectfully,

/s/ Karen Jacobs Louden

Karen Jacobs Louden (#2881)

cc: Clerk of the Court (*by e-filing and hand delivery*)
All Counsel of Record (*by e-mail*)

6343352