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.	)	

P.U.M.'S REPLY IN SUPPORT OF ITS MOTION FOR LEAVE TO CROSS-MOVE FOR SUMMARY JUDGMENT

In its opposition (D.I. 445), Google neither addresses the merits of P.U.M.'s cross-motion nor the indisputable proposition that, if the cross-motion is granted, it would greatly simplify the case for the Court and the jury by removing Google's stale ownership claims. Instead, Google's opposition is entirely formalistic, based on an assertion that granting leave would "violate" the Scheduling Order and that Google would somehow be prejudiced by having to respond to a cross-motion that relies on the same facts as P.U.M.'s opposition to Google's own summary judgment motion. Neither assertion has merit. As a result, P.U.M. respectfully requests that its motion for leave to cross-move be granted.

First, Google makes much of the fact that P.U.M. requests an adjustment to the Scheduling Order, arguing that "the scheduling orders in this case would be effectively rendered

meaningless if parties could simply move to file motions that violate these scheduling orders." D.I. 445 at 1. This is nonsense. The parties have filed more than a dozen stipulations in this case – the majority at Google's behest – requesting that the Court amend the Scheduling Order. None of those stipulations, largely requested by Google, rendered the Scheduling Order "meaningless." P.U.M.'s motion does not "violate" the Scheduling Order, as Google contends, but is a request to the Court for leave pursuant to Fed. R. Civ. P. 16(b)(4), for good cause shown, to extend the date for its cross-motion. P.U.M.'s motion for leave, has demonstrated good cause for this slight extension, including that its narrow cross-motion has the potential to entirely resolve the ownership dispute, so that the Court and the jury can focus on the already complex infringement and validity issues at trial.[1]

Second, Google also makes much of the fact that P.U.M. previously asserted its statute of limitations defense in opposing Google's earlier motion for leave. That only demonstrates, however, the lack of prejudice to Google in addressing these issues now. As noted in the motion for leave, P.U.M. did not know that Google would again move for summary judgment on the ownership issues. It was in the context of preparing its opposition that P.U.M.'s counsel became aware that the same facts on which Google relies in its summary judgment motion warrant judgment in P.U.M.'s favor.

Third, there is no unfair prejudice to Google. Indeed, Google does not even try to argue that the case schedule would be disrupted; nor could it given that the motion hearing is not

[1] Referencing the Court's decision to deny Google's request to file an ***early*** summary judgment motion on these issues, Google complains that P.U.M.'s current request is "both ironic and unfair." *Id*. at 2. It is neither. The Court denied Google's earlier request for leave to file its summary judgment motion because it preferred to "defer the issue on the merits until such time as all discovery is complete and all of the case dispositive motions can be taken up at the same time." D.I. 294 at 21. P.U.M.'s request is consistent with this guidance. Discovery is now complete and the Court may take up P.U.M.'s cross-motion at the same time as it considers Google's Motion.

set until May 8 and no trial date has been set. Google's complaints about the page limits are also a red herring. The facts on which P.U.M. will rely in support of its opposition to Google's summary judgment motion, to which Google will have to respond in its reply, are the same facts on which P.U.M. will rely in its cross-motion. In fact, under Fed. R. Civ. P. 56(f) the Court has the discretion to grant judgment in favor of P.U.M.as the nonmovant even in the absence of a cross-motion. The exercise of that discretion would be particularly appropriate here given the waste of resources and needless complexity that would be involved in a full trial on the merits of stale claims. *See, e.g.,* 11 James Wm. Moore et al., *Moore's Federal Practice*, ¶ 56.25[1][c] (3d ed. 2011) (noting the susceptibility of statute of limitations defenses to summary disposition).[2]

For the foregoing reasons, P.U.M. reiterates its request that, to the extent leave is required, the Court grant it leave to file a cross-motion for summary judgment in response to Google's Motion. Allowing P.U.M. to file a cross-motion for summary judgment would serve the interests of justice and judicial economy, and cause no unfair prejudice to Google.

[2] Google cites two cases for the proposition that "simple fairness requires that the parties file their summary judgment motions at the same time." Both are inapposite. The court in *Mushroom Associates v. Monterey Mushrooms, Inc.* directed the parties not to file cross-motions for summary judgment with their opposition briefs because the parties had previously submitted multiple rounds of supplemental briefing in connection with briefs on summary judgment that caused the parties to exceed the page limits imposed by the local rules and made the motions "unnecessarily complicated." No. 91-1092, 1994 WL 508741, at *1 (N.D. Cal. Sept. 1. 1994). In *T.H.E. Insurance Co. v. Cochran Motor Speedway*, the defendant did not seek leave to file a cross-motion and, further, the motion lacked the required statement of material facts required by the local rules. No. 09-118, 2010 WL 5351183, at *1-2 (M.D. Ga. Dec. 21, 2010). Neither is remotely similar to the facts here where P.U.M. simply asserts that the same facts on which it relies for its opposition relating to statute of limitations actually warrant judgment in P.U.M.'s favor.

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