

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.)	

**PERSONALIZED USER MODEL, L.L.P.’S RESPONSE TO
GOOGLE’S NOTICE OF SUPPLEMENTAL AUTHORITY**

Plaintiff Personalized User Model L.L.P. (“PUM”) hereby submits this response to Google, Inc.’s (“Google”) February 19, 2013 filing, titled “Notice of Supplemental Authority for Defendant Google Inc.’s Summary Judgment Briefs.” (D.I. 503.) Contrary to its title, the Notice does not serve to advise the Court of any such authority. Instead, it seeks to introduce untimely arguments related to Google’s motions for summary judgment on noninfringement and invalidity based on ongoing reexamination proceedings that are regularly excluded from evidence. The Local Rules do not permit such untimely arguments. *See* D. Del. LR 7.1.2(b) (“Except for the citation of subsequent authorities, no additional papers shall be filed absent Court approval.”)

Even if the arguments contained in Google’s Notice were to be considered, the ongoing reexamination proceedings have no bearing on the current motions. As previously noted in P.U.M.’s Answering Brief in Opposition to Google’s Motion for Summary Judgment on Invalidity (D.I. 455, fn. 1), ongoing reexamination proceedings are not relevant to the questions of infringement or validity and are regularly excluded from evidence at trial. *See Callaway Golf Co. v. Acushnet Co.*, 691 F. Supp. 2d 566 (D. Del. 2010) (excluding reference to ongoing reexamination proceedings at trial); *see also Cordis Corp. v. Medtronic*, 2005 WL 885381 (D. Del. Feb. 28, 2005), *reversed in part on other grounds*, 511 F.3d 1157 (Fed. Cir. 2008) (granting motion *in limine* to preclude evidence and argument about reexamination of the patent-in-suit); *University of Pittsburgh v. Varian Medical Sys.*, 877 F. Supp. 2d 294 (W.D. Pa. June 29, 2012) (holding reexamination history of the patent-in-suit was properly excluded from evidence). As the Court recognized in denying Google’s recent Motion to Stay pending reexamination of the patents-in-suit, “despite the issuance of a final office action, the reexamination proceedings are far from over.” (*See* D.I. 407 at 2.)

As one district court explained in holding that evidence of ongoing reexamination proceedings is inadmissible for purposes of proving invalidity at the summary judgment stage:

Unlike in reexaminations, those challenging the validity of a patent in litigation must overcome a presumption of validity by proving by clear and convincing evidence that a patent is valid. The conclusions of examiners as to whether a claim should be confirmed or rejected using a completely different standard ***have no probative value in this context.***

Tesco Corp. v. Weatherford Int’l, Inc., 750 F. Supp. 2d 780, 794 (S.D. Tex. 2010). *See also Transamerica Life Ins. Co. v. Lincoln Nat. Life Ins. Co.*, 597 F. Supp. 2d 897, 907 (N.D. Iowa

2009) (“evidence of incomplete patent reexamination proceedings is not admissible to prove invalidity of a patent, because it has no probative value on that issue.”)

Likewise, here, the ongoing reexamination proceedings have no probative value to the summary judgment issues before the Court.

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2013, copies of the foregoing were caused to be served upon the following in the manner indicated:

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