

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. |) | |

JOINT STATUS REPORT

Pursuant to the Court’s September 9, 2013 Order (D.I. 522), the parties set forth their respective positions on the length and availability for trial.

PUM’S POSITION ON LENGTH AND AVAILABILITY FOR TRIAL

PUM is ready for trial as of March 2014 but agreed to postpone until May based on Google’s representations concerning the schedule of Google’s lead trial counsel, Mr. Charles Verhoeven. Google suggests that it is not available to begin trial after May 19, 2014 and that one of its experts, Dr. Michael Jordan, is unavailable for the entire month of June for “professional/academic” reasons. It thus raises the possibility of further delays in this case which has already been pending for more than four years.¹ To the extent the Court is not able to

¹ PUM respectfully submits that a paid expert’s academic commitments are not a basis to delay trial for an additional month.

schedule a trial in May, PUM requests that trial be scheduled at an earlier date at the Court's convenience.

PUM believes that the jury trial will require 10 calendar days (48 hours total).

PUM'S POSITION ON STATUTE OF LIMITATIONS ISSUE

It is PUM's position that the issue of whether the statute of limitations has run and therefore bars Google's Counterclaims and defenses of patent ownership, lack of standing, and breach of contract, is a legal issue that should be tried to the Court in advance of the jury trial. PUM therefore requests that a bench trial be scheduled on its statute of limitations defense. If the Court determines that Google's ownership claims are time-barred, then these issues need not be tried. This would greatly minimize the complexity of the trial and the potential confusion of including issues relating to SRI and its business having nothing to do with the issues of infringement and invalidity. Subject to the Court's availability, PUM requests that the bench trial be held in mid-late November 2013, or any time after that is convenient for the Court. PUM believes it will require no more than 1-2 days.

PUM believes this schedule is feasible and that Google overstates the purported obstacles. The parties can begin trial preparations for a November bench trial on the statute of limitations immediately. No *Daubert* motions are needed because the time for filing *Daubert* motions has passed (and Google does not even point to any relevant expert testimony in any event). The parties can submit an abbreviated Pretrial Order to address the limited issues involved, and the Court can also limit, or forego altogether, motions in limine given that the issues are to be tried to the Court. Google also overstates the burden in preparing a pretrial order for the jury trial, which will have to be prepared in any event. Parties regularly prepare pretrial orders without having any case dispositive decisions at all from the Court.

Google's arguments below on the statute of limitations amount to an inappropriate *second* motion for reconsideration, well after the time for such motions has passed, and should be disregarded. Indeed, Google did not even move for summary judgment on PUM's statute of limitations defense, rather PUM raised it as a basis for denial of Google's motion.

GOOGLE'S POSITION ON LENGTH AND AVAILABILITY FOR TRIAL

Google believes that its Motion for Reconsideration (D.I. 523) should be resolved before the Court sets a trial date because it will affect the scope of the trial and may obviate the need for a trial altogether. At a previous telephonic hearing regarding trial scheduling, the Court said that a trial date should not be set until case-dispositive motions are completed such that a trial date could be adhered to regardless of what else might happen in the case. (8.31.12 Hearing Tr. at 23:10-17.) The Motion for Reconsideration is part of the case-dispositive briefing, and thus trial should not be set unless and until the Motion for Reconsideration is resolved in a way that does not end this case.

To the extent the Court does wish to set a trial date at this time, Google states that it will be ready for trial by May 2014 and available to start a trial that begins no later than Monday, May 19, 2014. Google's counsel has trial commitments that preclude its availability for trial before May 2014, and one of Google's experts has professional/academic commitments out of the country in June 2014.² Google does not believe that ten full days will be required for trial. Rather, and depending on the amount of products PUM ultimately presents at trial, it believes that 8 days should be allocated to trial.³

As Google details below, PUM's bifurcation proposal is unjustified as a matter of law given that there are no triable issues on the statute of limitations. But PUM's proposal for a

² Should the Court so desire, Google is happy to provide detail regarding these commitments or have a teleconference to discuss them.

³ Presently, PUM asserts seven separate Google products or services of infringement.

November 2013 bench trial is also infeasible from a timing perspective. PUM requests two trials between now and May 2014: a bench trial in November 2013 on the statute of limitations, and then a jury trial in May 2014 on all other issues. November is only a month away. It is impracticable for the parties to not only prepare for this bench trial but also complete all the necessary pre-trial tasks – identify and prepare witnesses (some of whom would likely be third parties from SRI, the counterparty to the contract that forms the basis of Google’s breach of contract claim and PUM’s statute of limitation defense), identify exhibits and prepare exhibit lists, prepare deposition designations and counter-designations, negotiate a pre-trial order, brief motions *in limine*, brief *Daubert* motions, etc. – between now and November. Furthermore, PUM presents no basis for its statement that the *Daubert* deadline has passed for either a jury trial or its proposed bench trial.⁴ Nor is it reasonable to expect that Google identify now the specific *Daubert* issues it may identify as it prepares for trial.

This is particularly true given that PUM has given Google no specifics at what it intends this bench trial to even cover, other than saying that it should cover the “statute of limitations issue” generally. The parties met and conferred on this and Google asked PUM to explain what issues it believed would be covered in the proposed bench trial, the number of witnesses that would be called, whether there would be any expert witnesses called, etc. PUM would not or could not answer those basic questions. Yet PUM asks this Court to set this bench trial (and Google to be prepared for a bench trial) in just one month, when the contours of the proposed bench trial remain almost entirely undefined.⁵

⁴ Google is aware that this Court’s current form scheduling order has *Daubert* motions being due at the same time as dispositive motions, but that form was not used in this case. (*See* D.I. 32.)

⁵ Without information regarding the contours of the proposed bench trial, Google is not in a position to respond as to whether it agrees with PUM’s 1-2 day estimate for a bench trial.

GOOGLE'S POSITION ON STATUTE OF LIMITATIONS ISSUE⁶

PUM's request for a separate bench trial on its statute of limitations defense is unwarranted and contrary to law. The Court has never found that there is a fact dispute regarding the statute of limitations. During the summary judgment process, the Court simply declined to reach the merits of PUM's statute of limitations defense because it found there to be an issue of fact on the conception issue and PUM's motion on that defense was untimely. Given that the Court has never found a fact dispute on the statute of limitations defense, Google believes that this defense can and should be resolved as a matter of law in resolving its motion for summary judgment (and PUM's opposition thereto), thus making PUM's requested separate bench trial unnecessary.⁷ (D.I. 486, at 1-8.)

But if there were any fact disputes on the statute of limitations, Google would be entitled to have these factual disputes heard in the course of the main jury trial. Indeed, PUM provides no reasoning for why fact disputes over the statute of limitations would be pure "legal" issues rather than jury issues. Nor does PUM present a valid basis to bifurcate the statute of limitations from every other claim and defense in this case and subject it to an entirely separate trial from the trial on the other issues, with its own round of pre-trial filings, trial deposition and exhibit designations, etc.

For all these reasons, the Court should decline PUM's request for a separate bench trial on the statute of limitations.

⁶ PUM alleges that Google's position statement below amounts to a second motion for reconsideration, but that is simply incorrect. Google merely responds to PUM's position regarding how the statute of limitations defense should be adjudicated.

⁷ PUM's separate attempt to seek summary judgment in its favor on the statute of limitations defense remains untimely, and does not warrant the Court examining this defense except in the context of deciding Google's summary judgment motion. (D.I. 445; D.I. 486 at 1.)

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September 30, 2013
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