Personalized User Model LLP v. Google Inc. Doc. 532

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.	)	

PUM'S OPPOSITION TO GOOGLE'S MOTION FOR LEAVE TO FILE A REPLY BRIEF IN SUPPORT OF GOOGLE'S MOTION FOR RECONSIDERATION

Google's motion for leave to file a reply reconsideration brief is Google's fourth attempt at summary judgment. The first was its original summary judgment motion, the second its pending Motion for Reconsideration, the third Google's extraneous legal argument contained in the Joint Status Report (D.I. 529) to which PUM objected, and the fourth its motion for leave to present additional arguments in an unauthorized reconsideration reply brief. Like in its motion for reconsideration, Google improperly rehashes old arguments, and even improperly introduces new ones, in its "never-ending polemic between the litigants and the Court."[1] In its proposed reconsideration reply brief, Google goes a step further and asks the Court to grant *Google*

[1] *Dentsply Int'l, Inc. v. Kerr Mfg. Co.*, 42 F. Supp. 2d 385, 419 (D. Del. 1999) (*quoting Oglesby v. Penn Mutual Life Ins. Co.*, 877 F. Supp. 872, 892 (D. Del. 1995)).

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summary judgment on PUM's statute of limitations defense, despite never having moved on that defense or even having mentioned it in its motion for reconsideration.[2] Google's brand new arguments are improper and should be rejected.

For several reasons PUM respectfully requests that Google's motion for leave to file a reconsideration reply brief be denied.

First, like its motion for reconsideration, Google's motion for leave and its proposed reconsideration reply brief fail to demonstrate that the Court committed clear legal error in finding that "there is a question of fact as to whether the parties intended at the time of contracting to use the lay or legal definition." Mem. Op., D.I. 521, at 15. Google notably does not explain why the extrinsic evidence to which PUM points is "irrelevant" to the parties' objective contractual intent, particularly where that evidence contradicts what Google contends was Dr. Konig's subjective (but legally irrelevant) understanding of "conception." *See* D.I. 531, Ex. 1 at 1, 3.[3]

Second, in an attempt to justify its fourth bite at the apple, Google contends that PUM improperly raised new arguments in its opposition to the motion for reconsideration. Again, Google is wrong. PUM clearly argued in its summary judgment opposition that the patent law meaning of "conception" should be applied. *See* PUM Summary Judgment Resp. Br., D.I. 452, at 9-11. In fact, although Google now argues that the definition of patent conception articulated

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[2] PUM's opposition to Google's motion for summary judgment, D.I. 452, raised the Delaware statute of limitation in opposition to Google's request for summary judgment on its ownership and breach of contract claims. *See also* PUM's Reply to Google's Amended Counterclaims, D.I. 217, at ¶59. Not only did Google not move for summary judgment on PUM's statute of limitation defense, it did not address either that defense or Section 2870 of the California Labor Code in its reconsideration motion. It cannot do so now as a basis for asking the Court to grant summary judgment in Google's favor.

[3] Indeed, were Google's position adopted, the meaning of this form contract would vary based on the subjective (but unspoken) belief of the employee.

in *Burroughs Wellcome* "is not true," D.I. 531 Ex. 1 at 4, Google itself relied on that case in its summary judgment reply. *See* Google Reply Br., D.I. 493, at 4 (quoting *Burroughs Wellcome Co. v. Barr Labs., Inc.*, 40 F. 3d 1223, 1228 (Fed. Cir. 1994)) ("[c]onception is complete only when the [idea] is so clearly defined in the inventor's mind that only ordinary skill would be necessary to reduce the invention to practice [, without extensive research or experimentation].").

Google then criticizes PUM for citing section 1654 of the California Civil Code. But PUM did so to rebut an argument that *Google* improperly raised *for the first time* in its motion for reconsideration. *See* PUM's Resp. to Google's Motion For Reconsideration, D.I. 530, at 4-8. Specifically, Google argued that California contract law requires that an ambiguity be resolved as a matter of law by the Court in the absence of conflicting extrinsic evidence. *See* D.I. 523.[4] PUM's response brief referenced other relevant California contract interpretation principles, which Google ignored, that belie Google's contention that any ambiguity should be resolved in its favor. *See* D.I. 530 at 4-8.

Third, Google's assertion, in a proposed reply reconsideration brief, that the Court should now address the issue of the statute of limitation - *and* the applicability of Section 2870 of the California Labor Code - is both untimely and improper. As noted above, Google did not seek

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[4] In its proposed reconsideration reply brief, Google again emphasizes that "the Agreement was between two California citizens, was signed in California, and governed an employment relationship taking place in California" (D.I. 531 Ex. 1 at 1 n. 2). But Google nonetheless ironically asks the Court to apply the Delaware tolling statute, 10 Del. C. § 8117, to this California based-dispute, because Dr. Konig, who was not a party to this patent suit, agreed to accept service in Delaware to avoid duplicative litigation. *See* D.I. 486 at 6-8. Were Google correct, any party could revive a stale claim merely by bringing it in a forum having nothing to do with the parties' dispute, thus eviscerating the statute of limitation. That is precisely the result that the Delaware borrowing statute was intended to avoid. *See* 10 Del. C. § 8121 ("Where a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action.").

summary judgment on the statute of limitation and cannot do so now in the guise of reconsideration.

For all these reasons, PUM respectfully requests that Google's motion be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2013, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF which will send electronic notification of such filing to all registered participants.

Additionally, I hereby certify that true and correct copies of the foregoing were caused to be served on October 7, 2013, upon the following individuals in the manner indicated:

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