

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

PERSONALIZED USER MODEL, L.L.P.,)

Plaintiff,)

v.)

GOOGLE INC.,)

Defendant.)

GOOGLE, INC.)

Counterclaimant,)

v.)

PERSONALIZED USER MODEL, LLP and)
YOCHAI KONIG)

Counterdefendants.)

C.A. No. 09-525-LPS

JURY TRIAL DEMANDED

REPLY IN SUPPORT OF MOTION FOR LEAVE

OF COUNSEL:

QUINN EMANUEL URQUHART
& SULLIVAN, LLP

Charles K. Verhoeven

David A. Perlson

Joshua Lee Sohn

Antonio R. Sistos

Margaret Pirnie Kammerud

50 California St.

San Francisco, CA 94111

Richard L. Horwitz (#2246)

David E. Moore (#3983)

Bindu A. Palapura (#5370)

POTTER ANDERSON & CORROON LLP

Hercules Plaza, 6th Floor

1313 N. Market Street

Wilmington, DE 19801

Tel: (302) 984-6000

rhorwitz@potteranderson.com

dmoore@potteranderson.com

bpalapura@potteranderson.com

Andrea Pallios Roberts
555 Twin Dolphin Drive, Suite 560
Redwood Shores, CA 94065

Attorneys for Defendant Google Inc.

Dated: October 9, 2013

1125666 / 34638

Google’s Motion for Leave seeks only to respond to three newly-articulated arguments for why “conception” should get a patent-law meaning in the Konig-SRI Agreement, arguments that PUM made for the first time in its Opposition to Google’s Motion for Reconsideration. (D.I. 530 at 5-7.) While PUM is correct that it previously argued that the patent-law meaning of conception should be applied, PUM does not dispute that it never previously articulated the three newly proffered reasons for applying the patent-law meaning of conception, to which Google seeks to respond. To the extent the Court considers PUM’s new arguments at all, it is only fair that Google have an opportunity to respond to these new arguments.

Going beyond the narrow issue raised by Google’s Motion for Leave—whether Google should be entitled to respond to PUM’s new arguments—PUM’s latest Opposition also raises several other arguments. Each are without merit, and none warrant denial of Google’s Motion for Leave (or its Motion for Reconsideration).

For example, regarding the Court’s holding that there is an issue of fact on contract interpretation, PUM argues that Google’s Motion for Leave and proposed Reconsideration Reply fail to demonstrate clear legal error in this holding because Google does not explain why PUM’s extrinsic evidence is “irrelevant” to the parties’ objective contractual intent. (D.I. 532 at 2.) But once again PUM ignores that, in matters of contract interpretation, an issue of fact can only exist if there is conflicting extrinsic evidence. (D.I. 523 at 2-4) (collecting cases). And once again, PUM fails to identify any such conflicting extrinsic evidence in the record.

PUM further argues that Google has improperly added to the proceedings by raising arguments in its Motion for Reconsideration that were not in its summary judgment briefing. (D.I. 532 at 1.) PUM’s efforts to sully Google are without merit. As Google noted in its Motion for Reconsideration, it was PUM’s argument about ambiguous contract language presenting a fact issue

– an argument raised for the first time at the summary judgment hearing – that led the Court to its legally erroneous holding that interpreting the Konig-SRI Agreement is a question of fact merely because there is a dispute over how it should be interpreted. (D.I. 523 at 5 fn. 4.) PUM does not dispute this. And while PUM argues that the Joint Status Report contains “extraneous legal argument” by Google, PUM omits that the initial draft status report PUM sent to Google included extensive legal argument and case law in purported support for its position that fact disputes over the statute of limitations should go to a bench trial rather than a jury trial. (Sohn Decl., Ex. A.)¹ It was only after Google provided its responsive position, with case law debunking PUM’s position, that PUM took issue with raising “legal argument” in the Joint Status Report. (*Id.*, Ex. B.)

PUM’s argument that Google improperly seeks summary judgment on the statute of limitations (D.I. 532 at 1-2) is also incorrect. Google moved for summary judgment on its breach-of-contract claim. (D.I. 413.) As PUM acknowledges in its opposition (D.I. 532 at 2 n.2), PUM then raised its statute of limitations defense in opposition to Google’s summary judgment motion. (D.I. 452 at 7-9.) Google responded, consistent with its current position, that PUM’s arguments on its statute of limitations defense should be rejected and that the statute of limitations does not defeat Google’s summary judgment motion. (D.I. 486 at 1-8; D.I. 531-1 at 1 n. 2.) There is nothing improper about this.

In footnote 4, PUM also faults Google for interpreting the Konig-SRI Agreement under California law but invoking the Delaware tolling statute against PUM’s statute of limitations defense. (D.I. 532 at 3 fn. 4.) This argument is not credible. Indeed, two footnotes earlier, PUM acknowledges that it was PUM who “raised the Delaware statute of limitation in opposition to Google’s request for summary judgment on its ownership and breach of contract claims.” (D.I. 532

¹ All Exhibits are to the Declaration of Joshua Sohn, submitted with this Reply.

at 2 n.2.) As Google has repeatedly made clear, Google merely chose not to dispute PUM's position on this choice-of-law question. (*See, e.g.*, Summary Judgment Hearing Tr. 120:21-121:3.)

Respectfully submitted,

POTTER ANDERSON & CORROON LLP

OF COUNSEL:

Charles K. Verhoeven
David A. Perlson
Joshua Lee Sohn
Antonio R. Sistos
Margaret Pirnie Kammerud
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
50 California St.
San Francisco, CA 94111
Tel.: (415) 875-6600

Andrea Pallios Roberts
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
555 Twin Dolphin Drive, Suite 560
Redwood Shores, CA 94065
Tel.: (650) 801-5000

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By: /s/ David E. Moore

Richard L. Horwitz (#2246)
David E. Moore (#3983)
Bindu A. Palapura (#5370)
Hercules Plaza, 6th Floor
1313 N. Market Street
Wilmington, DE 19801
Tel: (302) 984-6000
rhorwitz@potteranderson.com
dmoore@potteranderson.com
bpalapura@potteranderson.com

Attorneys for Defendant Google Inc.

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CERTIFICATE OF SERVICE

I, David E. Moore, hereby certify that on October 9, 2013, the attached document was electronically filed with the Clerk of the Court using CM/ECF which will send notification to the registered attorney(s) of record that the document has been filed and is available for viewing and downloading.

I further certify that on October 9, 2013, the attached document was Electronically Mailed to the following person(s):

Karen Jacobs Louden
Jeremy A. Tigan
Morris, Nichols, Arsht & Tunnell LLP
1201 North Market Street, 18th Fl.
P.O. Box 1347
Wilmington, DE 19899-1347
klouden@mnat.com
jtigan@mnat.com

Marc S. Friedman
Dentons US LLP
1221 Avenue of the Americas
New York, NY 10020-1089
marc.friedman@dentons.com

Jennifer D. Bennett
Matthew P. Larson
Dentons US LLP
1530 Page Mill Road, Ste. 200
Palo Alto, CA 94304-1125
jennifer.bennett@dentons.com
matthew.larson@dentons.com

Mark C. Nelson
Robert Needham
Dentons US LLP
2000 McKinney, Suite 1900
Dallas, TX 75201
mark.nelson@dentons.com
robert.needham@dentons.com

/s/ David E. Moore
Richard L. Horwitz
David E. Moore
Bindu A. Palapura
POTTER ANDERSON & CORROON LLP
(302) 984-6000
rhowitz@potteranderson.com
dmoore@potteranderson.com
bpalapura@potteranderson.com