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BY E-FILING

The Honorable Leonard P. Stark
United States District Court
for the District of Delaware
844 North King Street
Wilmington, DE 19801

Re: *Personalized User Model, L.L.P. v. Google, Inc.*
C.A. No. 09-525 (LPS)

Dear Judge Stark:

We write this joint letter pursuant to the Court's instructions at the November 20, 2013 teleconference to set forth the parties' positions concerning trial in this matter. The parties have met and conferred and submit their respective positions below.

PUM's Position:

As we previously stated, when PUM received the Court's ruling on October 28 on Google's motion for reconsideration setting a March 10, 2014 trial date, PUM asked that its clients, fact witnesses and expert witnesses adjust their schedules, if necessary, to ensure their attendance, and this was done. PUM is prepared to begin trial on March 10, 2014 as Your Honor previously directed. Notwithstanding this, to accommodate Google, PUM would be prepared to try both liability and damages during either the July or August dates that the Court offered.¹ It

¹ Google recently represented to this Court that if an earlier date were not available, "Google is available for trial as of August 4, 2014." (D.I. 538 at 2). Google also has not advised of any conflicts that would preclude a trial during the July 7-18 dates the Court has offered. Indeed, it is ironic that Google would now point to a trial that has not even been scheduled (*see* fn. 7 below, discussing the *SynQr* case) as a reason not to schedule trial in this case. PUM is not available during the September dates that the Court offered because PUM's lead counsel, Mark Nelson and Jennifer Bennett, are involved in a two-week trial scheduled to begin on September 8.

would be unduly prejudicial to PUM, however, to further delay this almost five-year old case by setting a liability-only trial any later than March 2014. PUM made clear in the Joint Status Report that it only agreed to a May trial to accommodate Google, and that if the Court were unavailable it requested that the case be tried in March. (D.I. 529 at 1). The Court likewise noted in its ruling that it was unwilling to delay scheduling trial as Google had requested. (D.I. 537 at 4). Google's proposal that the parties instead reopen fact and expert discovery that has already been completed in order to accommodate a liability-only June trial is a waste of the parties' and the Court's resources. There is no basis to hold a liability-only trial in June (nine months after the Court's summary judgment rulings), as Google proposes, rather than using that time to complete damages discovery and proceed to trial on all issues in July or August, 2014.²

We note as an initial matter (as the Court did at the November 20 conference) that Google's asserted conflicts are of its making, having scheduled trial in its 2012 case after this Court clearly stated it would set a trial date as soon as dispositive motions were decided. Nor has Google made (or agreed to make) reasonable efforts to resolve those conflicts. As Google's November 7, 2013 letter (D.I. 538) indicates, and as Google confirmed during the parties' meet and confer, Google has not even attempted to request a different trial date in the *TracBeam* matter. And although Google asserts that it brought this Court's trial date to the attention of the *Viasat* court, that court merely responded that it would "prefer" to keep the March 18, 2014 date. (D.I. 538, Ex. A at 2). Google has not agreed to seek further guidance from either of these courts in light of this Court's maintenance of the March 10, 2014 trial date, even though, as Your Honor correctly noted, both these case were filed well after this one.

Thus, PUM wishes to proceed with the infringement trial on March 10, 2014, unless the Court will try the entire case in July or August, 2014. PUM will be ready to immediately begin damages discovery so that the entire case is trial ready at that time.

PUM understands that Google continues to pursue an April 2014 trial date, notwithstanding PUM's stated unavailability during the Passover holiday. As PUM explained to Google, it is impossible for any of PUM's three client representatives to attend trial at that time because all are Orthodox and observe the entirety of the Passover holiday (April 14-22) in Israel. They have further advised that, in their view, it would violate Torah law to proceed with trial during that period, even if they were not in attendance (which they wish to be).³ PUM's two inventors (who reside in California) also will be unavailable during the first three days of Passover (April 14-16), and it would be a substantial hardship for them to travel to Delaware for

² Contrary to Google's argument, PUM does have conflicts in June. The Shavout holiday is June 4-5, 2014. One of PUM's client representatives is also unavailable during the second half of June. PUM did not raise these conflicts, however, as a basis not to schedule trial in June.

³ Two of these client representatives were also present at the Court's summary judgment motion hearing.

trial during this period. It would therefore be highly prejudicial for PUM to proceed to trial during Passover when its client representatives cannot attend, when it will have limited access to its witnesses, and when members of its trial team would be forced to choose between preparing and/or attending trial and observing the holiday. As PUM has advised Google, should the Court desire, PUM is prepared to submit declarations from each of its client representatives, its two inventors and trial counsel explaining why it would be a personal hardship for them for trial to proceed during this period.

Google's Position:

Defendant Google appreciates the Court's efforts to discuss potential options for trial other than the current March 10, 2014 trial setting. Based on meet and confers with PUM, Google believes that a liability trial in June 2014 provides the best solution. To accommodate this date, Google would need to identify a new invalidity expert and replace one Google witness, as they both have conflicts in June 2014, which Google is willing to do. PUM has identified no conflicts that would preclude its availability for a trial on the June dates. Google is also available in April 2014, but understands PUM objects to that time due to the Passover holiday. In all events, Google objects to vacating the Court's Order bifurcating liability and damages.

Google Is Available for a Trial on Liability Issues in April or June 2014.

As Google previously informed the Court and PUM, Google's trial team is not available on the March 10, 2014 trial date set by the Court. Virtually every member of the Quinn Emanuel team representing Google in this case (Charles Verhoeven, David Perlson, Antonio Sistos, Joshua Sohn, and Margaret Kammerud) is scheduled to be in trial in *TracBeam v. Google Inc.*, No. 6:13-cv-93 (E.D. Tex.) beginning March 10, 2014. Each of these team members have been working on this case for years. To replace the entire team in either case would be extremely prejudicial to Google. Additionally, Mr. Verhoeven is scheduled to be lead trial counsel in *ViaSat v. Space Systems/Loral*, No. 12-cv-0260 (S.D. Cal.) beginning March 18, 2014 and lasting for two weeks.⁴

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As detailed in Google's November 7 letter to this Court, Mr. Verhoeven asked the *ViaSat* Court to move the trial date to May 2014 to avoid the conflict, and that court declined to move the date. In the *TracBeam* case, the parties in that case already jointly requested a May 2014 trial date. On September 26, 2014, days before this Court set the trial date in this matter, that request was rejected by the court and trial was set for March 10, 2014. We have been informed by local counsel in the *TracBeam* matter, that the court in that case would not likely move the trial date due to trial counsel conflicts before the pre-trial conference on February 20, 2014. PUM's suggestion that Google has acted improperly in not approaching the *ViaSat* court or the *TracBeam* court in the two days since the teleconference with this Court while Google has been working with PUM to resolve the schedule in this case, is not well taken.

One of the potential dates the Court identified to the parties for a liability trial is April 14-25, 2014. Google is available for trial on these days in April. PUM's counsel, however, has indicated PUM is unable to proceed on these dates due to the Passover holiday, which begins the evening of April 14 and lasts through April 22. Specifically, PUM indicates it has two witnesses, the named inventors of the patents-in-suit (also co-owners of PUM), that intend to celebrate Passover in California with their families on the evening of April 14. Additionally, PUM has indicated it has three client representatives who observe Passover in a manner that precludes them from attending trial at any time during the holiday.

Google is also available for a liability trial on June 2-14, 2014, which is the closest in time to the May 2014 trial timeframe that both PUM and Google indicated would be acceptable for a liability only trial in their September 30, 2013 Joint Status Report. (D.I. 529.) For its part, Google has conflicts of its own in June, but is willing to work around them.

First, Google's expert witness on invalidity, Professor Michael Jordan, is contractually committed to teaching and providing research guidance to doctoral students at Bocconi University in Milan, Italy for the month of June 2014. His schedule and obligations do not leave him with time to return to the United States for trial during that period. In order to resolve the issue of the trial date, if permitted, Google would be willing to obtain a new invalidity expert to testify on the subject matter Dr. Jordan would have testified to. There should be plenty of time to accommodate any necessary expert discovery related to this new expert.

Second, one of Google's witnesses who was deposed in this case, Karthik Gopalratnam, has a trip to India scheduled for the month of June. Here too, Google would be willing to locate a different Google engineer to testify on the subject matter that Mr. Gopalratnam would have testified, and make the engineer available for deposition.⁵

For its part, PUM has identified no conflicts that would preclude its availability for a trial in June 2014 on liability.⁶ Instead, PUM's only apparent objection to this date is that it is too late. Google submits this position is unreasonable. Indeed, just six weeks ago in the parties' Joint Status Report, PUM indicated May 2014 would be acceptable for a trial on liability issues,

⁵ Google's offer to replace these witnesses to resolve PUM's stated unavailability in April 2014 (at significant additional expense to Google) does not require the extensive "reopening" of fact and expert discovery as PUM suggests. And the significant prejudice to Google with proceeding in March 2014 would far exceed any prejudice to PUM for costs related to the limited, additional discovery that would be necessary in relation to replacing these witnesses.

⁶ PUM does note that one client representative has an unidentified conflict "during the second half of June," the relevance of which is unclear given the proposed June trial dates are in the first half of the month. PUM also references Shavuot on June 4-5, but states that it is not raising it "as a basis not to schedule trial in June."

belying PUM's current claim that "setting a liability-only trial any later than March 2014" would be "unduly prejudicial." In actuality, it is proceeding with trial in March 2014 that would cause undue prejudice to Google. And PUM's refusal to proceed with trial on June 2 on liability issues even though it does not base that refusal on a conflict with that date suggests that PUM is pursuing trial in March 2014 for strategic leverage rather than any legitimate claim of prejudice.

PUM's request for a trial on all issues in July or August is unnecessary contradicts this Court's prior rulings, and presents additional conflicts.

At the outset of this case, Judge Farnan bifurcated liability and damages over PUM's objection. (D.I. 32.) PUM later filed a motion for reconsideration of this bifurcation, which the Court rejected. These rulings should not and need not be disturbed.

Initially, given that PUM has no conflicts that would preclude its availability for a trial in June, there is no reason why the Court should set a trial on all issues after that.

Further, opening up damages discovery and adding damages to the trial is not a simple matter. PUM accused seven Google products and services of infringing its patents. It took thirteen depositions of current and former Google engineers on liability alone. For the damages phase, the parties will need to produce new documents, serve and respond to written discovery, take more depositions, possibly engage in motion practice, and prepare expert damages reports and take damages depositions. It would be extremely burdensome, if not infeasible, to complete this discovery and prepare for trial on all issues by July 2014 as PUM proposes. Google and its witnesses also have conflicts in July and August.⁷ Nor should Google have to go to the expense and burden of providing such discovery if PUM cannot prove liability, one of the obvious benefits of the bifurcation ordered by the Court.

⁷ PUM's statement that "Google also has not advised of any conflicts that would preclude a trial during the July 7-18 dates the Court has offered" is incorrect. Just this morning Google emailed PUM identifying conflicts, including that Mr. Verhoeven is scheduled to be lead trial counsel in *SynQor, Inc. v. Ericsson, Inc. et al.*, 2:11-cv-00054-MHS sometime between June 25 and July 23, 2014. The Pretrial Conference is on June 25, 2014 and that court has advised the parties that trial will be set within four weeks of that date. Further, in addition to having a family wedding to attend July 10-15, Google's non-infringement expert, Dr. Edward Fox is chairing a board meeting and running a related conference in the United Kingdom July 19-27. Mr. Verhoeven is lead trial counsel in *Motorola Mobility v. Apple*, Case No. 1:10-cv-23580-SCOLA, 1:12-cv-20271-SCOLA (SD Fla) with a trial calendar call of August 25, 2014, and David Perlson and Andrea Roberts are also part of that team.

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Respectfully,

/s/ Karen Jacobs

Karen Jacobs (#2881)

cc: Clerk of the Court (by hand)
All Counsel of Record (by e-mail)

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