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 **JURY TRIAL DEMANDED** **PUBLIC VERSION**
GOOGLE, INC. Counterclaimant, v. PERSONALIZED USER MODEL, LLP and YOCHAI KONIG Counterdefendants.	)	

GOOGLE'S OPPOSITION TO PUM'S MOTION TO EXCLUDE PORTIONS OF DR. EDWARD FOX'S NON-INFRINGEMENT REPORT

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Introduction

Plaintiff Personalized User Model L.L.P. ("PUM" or "Plaintiff") seeks to preclude Dr. Fox from testifying in a manner that, according to PUM, disregards the Court's claim constructions of several claim terms. PUM's arguments are without merit. The opinions Dr. Fox will present at trial are fully consistent with the Court's constructions. If anything, PUM's motion merely exposes the failure and inconsistencies in PUM's and its experts' positions in relation to these same constructions.

PUM first argues that Dr. Fox disregards the Court's claim construction of "User Model specific to the user" and "user specific learning machine." Specifically, PUM asserts that Dr. Fox's opinion that "there are *separate* User Models for each user rather than a single shared model" is contrary to the Court's *Markman* Ruling. (D.I. 556 at 1.) It is not. The Court found that the "parameters" are "values or weights" that "define the user model and the user-specific learning machine...." In doing so, the Court noted that these parameters "would be likely quite different for each user." (D.I. 347 at 27.) In other words, each user has his own set of values or weights defining the user model, although nothing precludes any two such sets from having the same values or weights. PUM is attempting to cast the Court's agreement with PUM's position at the Markman hearing—that the user-specific User Model need only contain the specific values or weights for each user and not the variables associated with those values or weights—as a finding that the User Models need not be user-specific at all. (D.I. 347 at 26.) Notably, PUM's validity expert, Dr. Carbonell, relies on the same distinction as Dr. Fox in purporting to distinguish prior art. (*See, e.g.,* Sistos Decl. Ex. 2 ¶ 373 (arguing [redacted]

[redacted]).)[1] PUM's attempt to prevent Google's noninfringement expert from interpreting the claims in the same manner as PUM's validity expert should be rejected. *White v. Dunbar*, 119 U.S. 47, 51-52 (1886) (patent claim is not a "nose of wax" to be twisted one way to preserve a patent's validity and another way to catch an alleged infringer).

PUM also argues Dr. Fox's opinions as to the terms "estimating parameters of a learning machine" and "estimating a probability that a document is of interest to user" should be excluded because he supposedly opines that estimating "excludes" calculating. But Dr. Fox advances no such opinion. At Dr. Fox's deposition, he explicitly testified that he believed the Court's construction "doesn't mean that calculation can't be part of the estimation." (Sistos Decl. Ex. 3 at 137:24-138:4) Rather, because the Court held that an estimation is "a measurement that is not entirely precise" (D.I. 347 at 33), and the Court rejected construing "estimating" as "calculating" in favor of "approximating or roughly calculating," Dr. Fox's opinions reflect that measurements that are entirely precise cannot be "estimations," regardless of whether those measurements use calculations. (*See, e.g.,* D.I. 557 Ex. 1 ¶ 290 n.39.) In actuality, it is PUM's infringement expert Dr. Pazzani that ignores the Court's claim construction by asserting that precise measurements meet the "estimating" limitations, not even attempting to apply the Court's construction of "estimating." In fact, Dr. Pazzani does not even list the Court's construction of "estimating" as among the constructions considered in opining on the "estimating parameters" limitation. (Sistos Decl. Ex. 1 ¶ 163.)

Finally, PUM argues that Dr. Fox's opinions as to calculating a probability should be precluded because he opines that a probability must be a number between 0 and 1. But again, PUM misstates what Dr. Fox asserts. (D.I. 557 Ex. 1 ¶ 303 (noting that 40%, 0.4, and 4 in 10

[1] Unless otherwise noted, all references to "Ex. __" are to the Declaration of Antonio Sistos filed concurrently herewith.

could all be a "numerical degree of belief or likelihood")). Rather, Dr. Fox observes that for a number to convey a "degree of belief or likelihood," that number must fall within a known range. (D.I. 557 Ex. 1 Section V.G.) Here too, PUM's complaint does not sync with its validity theories. In purporting to distinguish the prior art, PUM's validity expert Dr. Carbonell similarly asserts that the required "probabilities" must exist within a known range. (Sistos Decl. Ex. 2 ¶ 252 ([redacted]).) PUM's attempt to twist a claim limitation one way to assert infringement and in another way to distinguish prior art should be rejected. *See White*, 119 U.S. at 51-52; *Springs Window Fashions LP v. Novo Indus.*, L.P., 323 F.3d 989, 995 (Fed. Cir. 2003) ("A patentee may not state during prosecution that the claims do not cover a particular device and then change position and later sue a party who makes that same device for infringement.")

Further, PUM can address any disagreements it has with Dr. Fox's application of the Court's constructions to the accused products during cross examination, as Google will do with PUM's experts to expose PUM's many inconsistencies in its theories. PUM's motion should be seen for what it is: an attempt to preclude Dr. Fox from presenting Google's legitimate non-infringement theories and exposing the inconsistencies in PUM's theories to the jury. The motion should be denied.

Argument

Federal Rule of Evidence 702 and the Supreme Court's interpretation of that rule in *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579 (1993), govern the admissibility of expert testimony. Rule 702 states in part that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact . . . a witness qualified as an expert by knowledge, skill,

experience, training or education, may testify thereto in the form of an opinion." An expert's testimony must be consistent with the claim construction ruling, but it need not "use the [construction's] exact words." *Innogenetics, N.V. v. Abbott Laboratories.*, 512 F.3d 1363, 1378 (Fed. Cir. 2008). PUM fails to meet its burden to show that Dr. Fox has run afoul of any of the Court's constructions.

I. PUM FAILS TO DEMONSTRATE ANYTHING IMPROPER REGARDING DR. FOX'S APPLICATION OF THE COURT'S CONSTRUCTIONS OF "USER MODEL SPECIFIC TO THE USER" OR "USER-SPECIFIC LEARNING MACHINE."

A. Dr. Fox Properly Applies the Court's *Markman* Ruling Requiring That The "User Model" or "Learning Machine" Be "*Specific* To The User."

The Court construed "User Model specific to the user" as "an implementation of a learning machine updated in part by data *specific to the user*" and construed "user-specific learning machine" as "a learning machine [as construed] *specific to the user*." (D.I. 348 at 2 (emphasis added).) PUM's motion miscasts the Court's Markman Order as somehow ruling that there need be no user-specificity at all, asserting that the Court's rejection of "unique" meant that users could share Models. (D.I. 556 at 5.) But in rejecting "unique," the Court only held that nothing precludes two User Models from having the same values or weights, not that two users could share a User Model. Specifically, the dispute that the Court sought to resolve during claim construction was whether "a User Model is specific because it has completely different ***variables*** than other User Models, or if, instead, a User Model is specific because it has completely different ***numerical values*** than other User Models." (D.I. 347 at 26 (emphasis in original).) In other words, the parties disputed the *contents* of the user-specific User Model. As to the contents of the User Model, the Court found in favor of PUM, holding that since "parameters" are values or weights, each user need only have his own set of numerical values for that user's "User

Model" to be specific to him. (*Id.*) As discussed above, the Court further noted that while each user must have his own set of values or weights, nothing precluded two users from having the same set of values or weights in their respective User Models. (D.I. 347 at 27; *see also id.* at 25 (citing PUM's extrinsic evidence that "specific" means "restricted by nature to a particular individual, situation, relation, or effect."))

Dr. Fox applied the Court's *Markman* order requiring that each user have his own User Model—that is, his own set of numerical values.[2] Thus, a set of numerical values that were *shared* among multiple users could not be a "User Model specific to the user" or a "user specific learning machine" as the terms were construed by the Court. (D.I. 557 Ex. 1 ¶ 67: "Fig. 21 of the '040 patent makes clear that there are *separate* User Models for each user rather than a single shared model." (*cited at* D.I. 556 at 1); D.I. 557 Ex. 1 ¶ 318: "The plain language of the claim requires that each user have his *own* User Model, i.e., a User Model *specific to* the user." (*quoted at* D.I. 556 at 2); *see generally* quotes from Fox report *at* D.I. 556 at 2.)

PUM's *Daubert* motion attempts to interpret the Court's claim constructions as to "User Model specific to a user" and "user specific learning machine" so as to require no user specificity at all. For example, PUM string-cites a number of allegedly "improper" paragraphs of the Fox Report on page 7 of its brief. But those paragraphs simply opine that each user must have his own model. *See, e.g.,* D.I. 557 Ex. 1 ¶ 67 ("there are *separate* User Models for each user rather than a single shared model"), ¶ 313 (quoting the Court's Opinion and reiterating that "there are *separate* User Models for each user rather than a single shared model"). PUM provides no

[2] While there is no dispute that Dr. Fox reviewed the Court's Claim Construction Order, it is unclear why PUM complains that Dr. Fox did not review the *transcript* of the Markman hearing (D.I. 556 at 6 n.5), particularly given that its infringement expert, Dr. Pazzani, does not list it among the materials he considered as required under Rule 26. (Sistos Decl. Ex. 1 at 95-97.)

explanation as to how Dr. Fox's conclusions, which precisely apply the Court's claim construction, are somehow in violation of it.[3]

PUM also complains that requiring that each user have his own User Model would require "millions or billions" of sets of parameters (values), one set for each user. (D.I. 556 at 7 n.7.) But that is precisely what the Court's opinion states: "the parameters define the user model and the user-specific learning machine would be likely quite different for each user." (D.I. 347 at 27.) PUM also cites to the Court's discussion of the "parameters" limitation, wherein the Court adopted PUM's proposed construction of "values or weights" as opposed to "variables." (D.I. 556 at 6, *citing* D.I. 347 at 18.) PUM is apparently implying that the Court disagreed with potentially storing "hundreds or thousands" of parameters for each user-specific User Model. (*See also* D.I. 556 at 7 n.7.) Not so. As discussed above, the parties and the Court agreed that the User Model would potentially store thousands or millions of parameters. Where the parties disagreed was in the composition of those "parameters."

The Court found that given that the User Model would potentially store hundreds of thousands of parameters, it did not make sense to store the words or variables for each parameter in addition to their values. (D.I. 347 at 18, 25.) The Court thus agreed with PUM that "a User

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[3] While PUM complains that Dr. Fox opines that models need to be based on the activities of a specific user rather than all users, PUM's expert Dr. Pazzani contends that he does not accuse any model that is based on the activities of all users that is merely applied to information known about a specific user:

Q Okay. And so, for getting back to, for example, Google Search, [redacted]

A Of course not.

Q Why of course not?

A I never pointed to anything built from multiple users.

(Sistos Decl. Ex. 4 at 61:15-24.)

Model is specific because it has completely different ***numerical values*** than other User Models." (D.I. 347 at 26-27.) Without an individualized set of numbers or values for each user, the User Model could not be specific to the user. *See also* D.I. 347 at 25 (listing PUM's dictionary evidence for "specific": "restricted by nature to a particular individual, situation, relation, or effect" (emphasis added).) Thus, far from being improper, Dr. Fox's opinion that the claims require that each user have his own User Model is consistent with the Court's opinion and constructions.[4]

B. PUM's Daubert Motion Is Inconsistent With Its Own Validity Theories.

Notably, Dr. Fox advances the same interpretation of claim scope as PUM's validity expert Dr. Carbonell purports to: that the limitations require that each user have his own User Model with parameters learned from that specific user, not all users. For instance, Dr. Carbonell distinguishes Joachims because [redacted]" (Sistos Decl. Ex. 2 ¶ 373 (emphasis added).) Dr. Carbonell also asserts that Wasfi does not meet the "User Model specific to a user" limitation because "[redacted]." (Sistos Decl. Ex. 2 ¶ 246 (emphasis added).) Dr. Carbonell further agreed at his deposition that "a user-specific learning machine must at least have some parameters that are specific to that user." (Sistos Decl. Ex. 5 at 264:25 – 265:3.) In fact, even PUM's infringement expert Dr.

[4] As Dr. Fox notes, the Court did not squarely address whether User Models needed to be user specific in the corresponding construction. (D.I. 557 Ex. 1 ¶ 317, *quoted at* D.I. 556 at 5.) Given the plain language of the claims and the parties' agreement regarding parameters discussed above, however, it did not have to. (D.I. 347 at 26: "Resolution of this dispute turns on whether a User Model is specific because it has completely different ***variables*** than other User Models, or if, instead, a User Model is specific because it has completely different ***numerical values*** than other User Models." (emphasis in original).) In other words, the Court decided whether a user-specific User Model need only include a list of values like {3, 6, 8, 4}, or whether that User Model also needed to include the corresponding variables like {politics=3, sports=6, entertainment=8, travel=4}.

Pazzani conceded at deposition that the User Model required by the claims "has to contain data specific to the current user." (Sistos Decl. Ex. 4 at 40:1-14.)

In the ongoing reexaminations, PUM has similarly argued that the claims require that each user have his own User Model, contending that in the prior art Wasfi reference "the context model is *not* specific to a particular user. Instead, it is assembled from monitored actions of a large number of users." And PUM further states Wasfi's "learning module is constructed on the basis of *Web-site specific* data files that represent the activities of *many users*. This is in sharp contrast to the present claim, which recites parameters of a learning machine estimated from *user-specific* data files." Sistos Decl. Ex. 7, July 27, 2011 Response at 19 (italics in original; underline added); *see also* Sistos Decl. Ex. 8, December 23, 2011 Response at 22-23 (making nearly identical arguments).)

A patent claim is not a "nose of wax" to be twisted one way to preserve a patent's validity and another way to catch an alleged infringer. *White*, 119 U.S. at 51-52; *see also Springs Window Fashionsi,* 323 F.3d at 995; *TorPharm, Inc. v. Ranbaxy Pharms., Inc.*, 336 F.3d 1322, 1329 (Fed. Cir. 2003) (a patentee may not "adopt a position contradictory to that adopted before the PTO and expect to be believed"). The Court should reject PUM's attempt to preclude Google's noninfringement expert from applying the same arguments that PUM and its expert have applied for the purposes of validity.

II. DR. FOX PROPERLY APPLIES THE COURT'S CONSTRUCTION OF "ESTIMATING."

A. The Court's Claim Construction Required "Estimating" Be "Approximating or Roughly Calculating," Not Merely "Calculating."

The asserted claims require both "*estimating* parameters of a learning machine" and "*estimating* a probability" of user interest in a document. During claim construction, Google argued "estimating" in these limitations should be construed as "calculating." The Court,

however, adopted PUM's proposal that "estimating" mean "approximating or roughly calculating." (D.I. 348, ¶10; D.I. 347, 33.) In rejecting Google's proposed construction, the Court found that "'estimating' was generally understood by one of ordinary skill in the art at the relevant time as a measurement that is not entirely precise." (D.I. 347, 33)(emphasis added).

Dr. Fox carefully adopted the Court's findings in his report:

> The Court has construed "estimating" as "approximating or roughly calculating," finding that estimating "was generally understood by one of ordinary skill in the art at the relevant time as a measurement that is not entirely precise." (Opinion at 33.) The Court rejected construing "estimating" as "calculating." (*Id.* at 32-33.) The Court further noted that "the claims use estimating in two separate limitations: estimating parameters and estimating a probability" and that "the Court's construction should apply equally when the patent speaks of estimating parameters and estimating probabilities. (*Id.*)

(D.I. 557 Ex. 1 ¶ 52.) As Dr. Fox further explained, determining that the number of people in the United States is "roughly 300 million" is an estimation, whereas undergoing the census and determining that the number of people in the United States is 303,124,754 is not. (D.I. 557 Ex. 1 ¶ 290, n.39.)

PUM's motion raises a straw man, arguing that Google and Dr. Fox interpret the Court's construction of "estimating" as precluding any calculations (*i.e.*, math). PUM relies on a number of out-of-context quotes from Dr. Fox's report for this argument. (D.I. 556 at 8.) But as PUM is well aware, Dr. Fox does not contend that anything with a calculation cannot be "estimating" as construed by the Court. Indeed, at his deposition Dr. Fox said just the opposite:

> Q. Does the Court ever say that – that an estimation could never be the result of a calculation?
>
> A. The Court distinguishes between the two, so they can't be the same. It doesn't mean that calculation can't be part of estimation.

(Sistos Decl. Ex. 3 at 137:24 – 138:4 (emphasis added).) Dr. Fox further opined that adding 2 and 7 to get 9 cannot be an estimation, because 9 is the precise result rather than an approximate

result. (*Id.* 139:16 – 140:2.) In contrast, Dr. Fox testified that predicting the weather with a calculation that uses a regression equation could produce an estimate:

> Q. What if you used a regression equation to produce -- or to predict tomorrow's temperature, would that temperature be an estimate or a nonestimate?
>
> THE WITNESS: If I had a regression equation that's designed to describe -- to give me a prediction about weather, and I make use of that, I can produce an estimate, yes.

(*Id.* 140:4-12) (objection omitted).

Put more simply, "estimating" as construed by the Court and as applied by Dr. Fox imposes requirements on the result—that it be "not entirely precise"—not on the process used to obtain that result. Since the numbers PUM accuses of meeting the "parameters" limitations are all precise, they cannot be the result of "estimating." For example, Dr. Pazzani asserts that [redacted] The resulting value does not approximate anything, ergo it cannot be an estimation. (*Id.*) In fact, Dr. Pazzani provides no opinion as to whether any of the accused parameters are approximated or roughly calculated. (*See, e.g.,* Sistos Decl. Ex. 1 ¶¶ 163-197, 297-304, 353-359, 415-421.) Having failed to apply the Court's construction, PUM now paradoxically brings a *Daubert* motion seeking to preclude Dr. Fox from doing the same. PUM's motion should be rejected.

B. PUM's *Daubert* Motion Is Inconsistent With Its Own Representations to the Patent Office.

Here too, PUM's motion with regard to "estimating" is inconsistent with its own validity theories. For example, in the ongoing reexamination in which the "broadest reasonable

interpretation" of the claims is applied, PUM sought to distinguish Culliss on the basis that its calculations did not include any estimations:

> The Office Action equates the "cumulative score [that] can be developed for the user for each item of personal data" (a personal data item score) with estimating the parameters of a learning machine. However, this is incorrect. According to *Culliss*, when the personal data item score of the user reaches a certain threshold, then the item of personal data can be said to be associated with the user. Additionally or alternatively, the strength of the association can be determined by the cumulative personal data item score. *Id.* at 4:67 - 5:4. Developing a score in this manner (*i.e.*, essentially by summation and thresholding) involves a direct, calculated relationship between the user and personal data associated with the user. Such a calculation does not include any estimations: "For example, whenever there is a match (whole or partial) between a search request or URL and an item of personal data, a record for the user can be updated to give a+1 for that item of personal data." *Id.* at 4:61-64. Thus, whether the cumulative score and personal data item score of *Culliss* are or are not parameters of a learning machine, because these items are not estimated they cannot be read as teaching this element of the claims. Accordingly, claims 1 and 32 are not anticipated by *Culliss*.

(Sistos Decl. Ex. 7, July 27, 2011 Response at 32.) PUM cannot credibly argue that its representations to this Court are consistent with its representations to the PTO. Here too, PUM's attempt to twist the claims one way to preserve its patents' validity and another way to accuse Google's services should be rejected. *White*, 119 U.S. at 51-52; *Springs Window Fashionsi,* 323 F.3d at 995; *TorPharm,* 336 F.3d at 1329.

III. DR. FOX PROPERLY APPLIES THE COURT'S "PROBABILITY" CONSTRUCTION.

A. Dr. Fox Will Not Testify That a Probability Must Be Between 0 And 1.

The Court construed "probability" as "numerical degree of belief or likelihood." In doing so, the Court rejected Google's proposal that a probability be a "percentage chance." But the Court held only that a probability need not be *expressed* as a percentage chance: "PUM points out that nowhere does the patent require that the probability be expressed as a percentage chance....In light of PUM's agreement to include the requirement that the probability be

expressed in numerical format, it is unclear whether the parties still have a material dispute with regard to this term." (D.I. 347, 33-34 (emphasis added).) It did not hold that, when expressed as a percentage, a probability could be less than 0% or greater than 100%. In ruling on Google's Motion for Summary Judgment, the Court further clarified that "[t]here is no requirement in the Court's construction that the number be between zero and one." (D.I. 521 at 7.)

Dr. Fox does not opine otherwise. Rather, he applies the Court's construction requiring that the probability be a "numerical degree of belief or likelihood," which in turn requires that the number exist within a defined (or "absolute") range. (D.I. 557 Ex. 1 at V.G.) Absent that range, a number cannot convey a degree of belief or likelihood. (*Id.* ¶ 305: "a user would not know whether a score of 2 is important enough to drag your boss out of a meeting. Is that a score of 2 out of 2? 2 out of 10? 2 out of 100,000?" (quotation marks omitted).) Thus a value bereft of a range may be a number, but it would not be a "numerical degree of belief or likelihood" as required by the Court's construction.

Dr. Fox then applied the Court's construction and found that in many instances, the "probabilities" pointed to by Dr. Pazzani were simply numbers and not numerical degrees of belief or likelihood. For instance, Dr. Pazzani asserts that [redacted] Thus "2" does not convey a numerical degree of belief or likelihood because it is unclear what that number corresponds to. Little interest? Some interest? Heavy interest? (*See* D.I. 557 Ex. 1 ¶¶ 304-305.)

B. PUM's Daubert Motion Is Inconsistent With Its Own Validity Theories.

PUM's motion notably fails to address Dr. Fox's actual application of the Court's construction. Nor does PUM even attempt to explain why Dr. Fox is wrong. PUM's failure to do so is likely a strategic omission, as PUM's own validity expert Dr. Carbonell advances the same theories: that a "probability" as defined by the Court must exist within a known range in order to indicate a degree of belief or likelihood. Yet again, PUM's *Daubert* motion is inconsistent with its own validity theories.

For example, PUM's invalidity expert Dr. Carbonell seeks to distinguish the prior art Wasfi reference for [redacted]") As Dr. Carbonell explained at his deposition, probabilities must exist within defined, bounded ranges: "A probability requires both end points to be nailed down, to be defined. The impossible versus the certain." (Sistos Decl. Ex. 5 at 27:6-8; *see also id.* at 23:15-19.) Dr. Carbonell similarly argued that because the T_{ij} variable in Wasfi can potentially yield infinity, it cannot be a probability even though it "is meant to be measure of importance or interestingness of the page." (*Id.* 261:22 – 262:20.) Dr. Fox's opinion also mirrors PUM's arguments during the prosecutions and reexaminations of the patents-in-suit. (Sistos Decl. Ex. 6, March 8, 2004 Reply at 6 ("the present invention [] determines for every document an absolute score of importance, e.g. 0.9 probability that a document is of interest to the user"); Sistos Decl. Ex. 7, May 21, 2012 Response at 20 ("Probabilities have absolute meaning within a defined range.")

Conclusion

PUM's *Daubert* motion is an attempt to preclude Google from presenting its legitimate non-infringement positions and from relying on PUM's own validity positions in defending itself against PUM's accusations of infringement. The Court should not condone PUM's strategy of advancing a broad interpretation of its patents for infringement purposes while simultaneously alleging a narrow interpretation of its patents for validity purposes. PUM's *Daubert* motion should be denied.[5]

Respectfully submitted,

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[5] To the extent the Court grants PUM's motion as to any of the contested claim limitations, Google respectfully requests that the Court similarly bar PUM's expert Dr. Carbonell from raising the same arguments in asserting that the patents are valid.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CERTIFICATE OF SERVICE

I, David E. Moore, hereby certify that on February 18, 2014, 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 February 18, 2014, the attached document was Electronically Mailed to the following person(s):

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