

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, L.L.P. and )  
 YOCHAI KONIG, )  
 )  
 Counterclaim-Defendants. )

C.A. No. 09-525 (LPS)

**JOINT PROPOSED FINAL JURY INSTRUCTIONS**

MORRIS, NICHOLS, ARSHT & TUNNELL LLP  
 Karen Jacobs (#2881)  
 Jeremy A. Tigan (#5239)  
 Regina Murphy (#5648)  
 1201 N. Market Street  
 P.O. Box 1347  
 Wilmington, DE 19899-1347  
 (302) 658-9200  
 kjacobs@mnat.com  
 jtigan@mnat.com  
 rmurphy@mnat.com

POTTER ANDERSON & CORROON LLP  
 Richard L. Horwitz (#2246)  
 David E. Moore (#3983)  
 Hercules Plaza, 6th Floor  
 1313 N. Market Street  
 Wilmington, DE 19801  
 (302) 984-6000  
 rhorwitz@potteranderson.com  
 dmoore@potteranderson.com

OF COUNSEL:

Marc S. Friedman  
DENTONS US LLP  
1221 Avenue of the Americas  
New York, NY 10020-1089

Mark C. Nelson  
Steven M. Geiszler  
Richard D. Salgado  
DENTONS US LLP  
2000 McKinney Avenue, Suite 1900  
Dallas, TX 75201

Jennifer D. Bennett  
DENTONS US LLP  
1530 Page Mill Road, Ste. 200  
Palo Alto, CA 94304-1125

Andrew M. Grodin  
DENTONS US LLP  
101 JFK Parkway  
Short Hills, NJ 07078-2708

*Attorneys for Personalized User Model, L.L.P.  
and Yochai Konig*

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OF COUNSEL:

Charles K. Verhoeven  
David A. Perlson  
Joshua Lee Sohn  
Antonio R. Sistos  
Margaret Pirnir Kammerud  
QUINN EMANUEL URQUHART &  
SULLIVAN, LLP  
50 California St.  
San Francisco, CA 94111

Andrea Pallios Roberts  
QUINN EMANUEL URQUHART &  
SULLIVAN, LLP  
555 Twin Dolphin Drive, Suite 560  
Redwood Shores, CA 94065

*Attorneys for Defendant Google, Inc.*

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# **1. GENERAL INSTRUCTIONS**

## **1.1 INTRODUCTION<sup>1</sup>**

Members of the jury, now it is time for me to instruct you about the law that you must follow in deciding this case.

I will start by explaining your duties and the general rules that apply in every civil case. Then I will explain some rules that you must use in evaluating particular testimony and evidence.

Then I will explain the positions of the parties and the law you will apply in this case. And last, I will explain the rules that you must follow during your deliberations in the jury room, and the possible verdicts that you may return.

Please listen very carefully to everything I say.

You will have a written copy of these instructions with you in the jury room for your reference during your deliberations. You will also have a verdict form, which will list the questions that you must answer to decide this case.

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<sup>1</sup> *Sunovion Pharmaceuticals Inc. v. Dey Pharma, L.P., et al.*, No. 06-113 (LPS), D.I. 571 (D. Del. Feb. 8, 2012); *The Uniform Jury Instruction for Patent Cases in the United States District Court for the District of Delaware* (March 1993)

## 1.2 DUTY OF THE JURY<sup>2</sup>

You have two main duties as jurors. The first one is to decide what the facts are from the evidence that you saw and heard here in court. Deciding what the facts are is your job, not mine, and nothing I have said or done during this trial was meant to influence your decision about the facts in any way.

Your second duty is to take the law that I give you, apply it to the facts, and decide, under the appropriate burden of proof, which party should prevail on any given issue. It is my job to instruct you about the law, and you are bound by the oath that you took at the beginning of the trial to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions that I gave you before and during the trial, and these instructions. All the instructions are important, and you should consider them together as a whole.

Perform these duties fairly. Do not let any bias, sympathy, or prejudice that you may feel toward one side or the other influence your decision in any way.

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<sup>2</sup> *Sunovion Pharmaceuticals Inc. v. Dey Pharma, L.P., et al.*, No. 06-113 (LPS), D.I. 571 (D. Del. Feb. 8, 2012); *The Uniform Jury Instruction for Patent Cases in the United States District Court for the District of Delaware* (March 1993)

## 1.4 EVIDENCE DEFINED<sup>3</sup>

You must make your decision based only on the evidence that you saw and heard here in Court. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of Court influence your decision in any way.

The evidence in this case includes only what the witnesses said while they were testifying under oath (including deposition testimony that has been played or read to you), the exhibits that I allowed into evidence, the stipulations that the lawyers agreed to.

Certain charts and graphics have been used to illustrate testimony from witnesses. Unless I have specifically admitted them into evidence, these charts and graphics are not themselves evidence, even if they refer to, identify, or summarize evidence, and you will not have these demonstratives in the jury room.

Nothing else is evidence. The lawyers' statements and arguments are not evidence. The arguments of the lawyers are offered solely as an aid to help you in your determination of the facts. Their questions and objections are not evidence. My legal rulings are not evidence. Any of my comments and questions are not evidence. The notes taken by any juror are not evidence.

During the trial I may have not let you hear the answers to some of the questions that the lawyers asked. I also may have ruled that you could not see some of the exhibits that the lawyers wanted you to see. You must completely ignore all of these things. Do not even think about them. Do not speculate about what a witness might have said or what an exhibit might have shown. These things are not evidence, and you are bound by your oath not to let them influence your decision in any way.

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<sup>3</sup> *Sunovion Pharmaceuticals Inc. v. Dey Pharma, L.P., et al.*, No. 06-113 (LPS), D.I. 571 (D. Del. Feb. 8, 2012); *The Uniform Jury Instruction for Patent Cases in the United States District Court for the District of Delaware* (March 1993)

Make your decision based only on the evidence, as I have defined it here, and nothing else.

## **CONSIDERATION OF EVIDENCE<sup>4</sup>**

### **[PUM INSTRUCTION 1.6; GOOGLE INSTRUCTION 1.5]**

You should use your common sense in weighing the evidence. Consider it in light of your everyday experience with people and events, and give it whatever weight you believe it deserves. If your experience tells you that certain evidence reasonably leads to a conclusion, you are free to reach that conclusion.

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<sup>4</sup> *Sunovion Pharmaceuticals Inc. v. Dey Pharma, L.P., et al.*, No. 06-113 (LPS), D.I. 571 (D. Del. Feb. 8, 2012); *The Uniform Jury Instruction for Patent Cases in the United States District Court for the District of Delaware* (March 1993)



## **DIRECT AND CIRCUMSTANTIAL EVIDENCE<sup>5</sup>**

### **[PUM INSTRUCTION 1.5; GOOGLE INSTRUCTION 1.6]**

Now, some of you may have heard the terms “direct evidence” and “circumstantial evidence.”

Direct evidence is simply evidence like the testimony of an eyewitness which, if you believe it, directly proves a fact. If a witness testified that he saw it raining outside, and you believed him, that would be direct evidence that it was raining.

Circumstantial evidence is a chain of circumstances that indirectly proves a fact. If someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude that it was raining.

It is your job to decide how much weight to give the direct and circumstantial evidence. The law makes no distinction between the weight that you should give to either one, nor does it say that one is any better evidence than the other. You should consider all the evidence, both direct and circumstantial, and give it whatever weight you believe it deserves.

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<sup>5</sup> *Sunovion Pharmaceuticals Inc. v. Dey Pharma, L.P., et al.*, No. 06-113 (LPS), D.I. 571 (D. Del. Feb. 8, 2012); *The Uniform Jury Instruction for Patent Cases in the United States District Court for the District of Delaware* (March 1993)

## 1.7 STATEMENTS OF COUNSEL<sup>6</sup>

A further word about statements and arguments of counsel. The attorneys' statements and arguments are not evidence. Instead, their statements and arguments are intended to help you review the evidence presented. If you remember the evidence differently from the attorneys, you should rely on your own recollection.

**[*Google proposal*: The role of attorneys is to zealously and effectively advance the claims of the parties they represent within the bounds of the law. An attorney may argue all reasonable conclusions from evidence in the record. It is not proper, however, for an attorney to state an opinion as to the truth or falsity of any testimony or evidence. What an attorney personally thinks or believes about the testimony or evidence in a case is not relevant, and you are instructed to disregard any personal opinion or belief concerning testimony or evidence that an attorney has offered during opening or closing statements, or at any other time during the course of the trial.]**

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<sup>6</sup> *Tarkus Imaging, Inc. v. Adobe Systems, Inc., et al.*, C.A. No. 10-063 (LPS), D.I. 454 (Preliminary Jury Instructions) (D. Del.) June 18, 2012). *See also British Telecommunications PLC v. Google Inc.*, No. 11-1249 (LPS), D.I. 376 (Joint Proposed Final Jury Instructions) (D. Del. Jan. 17, 2014).

## 1.8 CREDIBILITY OF WITNESSES<sup>7</sup>

You are the sole judges of each witness's credibility. You should consider each witness's means of knowledge; strength of memory; opportunity to observe; how reasonable or unreasonable the testimony is; whether it is consistent or inconsistent; whether it has been contradicted; the witness's biases, prejudices, or interests; the witness's manner or demeanor on the witness stand; and all circumstances that, according to the evidence, could affect the credibility of the testimony.

If you find the testimony to be contradictory, you must try to reconcile it, if reasonably possible, so as to make one harmonious story of it all. But if you can't do this, then it is your duty and privilege to believe the testimony that, in your judgment, is most believable and disregard any testimony that, in your judgment, is not believable.

In determining the weight to give to the testimony of a witness, you should ask yourself whether there is evidence tending to prove that the witness testified falsely about some important fact, or, whether there was evidence that at some other time the witness said or did something, or failed to say or do something, that was different from the testimony he or she gave at trial. You have the right to distrust such witness's testimony in other particulars and you may reject all or some of the testimony of that witness or give it such credibility as you may think it deserves.

You should remember that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth. People may tend to forget some things or remember other things inaccurately. If a witness has made a misstatement, you must consider whether it was

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<sup>7</sup> *Sunovion Pharmaceuticals Inc. v. Dey Pharma, L.P., et al.*, No. 06-113 (LPS), D.I. 571 (D. Del. Feb. 8, 2012); *The Uniform Jury Instruction for Patent Cases in the United States District Court for the District of Delaware* (March 1993)

simply an innocent lapse of memory or an intentional falsehood, and that may depend upon whether it concerns an important fact or an unimportant detail.

This instruction applies to all witnesses.

## **NUMBER OF WITNESSES<sup>8</sup>**

### **[PUM INSTRUCTION 1.13; GOOGLE INSTRUCTION 1.9]**

One more point about the witnesses. Sometimes jurors wonder if the number of witnesses who testified makes any difference.

Do not make any decisions based only on the number of witnesses who testified. What is more important is how believable the witnesses were, and how much weight you think their testimony deserves. Concentrate on that, not the numbers.

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<sup>8</sup> *Sunovion Pharmaceuticals Inc. v. Dey Pharma, L.P. et al.*, No. 06-113 (LPS), D.I. 571 (D. Del. Feb. 8, 2012); *The Uniform Jury Instruction for Patent Cases in the United States District Court for the District of Delaware* (March 1993).

## **EXPERT WITNESSES<sup>9</sup>**

### **[PUM INSTRUCTION 1.9; GOOGLE INSTRUCTION 1.10]**

When knowledge of technical subject matter may be helpful to the jury, a person who has special training or experience in that technical field – a person called an expert witness – is permitted to state his or her opinion on those technical matters. This skill or knowledge is not common to the average person, but has been acquired by the expert through special study or experience. [*Google proposal: However, you are not required to accept an expert witness's opinion. As with any other witness, it is up to you to decide whether to rely on an expert witness.*]

In weighing expert testimony, you may consider the expert's qualifications, the reasons for the expert's opinions, and the reliability of the information supporting the expert's opinions, as well as the factors I have previously mentioned for weighing testimony of any other witness. Expert testimony should receive whatever weight and credit you think appropriate, given all the other evidence in the case. You are free to accept or reject the testimony of experts, just as with any other witness.

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<sup>9</sup> *Sunovion Pharmaceuticals Inc. v. Dey Pharma, L.P. et al.*, No. 06-113 (LPS), D.I. 571 (D. Del. Feb. 8, 2012); *The Uniform Jury Instruction for Patent Cases in the United States District Court for the District of Delaware* (March 1993).

## **DEPOSITION TESTIMONY<sup>10</sup>**

### **[PUM INSTRUCTION 1.10; GOOGLE INSTRUCTION 1.11]**

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath and swears to tell the truth, and lawyers for each party may ask questions. A court reporter is present and records the questions and answers. The deposition may also be recorded on videotape.

During the trial, certain testimony was presented to you from the playing of video excerpts or the reading of written excerpts from depositions. Deposition testimony is out of court testimony given under oath and is entitled to the same consideration you would give it had the witness testified in person here in the courtroom.

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<sup>10</sup> *British Telecommunications PLC v. Google Inc.*, No. 11-1249 (LPS), D.I. 376 (Joint Proposed Final Jury Instructions) (D. Del. Jan. 17, 2014).

## **THE PARTIES AND THEIR CONTENTIONS**

### **THE PATENT LAWS**

#### **[PUM INSTRUCTION 2.2; GOOGLE INSTRUCTION 1.18]**

At the beginning of the trial, I gave you some general information about patents and the patent system and a brief overview of the patent laws relevant to this case. I will now give you more detailed instructions about the patent laws that specifically relate to this case. If you would like to review my instructions at any time during your deliberations, you will have your copy available to you in the jury room.



## **6 DELIBERATION AND VERDICT**

### **6.1 INTRODUCTION<sup>11</sup>**

That concludes the part of my instructions explaining the rules for considering some of the testimony and evidence. Now let me finish up by explaining some things about your deliberations in the jury room, and your possible verdicts.

Once you start deliberating, do not talk to the jury officer, or to me, or to anyone else except each other about the case. If you have any questions or messages, you must write them down on a piece of paper, sign them, and then give them to the jury officer. The officer will give them to me, and I will respond as soon as I can. I may have to talk to the lawyers about what you have asked, so it may take me some time to get back to you. Any questions or messages normally should be sent to me through your foreperson, who by custom of this Court is juror No. 1.

One more thing about messages. Do not ever write down or tell anyone how you stand on your votes. For example, do not write down or tell anyone that you are split 5-3 or 7-1, or whatever your vote happens to be. That should stay secret until you are finished.

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<sup>11</sup> *Sunovion Pharmaceuticals Inc. v. Dey Pharma, L.P. et al.*, No. 06-113 (LPS), D.I. 571 (D. Del. Feb. 8, 2012); *The Uniform Jury Instruction for Patent Cases in the United States District Court for the District of Delaware* (March 1993).

## 6.2 UNANIMOUS VERDICT<sup>12</sup>

Your verdict must represent the considered judgment of each juror. In order for you as a jury to return a verdict, it is necessary that each juror agree to the verdict. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view towards reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion, if you become convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the purpose of returning a verdict. Remember at all times that you are not partisans. You are judges — judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

A form of verdict has been prepared for you. You will take this form to the jury room and when you have reached unanimous agreement as to your verdict, you will have your foreperson fill in, date, and sign the form. Then each of you will sign and date the form. You will then return to the courtroom and your verdict will be read in open Court by my deputy.

It is proper to add the caution that nothing said in these instructions and nothing in the form of verdict is meant to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jury.

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<sup>12</sup> *Sunovion Pharmaceuticals Inc. v. Dey Pharma, L.P. et al.*, No. 06-113 (LPS), D.I. 571 (D. Del. Feb. 8, 2012); *The Uniform Jury Instruction for Patent Cases in the United States District Court for the District of Delaware* (March 1993).

### **6.3 DUTY TO DELIBERATE<sup>13</sup>**

Now that all the evidence is in and the arguments are completed, you are free to talk about the case in the jury room. In fact, it is your duty to talk with each other about the evidence, and to make every reasonable effort you can to reach unanimous agreement. Talk with each other, listen carefully and respectfully to each other's views, and keep an open mind as you listen to what your fellow jurors have to say. Try your best to work out your differences. Do not hesitate to change your mind if you are convinced that other jurors are right and that your original position was wrong.

But do not ever change your mind just because other jurors see things differently, or just to get the case over with. In the end, your vote must be exactly that — your own vote. It is important for you to reach unanimous agreement, but only if you can do so honestly and in good conscience.

No one will be allowed to hear your discussions in the jury room, and no record will be made of what you say. So you should all feel free to speak your minds.

Listen carefully to what the other jurors have to say, and then decide for yourself.

You might have questions about the schedule for deliberations. Generally speaking, your deliberations will run until \_\_\_ p.m., unless you unanimously decide you wish to deliberate until a later time. If you do not complete your deliberations today, you will return to continue deliberating tomorrow beginning at \_\_\_ a.m.

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<sup>13</sup> *Sunovion Pharmaceuticals Inc. v. Dey Pharma, L.P. et al.*, No. 06-113 (LPS), D.I. 571 (D. Del. Feb. 8, 2012); *The Uniform Jury Instruction for Patent Cases in the United States District Court for the District of Delaware* (March 1993).

## 6.4 SOCIAL MEDIA<sup>14</sup>

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as the telephone, a cell phone, smart phone, iPhone, blackberry or computer, the internet, any internet service, any text or instant messaging service, any internet chat room, blog, or website such as Face book, MySpace, Linkedin, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. **[PUM proposal: Nor should you perform any research or use any Google product to reach your own judgments about the issues in this case.]** In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case **[PUM proposal: or perform any research]**. You can only discuss the case in the jury room with your fellow jurors during deliberations.

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<sup>14</sup> *Sunovion Pharmaceuticals Inc. v. Dey Pharma, L.P. et al.*, No. 06-113 (LPS), D.I. 571 (D. Del. Feb. 8, 2012)

## 6.5 COURT HAS NO OPINION<sup>15</sup>

Let me finish up by repeating something that I said to you earlier. Nothing that I have said or done during this trial was meant to influence your decision in any way. You must decide the case yourselves based on the evidence presented.

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<sup>15</sup> *Sunovion Pharmaceuticals Inc. v. Dey Pharma, L.P. et al.*, No. 06-113 (LPS), D.I. 571 (D. Del. Feb. 8, 2012); *The Uniform Jury Instruction for Patent Cases in the United States District Court for the District of Delaware* (March 1993).