

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.)	

**PERSONALIZED USER MODEL, L.L.P.’S
PROPOSED FINAL JURY INSTRUCTIONS¹**

¹ Unless otherwise specifically noted, the authority for the following Joint Proposed Final Jury Instructions are: *DePuy Synthes Products, LLC, v. Globus Medical, Inc.*, No. 1:11-CV-00652-LPS (D. Del.) (“DePuy”) Final Jury Instructions; *Power Integration, Inc. v. Fairchild Semiconductor Int’l, Inc.*, No. 1:08-CV-00309-LPS (D. Del.) (“Power Integration”) Final Jury Instructions; *Tarkus Imaging, Inc. v. Adobe Sys., Inc.*, No. 1:10-cv-063-LPS (D. Del.) (“Tarkus”) Final Jury Instructions; *Leader Techs v. Facebook*, No. 1:08-cv-862-LPS (D. Del.) (“Leader”); Final Jury Instructions; *Laboratory Skin Care, Inc. v. Limited Brands, Inc.*, Civ. A. No. 06-601-LPS (D. Del. Feb. 16, 2011) (“Laboratory Skin”) Final Jury Instructions; *B. Braun Melsungen AG v. Terumo Med. Corp.*, Civ. A. No. 09-347-LPS (D. Del. Nov. 18, 2010) (“Braun”) Final Jury Instructions; *ICU Medical Inc. v. Rymed Techs.*, No. 1:07-cv-468-LPS (D. Del.) (“ICU Medical”); Uniform Jury Instructions for Patent Cases in the United States District Court for the District of Delaware (March 1993) (“Delaware Uniform Instructions”); *Instructions for Patent Cases in the United States District Court for the District of Delaware* (March 1993) (“Delaware Uniform Instructions”).

PUM is separately filing instructions that have been agreed upon by both parties. Having only this morning received Google's proposed jury instructions, PUM was unable to include the competing proposals in one document. Pursuant to D. Del. LR 51.1(a), PUM herewith files PUM's Proposed Final Jury Instructions that are contested. Where the parties have jointly agreed to an instruction, PUM also includes that instruction here, for the Court's convenience.

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1. GENERAL INSTRUCTIONS

1.1 INTRODUCTION (JOINTLY SUBMITTED)

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.

1.2 DUTY OF THE JURY (JOINTLY SUBMITTED)

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.

1.3 BURDENS OF PROOF

PUM has the burden of proving patent infringement by what is called a preponderance of the evidence. That means PUM has to produce evidence which, when considered in light of all of the facts, leads you to believe that what PUM claims is more likely true than not. To put it differently, if you were to put the evidence of PUM and Google concerning infringement on opposite sides of a scale, the evidence supporting PUM's' claims would have to make the scales tip somewhat on its side in each instance. If the scale should remain equal or tip in favor of Google, you must find for Google.

In this case, in addition to denying that they have infringed, Google asserts that both of PUM's Patents are invalid. The Asserted Patents, however, are presumed to be valid. Google thus has the burden of proving that the Asserted Patents are invalid by clear and convincing evidence.²

Clear and convincing evidence is evidence that produces an abiding conviction that the truth of a factual contention is highly probable. Proof by clear and convincing evidence is, thus, a higher burden than proof by a preponderance of the evidence.

Google has the burden of proving by a preponderance of the evidence its breach of contract claims. PUM in turn must prove by a preponderance of the evidence its defenses to that

² Google requests in § 1.3 of its Proposed Final Jury Instructions that if the Court precludes evidence of the reexamination proceedings, the Court should instruct the jury that Google need only prove invalidity by a preponderance of the evidence. This is contrary to law. *See Microsoft Corp. v. i4i P'ship*, --- U.S. ---, 131 S.Ct. 2238, 2250-51 (2011) (holding presumption of validity and clear and convincing evidence standard apply even where defendant presents evidence of prior art the PTO did not review). This is because “[n]othing in §282’s text suggests that Congress meant to . . . enact a standard of proof that would rise and fall with the facts of each case.” *Id.* at 2250. “Any re-calibration of the standard of proof remains in [Congress’] hands,” *id.* at 2252, and while “Congress has often amended § 282” in the last 30 years, “not once . . . has it even considered a proposal to lower the standard of proof.” *Id.*

claim, namely that the claim is time-barred, and that the inventions are protected from assignment under California law

Those of you familiar with criminal cases will have heard the term “proof beyond a reasonable doubt.” That burden does not apply in a civil case and you should, therefore, put it out of your mind in considering whether or not PUM or Google has met its burden of proof.

1.4 EVIDENCE DEFINED (JOINTLY SUBMITTED)

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.

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

1.5 DIRECT AND CIRCUMSTANTIAL EVIDENCE (JOINTLY SUBMITTED)

**Also contained in the parties' Joint Proposed
Final Jury Instructions as *Google proposal*: 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.

1.6 CONSIDERATION OF EVIDENCE (JOINTLY SUBMITTED)

**Also contained in the parties' Joint Proposed
Final Jury Instructions as *Google proposal*: 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.

1.7 STATEMENTS OF COUNSEL (JOINTLY SUBMITTED)

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.]

1.8 CREDIBILITY OF WITNESSES (JOINTLY SUBMITTED)

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 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.

1.9 EXPERT WITNESSES (JOINTLY SUBMITTED)

Also contained in the parties' Joint Proposed Final Jury Instructions as *Google proposal*: 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.

1.10 DEPOSITION TESTIMONY (JOINTLY SUBMITTED)

Also contained in the parties' Joint Proposed Final Jury Instructions as *Google proposal*: 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.

1.11 DEMONSTRATIVE EXHIBITS

During the course of the trial, you have seen many exhibits. Many of these exhibits were admitted as evidence. You will have these admitted exhibits in the jury room for your deliberations. During the course of this case you have seen some exhibits (including charts and animations) that the parties used to help illustrate the testimony of the various witnesses. These illustrative exhibits, called “demonstrative exhibits,” may not have been offered and admitted as evidence in this case. If they have not been admitted, they should not be considered as evidence.

Rather, it is the underlying testimony of the witness that you heard or the exhibits that have been entered into evidence when you saw the demonstrative exhibits that is the evidence in this case.

In some instances, certain charts and summaries may have been received into evidence to illustrate information brought out in the trial. You may use these charts and summaries as evidence, even though the underlying documents and records are not here. You should give them only such weight as you think they deserve.

1.12 USE OF NOTES

You may use notes taken during trial to assist your memory. However, you should use caution in consulting your notes. There is always a tendency to attach undue importance to matters that you have written down. Some testimony that is considered unimportant at the time presented, and thus not written down, takes on greater importance later on in the trial in light of all the evidence presented. Therefore, you are instructed that your notes are only a tool to aid your own individual memory, and you should not compare notes with other jurors in determining the content of any testimony or in evaluating the importance of any evidence. Your notes are not evidence, and are by no means a complete outline of the proceedings or a list of the highlights of the trial. You should not be overly influenced by your notes or those of your fellow jurors.

Above all, your memory should be the greatest asset when it comes time to deliberate and render a decision in this case.

1.13 NUMBER OF WITNESSES

Also contained in the parties' Joint Proposed Final Jury Instructions as *Google proposal*: 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.

2. THE PARTIES AND THEIR CONTENTIONS³

I will now review for you the parties in this action, and the positions that you will have to consider in reaching your verdict.

As I previously told you, and as you well know by now, the Plaintiff in this case is Personalized User Model or P-U-M for short. The Defendant in this case is Google. Google is also a counter-claimant on its breach of contract claim against Dr. Yochai Konig, one of the inventors of the patents in suit.

The United States Patents at issue in this case are: U.S. Patent Numbers 6,981,040, and 7,685,276. For simplicity, I will refer to these patents by their last three numbers, as “the ’040 patent” and “the ’276 patent.” A copy of each of these patents has been given to you. Collectively, I will refer to these patents as the “Asserted Patents” or the “Patents-in-Suit.”

PUM contends that the following Google products infringe the Asserted Patents: Google Search, Google’s Search Ads System (Adwords); Google’s Content Ads System (Adsense, including advertising on YouTube); and Google’s YouTube Video Recommendations. Collectively, I will refer to these products as the Google “Accused Products.”

PUM asserts that Google Search infringes claims 1, 11, 22, 32, or 34 of the ’040 patent and claims 1, 3, 6, 21, or 22 of the ’276 patent; that Google’s Search Ads System (Adwords) infringes claims 1, 11, 22, 32, or 34 of the ’040 patent and claims 1, 3, 5, 6, 7, or 21 of the ’276 patent; that Google’s Content Ads System (Adsense, including advertising on YouTube)

³ PUM has presented its understanding of the issues to be tried to the jury in this action, based on its understanding that the parties agree that Google’s counterclaims seeking a declaration of co-ownership, and for constructive trust and lack of standing by PUM are issues for the Court rather than the jury to decide, as is Google’s claim for conversion. *See* Ex. 12 to the Proposed Final Pretrial Order (PUM’s Motion In Limine To Exclude Argument Or Evidence That Google Is An Owner of the Patents-In-Suit Or Other Related Legal Or Equitable Issues). In the event the Court determines that the jury should decide any of these issues, PUM will supplement to provide proposed instructions.

infringes claims 1, 11, 22, 32, or 34 of the '040 patent and claims 1, 3, 6, 7, or 22 of the '276 patent; and that Google's YouTube Video Recommendations infringes claims 1, 22, 32, or 34 of the '040 Patent. I will refer to these claims collectively as the "Asserted Claims."

Google denies that the Accused Products infringe the Asserted Claims. Google also contends that the Asserted Patents are invalid because they are anticipated or rendered obvious by the prior art.

Google also asserts a breach of contract claim against Dr. Konig and alleges that Dr. Konig breached his employment agreement with SRI by assigning his inventions to Utopy rather than SRI.⁴ PUM and Dr. Konig deny that Google has standing to bring such a claim and deny that there was any breach. They further assert that Google's claims are barred as untimely, and that Dr. Konig's inventions were protected from assignment by the California Labor Code.

⁴ Google proposes that the jury be instructed that Google claims that "because of this breach claim, Google is a rightful owner of the patents-in-suit." First, it is undisputed that ownership is an issue for the Court, not the jury, and there is no dispute that Google is not now "a rightful owner." See *Archnid, Inc. v. Merit Indus., Inc.*, 939 F.2d 1574, 1579 (Fed. Cir. 1991); *Bd. Of Trustees of Leland Stanford v. Roche*, 583 F.3d 832, 841-42 (Fed. Cir. 2009); *IpVenture, Inc. v. Prostar Computer, Inc.*, 503 F.3d 1324, 1327 (Fed. Cir. 2007); *United States v. Bailey*, 288 F. Supp. 2d 1261, 1270 (M.D. Fla. 2003); *McCafferty v. Gilbank*, 249 Cal. App. 2d 569, 574-76 (Cal. Ct. App. 1967). Further, Google must do more than prove breach of contract to be declared an owner. See, e.g., PUM's *Motion in limine* (Ex. 12 to the Proposed Final Pretrial Order). It must establish that it has standing to assert SRI's breach claim, that the claim is not barred by the statute of limitations, that Dr. Konig's assignment to Utopy and its assigns does not prevent the Court from declaring Google an owner, and that PUM and its predecessors are not good faith purchasers for value pursuant to 35 U.S.C. § 261.

2.1 SUMMARY OF ISSUES

I will now summarize the issues that you must decide and for which I will provide instructions to guide your deliberations. You must decide the following main issues:

1. Whether PUM has proven by a preponderance of the evidence that the Google Accused Products infringe or have infringed or whether Google has actively induced infringement of any of the Asserted Claims of the Patents-in-Suit.

2. Whether Google has proven by clear and convincing evidence that any of the Asserted Claims of the Patents-in-Suit are invalid due to anticipation or obviousness over the prior art. Google has the burden of proving the invalidity of each patent claim, and the validity of each claim must be separately evaluated.

3. Whether Google has proven by a preponderance of the evidence that Dr. Konig breached his employment agreement with SRI by assigning his patent rights to Utopy rather than SRI.

4. Whether PUM has proven by a preponderance of the evidence that Google's breach of contract claim is barred as untimely under the statute of limitations.

5. Whether PUM has proven by a preponderance of the evidence that Dr. Konig's inventions were protected from assignment by the California Labor Code.

I will provide instructions concerning all of these claims and defenses shortly.

2.2 THE PATENT LAWS

Also contained in the parties' Joint Proposed Final Jury Instructions as *Google proposal*: 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.

3. PATENT INFRINGEMENT

3.1 INFRINGEMENT OF PATENT CLAIMS

I will now instruct you on the rules you must follow when deciding whether PUM has proven by a preponderance of the evidence that Google infringes the Asserted Claims of the Patents in Suit.

Patent law gives the owner of a valid patent the right to keep others from using a patented product or method within the United States during the term of the patent. Before you can decide many of the issues in this case, you will need to understand the role of patent “claims.”

The claims of a patent are the numbered paragraphs at the end of the patent. The claims are important because it is the words of the claims that define what a patent covers. The text in the rest of the patent provides a description and/or examples of the invention and provides a context for the claims, but it is the claims that define the breadth of the patent’s coverage. The claims are intended to define, in words, the boundaries of the invention that constitute the patent owner’s property rights. Infringement is the act of trespassing on those rights.

Each claim is effectively treated as if it were a separate patent, and each claim may cover more or less than another claim. To show patent infringement by Google, PUM need only establish that one claim of either the ’040 or ’276 patents has been infringed by Google.

In patent law, the requirements of a claim are often referred to as “claim elements” or “claim limitations.” When a thing (such as a product) meets each and every requirement of a claim, the claim is said to “cover” that thing, and that thing is said to “fall” within the scope of that claim.

The law says that it is my role to define the terms of the claims and it is your role to apply my definitions to the issues that you are asked to decide in this case. Therefore, I will explain to you the meaning of some of the words of the claims in this case. In doing so, I will explain some

of the requirements of the claims and you must accept my definition of these words in the claims as correct.

It is your job to take these definitions and apply them to the issues you are deciding, such as infringement and validity.⁵

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⁵ *Tarkus*, ¶¶ 3.1, 3.5; *Power Integration*, § 3.1; *Leader Technologies*, ¶ 3.2.

3.2 CLAIM CONSTRUCTION FOR THE CASE

It is the Court's duty under the law to define what the patent claims mean. I have made my determinations and I will now instruct you on the meaning of claim terms. You must use the meaning that I give you for each claim term to make your decision as to whether the claim is infringed or invalid, and you must apply the same meaning for purposes of both your infringement and your invalidity analyses. You must ignore any different definitions used by the witnesses or the attorneys. You should not take my definition of the language of the claims as an indication that I have a view regarding how you should decide the issues that you are being asked to decide, such as infringement and validity.

I instruct you that the following claim terms have the following definitions:

1. The term "automatic, personalized information services to the user" means "without human intervention."
2. The term "central computer" means "computer on the server side of a client-server relationship."
3. The terms "user" and "user u" as used in claim 1 of the '040 patent means "a person operating a computer or the associated representation of the user."
4. The term "user-specific data files" as used in claim 1(b) of the '040 patent means "the monitored user interactions with data and a set of documents associated with the user."
5. The term "monitored user interactions with the data" as used in claim 1(b) of the '040 patent means "the collected information about the user's interactions with data."
6. The term "parameters" as used in claim 1(c) of the '040 patent means "values or weights."

7. The term “estimating parameters of a learning machine” as used in claim 1(c) of the ’040 patent means “estimating values or weights of the variables of a learning machine.”

8. The term “learning machine” as used in claims 1 and 32 of the ’040 patent and claims 1, 5, and 23 of the ’276 patent means “a mathematical function and/or model used to make a prediction, that attempts to improve its predictive ability over time by altering the values/weights given to its variables, depending on a variety of knowledge sources, including monitored user interactions with data and a set of documents associated with the user.”

9. The term “User Model specific to the user” as used in claims 1, 21, and 32 of the ’040 patent means “an implementation of a learning machine updated in part by data specific to the user.”

10. The term “user-specific learning machine” as used in the ’276 patent means “a learning machine [as construed] specific to the user.”

11. The term “document” as used in claims 1, 11, and 34 of the ’040 patent and claims 1, 5-7, 14, 21-24 of the ’276 patent means “an electronic file including text or any type of media.”

12. The term “estimating” as used in claim 1(e) in the ’040 patent means “approximating or roughly calculating.”

13. The term “probability” as used in claim 1(e) of the ’040 patent means “numerical degree of belief or likelihood.”

14. The term “unseen document” as used in claim 1(e) of the ’040 patent means “document not previously seen by the user.”

15. The term “estimating a posterior probability $P(u/d,q)$ that a document d is of interest to the user u given a query q submitted by the user” as used in claim 11 of the ’040

patent means “approximating or roughly calculating a numerical degree of belief or likelihood that a document d is of interest to the user u given the information that is known about the document, and given a query q.”

16. The terms “present” and “presenting” as used in claim 1 of the ’276 patent mean “to provide or make available.”

17. The term “documents of interest” as used in claim 1 of the ’276 patent means “documents [i.e., electronic files (including text or any type of media)] for which the user has a positive response.” The term “documents not of interest” as used in claim 1 of the ’276 patent means “documents [i.e., electronic files (including text or any type of media)] for which the user has a negative response or has ignored.”

18. The term “document” as used in claim 1(d) of the ’040 patent refers to the unseen document recited in the same limitation. The term “document” as used in claim 1(e), however, does not necessarily refer to the same document in claim 1(e).

19. The term “estimated probability” as used in claim 1(f) of the ’040 patent refers to the probability that was estimated in the previous claim 1(e).

As I have mentioned, you should give the rest of the words in the claims their plain and ordinary meaning in the context of the patent specification and prosecution history. In doing so, you should be mindful that a product need not match the specification and examples in order to infringe a patent. As I stated earlier, to infringe a product need only meet all the elements of a single claim. The claim language as I have construed it defines the scope of the patents for purposes of infringement and validity.⁶

⁶ *Opinion on Claim Construction, D.I. 347 (Jan. 25, 2012).*

3.3 INDEPENDENT AND DEPENDENT CLAIMS

This case involves two types of patent claims: independent claims and dependent claims. An independent claim sets forth all of the requirements that must be met in order to be covered by that claim. Thus, it is not necessary to look at any other claim to determine what an independent claim covers. In this case, the independent claims are claim 1 of the '040 patent and claim 1 of the '276 patent. The remaining Asserted Claims in both patents are dependent claims.

A dependent claim does not itself recite all of the requirements of the claim but refers to another claim or claims for some of its requirements. In this way, the claim “depends” on another claim or claims. A dependent claim incorporates all of the requirements of the claims to which it refers. The dependent claim then adds its own additional requirements. To determine what a dependent claim covers, it is necessary to look at both the dependent claim and any other claims to which it refers.

3.4 OPEN ENDED OR “COMPRISING” CLAIMS

The beginning portion, or preamble, of several of the Asserted Claims has the word “comprising.” The word “comprising” means “including the following but not excluding others.” A claim that uses the word “comprising” or “including” is not limited to products having only the elements that are recited in the claim, but also covers products that have additional elements.

If you find, for example, that Google Search includes all of the elements of a particular claim, the fact that Google Search might include additional elements does not avoid infringement of a claim that uses “comprising” language.

3.5 PATENT INFRINGEMENT GENERALLY

I will now instruct you on the rules you must follow when deciding whether Google has infringed the Asserted Claims. As I said before, infringement is assessed on a claim-by-claim basis. Patent law gives the owner of a valid patent the right to keep others from making, using, selling, or offering to sell a patented product within the United States during the term of the patent. Any business entity that has made, used, sold, or offered to sell a patented product without the patent owner's permission, infringes the patent. And this is so whether the infringer saw or knew about the patent, or even if the defendant later made the same invention.

To prove infringement, PUM must meet its burden of proof by a preponderance of the evidence, i.e., that it is more likely than not that all of the requirements for infringement have been proven.⁷

⁷ *Leader*, ¶ 3.6.

3.6 DIRECT INFRINGEMENT – KNOWLEDGE OF PATENT OR INTENT TO INFRINGE IS IMMATERIAL

Google will be liable for directly infringing an Asserted Patent if you find that PUM has proven by a preponderance of the evidence that Google has made, used, sold or offered for sale, or imported the invention defined in at least one claim of a patent.

One may directly infringe a patent without knowledge that what one is doing is an infringement of the patent. One may also infringe while believing in good faith that a particular action is not an infringement of any patent.⁸

⁸ *Power Integration*, ¶ 4.1.2.

3.7 DIRECT INFRINGEMENT – LITERAL INFRINGEMENT

There are two ways in which a patent claim may be directly infringed. First, a claim may be literally infringed. Second, a claim may be infringed under what is called the “doctrine of equivalents,” which I will address shortly.

To prove literal infringement, PUM must prove by a preponderance of the evidence that one of Google’s Accused Products include every element or requirement in at least one of the Asserted Claims. The presence of other elements beyond those claimed does not avoid infringement, as long as each and every claimed element is present in the Accused Product. However, if an Accused Product omits a requirement recited in one of the Asserted Claims, then that product does not literally infringe that claim.⁹

⁹ *DePuy*, ¶ 3.6

3.8 DIRECT INFRINGEMENT – DOCTRINE OF EQUIVALENTS

If you do not find literal infringement, you may consider infringement under the “doctrine of equivalents.” I have referred to the “doctrine of equivalents” before. Now it is time to explain this term.

You may find that Google’s Accused Products infringe one or more of the Asserted Claims, even if not all of the requirements of the claim are literally present in the Accused Products. You may find infringement in such circumstances if the components or features of the Accused Products are equivalent to those claimed in at least one of the Asserted Claims. This is called the doctrine of equivalents. To prevail on this allegation of infringement, PUM must prove that it is more probable than not that the Accused Products contain components or features that are the same or equivalent to each claimed requirement of the patented invention.

A claim element is present in an Accused Product under the doctrine of equivalents if the differences between the claim element and a corresponding aspect of the Accused Product are insubstantial. One way to determine this is to look at whether or not the corresponding aspect of the Accused Product performs substantially the same function, in substantially the same way, to achieve substantially the same result as the element in the claimed invention. An Accused Product may infringe under the doctrine of equivalents even if the component or feature of the Accused Product has additional components or features or if the Accused Product also has additional ways of performing those functions.

Application of the doctrine of equivalents is on an element-by-element basis, meaning that for a product or the use of a product to infringe an asserted claim under the doctrine of equivalents, the element of the asserted claim which is not literally found in the Accused Product must be present by equivalence. Therefore, the question is whether the Accused Product contains an equivalent for each element of the claim that is not literally present in the Accused

Product. The question is not whether the Accused Product as a whole is equivalent to the claimed invention as a whole.

There does not need to be a one-to-one correlation between a structure in the Accused Product and a corresponding claim requirement for there to be infringement under the doctrine of equivalents. For example, one structure in the Accused Product may satisfy two claim requirements under the doctrine of equivalents so long as the claim language does not specifically require more than one structure. In addition, the components or features of the Accused Products can be part of an integral structure and still be equivalent to a claimed component or feature.

It is not a requirement under doctrine of equivalents infringement that those of ordinary skill in the art knew of the equivalent when the patent application was filed or when the patent issued. The question of whether a product and its components are equivalent to what is defined in an asserted patent claim is to be determined as of the time of the alleged infringement.¹⁰

¹⁰ *DePuy*, ¶ 3.7.

3.9 INDIRECT INFRINGEMENT – GENERALLY

In addition to stopping infringement by those who are directly infringing, a patent owner like PUM also has the right to stop those who are known as “indirect infringers.” There are those who encourage or induce others to infringe a patent; this is known as “inducing infringement.”¹¹

¹¹ *Power Integration*, ¶ 4.4

3.10 INDIRECT INFRINGEMENT – INDUCING PATENT INFRINGEMENT

A party induces patent infringement if it causes, urges or encourages another to infringe a patent of which it is aware or should have been aware. Inducement to infringe a claim cannot occur unintentionally. This is different from direct infringement, which, as I have told you, can occur unintentionally.

PUM alleges that Google is liable for infringement by actively inducing its customers to infringe the Asserted Patents. To be liable for inducement to infringe, Google must have known of the patent and encouraged or instructed another person how to use a product or perform a method in a manner that you, the jury, find infringes the asserted claims. Willful blindness to the existence of an infringed patent is not a defense.

As with direct infringement, you must determine whether there has been active inducement on a claim-by-claim basis. Google is liable for active inducement of infringement of a claim if PUM proves by a preponderance of the evidence that:

1. Google's customers complete the act of direct infringement of an Asserted Claim by implementing or using the Accused Products;¹²
2. Google took action during the time the Asserted Patents were in force intending to cause the infringing acts by its customers; and
3. Google was aware of the Asserted Patents and: (i) knew that the acts, if taken, would constitute infringement of that patent; or (ii) Google believed there was a high probability that the acts, if taken, would constitute infringement of the Asserted Patents but deliberately avoided confirming that belief.

¹² *Akamai Technologies Inc. v. Limelight Networks Inc.*, 692 F.3d 1301 (Fed. Cir. Aug. 31, 2012).

In order to establish active inducement of infringement, you must find that Google specifically intended that its users infringe the Asserted Patents or that Google believed there was a high probability its users would infringe the Asserted Patents, but remained willfully blind to the infringing nature of their users' acts. To show inducement, however, the customer who directly infringes need not be aware of the patent or its infringement.

As with all other matters, the intent to cause infringement may be shown by direct or circumstantial evidence. The law does not make any distinction between the weight that you should give to either one; nor does it say that one is better than another.

For example—assuming all of the other requirements are satisfied—Google may be found to induce infringement of the Asserted Patents by instructing its customers to use the product as claimed in the patent, because it is inferred that end-users follow those instructions with respect to the accused product.

When considering whether Google knew or should have known that the induced actions would constitute infringement, you may consider all of the circumstances, including whether or not Google obtained the advice of a competent lawyer. There is no affirmative duty to seek opinion of counsel regarding infringement. However, opinion of counsel evidence - or lack of such evidence - may be probative of whether Google knew or should have known that its actions would cause direct infringement. While the decision not to obtain an opinion of counsel may be probative circumstantial evidence that a defendant knew or should have known that its action would cause direct infringement, that fact cannot replace any of the requirements to prove inducement.¹³

¹³ *Tarkus*, ¶ 3.9.

3.11 PRACTICING YOUR OWN PATENTS IS NOT A DEFENSE TO INFRINGEMENT

You may have heard or seen evidence that Google has obtained patents relating to its Accused Products. However, you are not permitted to assume that these facts mean that Google cannot infringe PUM's patent claims. As long as an Accused Product includes all of the elements of at least one of the patent claims, or if an Accused Product is found to be equivalent under the doctrine of equivalents, the PUM's patent claims are infringed by the Accused Product even if Google improved upon the patents and despite Google's patents relating to the Accused Products.¹⁴

¹⁴ *Power Integration*, ¶ 4.7.

4. INVALIDITY

4.1 INVALIDITY—GENERALLY

Patent invalidity is a defense to patent infringement. Even though the Patent Office allowed the claims of a patent, you have the ultimate responsibility for deciding whether or not the claims of the Asserted Patents are proven to be invalid.¹⁵

¹⁵ *Power Integration*, ¶ 5; *Tarkus*, ¶ 4.1.

4.2 PRESUMPTION OF VALIDITY

The granting of a patent by the Patent Office carries with it the presumption that the patent's subject matter is new, useful, and constitutes an advance that was not, at the time the invention was made, obvious to one of ordinary skill in the art. The law presumes that the Patent Office acted correctly in issuing the patent.

This presumption of validity puts the burden of proving invalidity on the challenger. While this presumption can be rebutted, the burden is on the challenger to do so. This burden requires that Google prove by clear and convincing evidence that in this case, each of the asserted claims is invalid. This burden always remains with Google and never shifts to PUM. Clear and convincing evidence is evidence that produces an abiding conviction that the truth of the factual contention is highly probable.

Each of the asserted claims is presumed valid independently of the validity of each other claim, and you must determine validity separately for each Asserted Claim. Therefore, even if you find one claim of a patent invalid, other claims of the same patent may still be valid.¹⁶

¹⁶ *Power Integration*, ¶ 5.1; *B. Braun*, ¶ 5.1; Google's proposed instruction that it need only prove invalidity by a preponderance of the evidence is contrary to law. *See Microsoft Corp. v. i4i P'ship*, --- U.S. ---, 131 S.Ct. 2238, 2250-51 (2011)

4.3 ANTICIPATION

A person cannot obtain a patent on an invention if someone else has already made the same invention. If the invention is not new, we say that it was “anticipated” by prior art. Prior art is the legal term used to describe what others had done in the field before the invention was made. Prior art is the general body of knowledge in the public domain, such as articles or other patents before the invention was made. It is not necessary that the prior art has been available to every member of the public. It must have been available, without restriction, to that segment of the public most likely to avail itself of the prior art’s contents.

An invention that is “anticipated” by the prior art is not entitled to patent protection. In order to prove that an invention is “anticipated,” a party must prove by clear and convincing evidence that a single piece of prior art describes or discloses each and every element of an Asserted Patent. A single prior art reference must also disclose those elements as arranged in the claim.

For purposes of anticipation, you should consider that which is expressly stated or present in the item of prior art, and also that which is inherently present. Anticipation by inherent disclosure is appropriate only when the reference discloses prior art that must necessarily include the unstated limitation. Inherency may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient.¹⁷

Google asserts in this action that the following references anticipate the Asserted Claims:

1. “Personal WebWatcher: design and implementation” by Dunja Mladenec (“Mladenec”);

¹⁷ PUM includes an instruction on inherent disclosure because Google included such an instruction despite that it never disclosed this theory or indicated it intended to prove inherent disclosure at trial. PUM objects to the inclusion of such an instruction.

2. "Collecting User Access Patterns for Building User Profiles and Collaborative Filtering" by Ahmad M. Ahmad Wasfi ("Wasfi");
3. "A Personal Evolvable Advisor for WWW Knowledge-Based Systems" by M. Montebello, W.A. Gray, and S. Hurley ("Montebello");
4. Autonomy Agentware ("Autonomy");
5. U.S. Patent No. 7,631,032 to Refuah ("Refuah");
6. "WebWatcher: A Tour Guide for the World Wide Web" by Joachims, Freitag, and Mitchell ("Joachims");

You must determine whether Google has proven anticipation by clear and convincing evidence for each reference and each Asserted Claim.¹⁸

¹⁸ *Power Integration*, ¶ 5.2; *Leader*, ¶ 4.5; *Laboratory Skin*, ¶ 3.4.

4.4 OBVIOUSNESS

In order to be patentable, an invention must not have been obvious to a person of ordinary skill in the art at the time the invention was made. A claimed invention is invalid as obvious if it would have been obvious to a person of ordinary skill in the field of the invention at the time the invention was made. In this case, it is undisputed that the invention in the '040 patent was invented in 1999.

Obviousness must be shown by clear and convincing evidence considering one or more items of prior art. Obviousness is determined from the perspective of a person of ordinary skill in the field of the invention. The issue is not whether the claimed invention would be obvious to you as layman, to me as a judge, or to a genius in the art, but whether it would have been obvious to one of ordinary skill in the art at the time it was made. Thus, the question is, would it have been obvious for a skilled person who knew of the prior art to make the claimed invention? If the answer to that question is yes, then the patent claims are invalid. Google has the burden of proving obviousness by the clear and convincing evidence standard.

Google contends that the Asserted Claims are invalid because the claimed inventions are obvious.

Keep in mind that although Google must prove the existence of each and every element of the claimed invention in the prior art, this alone does not itself prove obviousness. Most, if not all, inventions rely on building blocks of prior art. Accordingly, you must be careful not to determine obviousness using hindsight to reconstruct or piece together the invention; many true inventions can be seen as obvious after the fact. You should not consider what is known today or what was learned from the teachings of the patent. You should not use the patent as a road map for selecting and combining items of prior art. You must put yourself in the place of a person of ordinary skill at the time the invention was made.

You must also keep in mind that the test for obviousness is not whether or not it would have been obvious to try to make the invention, but rather, whether or not the invention would have been obvious to a person of ordinary skill in the inventor's field at the time the invention was made. In determining whether or not these claims would have been obvious, you should make the following determinations:

First, what is the scope and content of the prior art?

Second, what differences, if any, are there between each asserted claim and the prior art?

Third, what was the level of ordinary skill in the art at the time the invention of the patent was made?

Fourth, are there any objective indications of non-obviousness?

In addition, you may consider whether there was an apparent reason to combine or modify the prior art references in the fashion claimed by the patent at issue, but in doing so, you must guard against slipping into the use of hindsight.

I will explain each of these factors in more detail in a moment. Against this background, you will then decide whether the subject matter of each asserted claim would have been obvious or non-obvious to a person of ordinary skill in the pertinent art.¹⁹

¹⁹ *DePuy*, ¶ 4.3; *Power Integration*, ¶ 5.3; *Tarkus*, ¶ 4.5.

4.4.1 OBVIOUSNESS – SCOPE AND CONTENT OF THE PRIOR ART

As I have just instructed you, in arriving at your decision on the issue of whether or not the claimed inventions were obvious to one of ordinary skill in the art, you must first determine the scope and content of the prior art. This means that you must determine what prior art is reasonably pertinent to the particular problem that the inventors faced. Prior art is reasonably pertinent if it is in the same field as the claimed invention or is from another field that a person of ordinary skill would look to in trying to solve the problem the claimed invention was trying to solve. The prior art may include any of the following items if received into evidence:

1. patents that issued more than one year before the earliest effective filing date of the patents, which is December 28, 1999 for the '040 patent, and January 8, 2008 for the '276 patent;

2. publications having a date more than one year before the earliest effective filing date of the patent;

Google has asserted that the following prior art combinations allegedly render the Asserted Patents obvious in this action:

1. Mladenic and Wasfi and Montebello
2. Mladenic and Wasfi and Montebello and Joachims
3. Mladenic and Wasfi and Montebello and Refuah
4. Mladenic and Wasfi and Montebello and Joachims and Refuah
5. Mladenic and Wasfi and Montebello and Autonomy
6. Mladenic and Wasfi and Montebello and Joachims and Autonomy
7. Mladenic and Refuah
8. Mladenic and Montebello
9. Mladenic and Autonomy

10. Montebello and Refuah
11. Montebello and Autonomy
12. Wasfi and Montebello
13. Wasfi and Refuah
14. Wasfi and Autonomy

Google has the burden of proving by clear and convincing evidence that each such combination contains each and every element of the Asserted Patents.²⁰

²⁰ *DePuy*, ¶ 4.3.1; *Power Integration*, ¶ 5.4; *Tarkus*, ¶ 4.5.1

4.4.2 OBVIOUSNESS – DIFFERENCES OVER THE PRIOR ART

You must next consider the differences, if any, between the prior art and the claimed invention from the view of a person of ordinary skill in the art as of the filing date of the applications for the Asserted Patents. Your analysis must determine the impact, if any, of such differences on the obviousness or non-obviousness of the invention as a whole and not merely some portion of it.

In analyzing the differences between the claimed invention and the prior art, you do not need to look for a precise teaching in the prior art directed to the subject matter of the claimed invention. You may take into account the inferences and creative steps that a person of ordinary skill in the art would have employed in reviewing the prior art at the time of the invention. For example, if the claimed invention combined elements known in the prior art and the combination yielded results that were predictable to a person of ordinary skill in the art at the time of the invention, then this evidence would make it more likely that the claim was obvious. On the other hand, if the combination of known elements yielded unexpected or unpredictable results, or if the prior art teaches away from combining the known elements, then this evidence would make it more likely that the claim that successfully combined those elements was not obvious.

Importantly, a claim is not proved obvious merely by demonstrating that each of the elements was independently known in the prior art. Most, if not all, inventions rely on building blocks long since uncovered, and claimed discoveries almost of necessity will likely be combinations of what is already known. Therefore, you should consider whether a reason existed at the time of the invention that would have prompted a person of ordinary skill in the art in the relevant field to combine the known elements in the way the claimed invention does. The reason could come from the prior art, the background knowledge of one of ordinary skill in the art, the nature of the problem to be solved, market demand, or common sense. Accordingly, you

may evaluate whether there was some teaching, suggestion, or motivation to arrive at the claimed invention before the time of the claimed invention, although proof of this is not a requirement to prove obviousness.

If you find that a reason existed at the time of the invention to combine the elements of the prior art to arrive at the claimed invention, this evidence would make it more likely that the claimed invention was obvious.

Again, you must undertake this analysis separately for each claim that Google contends is obvious and for each obviousness combination that Google asserts.²¹

²¹ *DePuy*, ¶ 4.3.2; *Tarkus*, ¶ 4.5.2.

4.4.3 OBVIOUSNESS – RELIANCE ON HINDSIGHT IMPROPER

The question of obviousness is simple to ask but difficult to answer. A person of ordinary skill in the art is presumed to have knowledge of the relevant prior art at the time of the patentee's invention. If you find the available prior art shows each of the elements of the claims in suit, you must determine whether it would then have been obvious to a person of ordinary skill in the art to combine or modify these elements in the same manner as the Asserted Claims.

The difficulty that attaches to all honest attempts to answer this question can be attributed to the strong temptation to rely on hindsight while undertaking this evaluation. It is wrong to use the patent in suit as a guide through the maze of prior art references, combining the right references in the right way so as to achieve the result of the claims in suit. Rather, you must cast your mind back to the time of the invention and consider only the thinking of one of ordinary skill in the art, guided only by the prior art and what was known in the field.²²

²² *Power Integration*, ¶ 5.6

4.4.4 OBVIOUSNESS - LEVEL OF ORDINARY SKILL

Obviousness is determined from the perspective of a person of ordinary skill in the art to which the claimed invention pertains at the time the claimed invention was made. This person is presumed to know all the prior art that you have determined to be reasonably relevant. When faced with a problem, this ordinary skilled person is able to apply his or her experience and ability to the problem and also look to any available prior art to help solve the problem.

Factors to consider in determining the level of ordinary skill in the art include: (1) the educational level and experience of people working in the field; (2) the types of problems faced by workers in the art at the time of the invention and the solutions found to those problems; (3) the prior art patents, products or devices, and publications; and (4) the sophistication of the technology in the field at the time of the invention, including how rapid innovations were made in the art at the time of the invention.²³

²³ *DePuy*, ¶ 4.3.2; *Tarkus*, ¶ 4.5.3

4.4.5 OBVIOUSNESS – SECONDARY CONSIDERATIONS CONCERNING OBVIOUSNESS

In evaluating the issue of obviousness, you must also consider certain factors which, if established by PUM, may indicate that the invention would not have been obvious. No factor alone is dispositive, and you must consider the obviousness or non-obviousness of the invention as a whole. Some of these indications are:

1. Commercial success of products that practice the claims of the Asserted Patents;
2. A long-felt need in the art that was satisfied by the inventions claimed in the Asserted Patents;
3. Failed attempts by others to make the invention;
4. Copying of the invention by others in the field;
5. Praise of the invention by the infringer or others in the field;
6. Unexpected results achieved by the invention;
7. The taking of licenses under the patents by others;
8. Expressions of surprise by experts and those skilled in the art at the making of the invention; and
9. That the patentee proceeded contrary to accepted wisdom of the prior art.

There must be a connection between the evidence showing any of these factors and either the claimed invention, or the advantages that result from practicing the claimed invention, if this evidence is to be given weight by you in arriving at your conclusion on the obviousness issue.

For example, if commercial success of products that practice the Asserted Patents is due to brand name recognition, company goodwill, advertising, promotion, salesmanship or the like, or is due to features of the product other than those claimed in the Asserted Patents, then commercial success may have no relation to the issue of obviousness. However, a relationship

between commercial success and the claimed invention is presumed to exist if the product that is commercially successful is the invention disclosed and claimed.²⁴

When a patentee such as PUM comes forward with evidence of secondary considerations, the burden of proof that the claims were obvious in light of all the evidence remains on the defendant such as Google by clear and convincing evidence.

²⁴ *DePuy*, ¶ 4.3.4; *Tarkus*, ¶ 4.5.4

5. GOOGLE'S BREACH OF CONTRACT COUNTERCLAIM

In order to decide whether Google has proven its breach of contract claim against Dr. Konig by a preponderance of the evidence, you need to address two issues.

First, you must decide whether PUM has proven by a preponderance of the evidence that Google's breach of contract counterclaim is barred by the statute of limitations.

Second, if not barred by the statute of limitations, you must decide whether SRI assigned its rights to assert a breach of contract claim against Dr. Konig to Google.

Third, if you find such assignment, you must then decide whether Google has shown by a preponderance of the evidence that Dr. Konig breached his employment agreement with SRI by assigning his rights in the patents-in-suit to Utopy rather than SRI. If you find that Dr. Konig violated the employment agreement by assigning his rights to Utopy rather than SRI, you must then decide whether PUM has shown by a preponderance of the evidence that Dr. Konig's inventions were covered by Section 2870 of the California Labor Law which protects certain inventions from assignment to employers.²⁵

I will now instruct you on the law that governs these issues.

²⁵ *California Civil Jury Instruction 300 (Breach of Contract - Introduction)*; 35 U.S.C. §. 261; *Filmtec Corp. v. Allied-Signal Inc.*, 939 F.2d 1568, 1574 (Fed. Cir. 1991); *Rhone-Poulenc Agro S.A. v. Dekalb Genetics Corp.*, 284 F.3d 1323 (Fed. Cir.2002).

5.1 STATUTE OF LIMITATIONS

The law requires a party to timely file an action to pursue its alleged rights. This is called a statute of limitations. Statutes of limitations afford plaintiffs a reasonable time to present their claims, but protect defendants and the courts from having stale claims brought to the Court²⁶ If a party does not file an action within the time period set by the statute of limitations, it is time-barred.

As assignee under the agreement between SRI and Google, Google stands in shoes of the assignor, SRI, such that if SRI's right to bring a claim against Dr. Konig is barred by the statute of limitations, Google's claim is barred as well.²⁷

The statute of limitations that applies to this case requires a party such as SRI and Google to file a breach of contract action within three years after the breach allegedly occurred. The statute begins to run at the time of the breach, even if SRI did not know of its claim.²⁸ There are only two circumstances under which the statute of limitations can be tolled. They are:

- a) if the injury was inherently unknowable and SRI is blamelessly ignorant of the wrongful act and the injury complained of; or
- b) if Dr. Konig fraudulently concealed the facts that would have put SRI on notice of its claim.

²⁶ *United States v. Kubrick*, 444 U.S. 111, 117 (1979).

²⁷ *Madison Fund, Inc. v. Midland Glass Co.*, No. 394-1974, 1980 WL 332958 (Del. Super. Ct. Aug. 11, 1980)

²⁸ *Medtronic Vascular, Inc. v. Advanced Cardiovascular Sys., Inc.*, Civ. A. No. 98-80-SLR, 2005 WL 46553, at *4 (D. Del. Jan. 5, 2005).

Neither of these exceptions is lightly invoked, because equitable exceptions to statutes of limitations are narrow and designed to prevent injustice.²⁹ It is Google's burden to demonstrate by a preponderance of evidence that either of these two exceptions applies such that the statute of limitations should be tolled or stopped from running for a period of time.

In determining whether tolling applies, it is important to keep in mind that the law requires a claimant such as SRI to exercise reasonable diligence to inquire into facts, which if pursued, would put it on notice of a potential claim. Inquiry notice does not require actual discovery of the reason for the injury, nor does it require SRI's or Google's awareness of all of the aspects of the alleged wrongful conduct.³⁰ Patents serve to put the world on notice with respect to what the patentee claims to own and starts the limitations period running.³¹

Facts thus are not inherently unknowable if the plaintiff could have obtained access to information that would have alerted it to the defendant's alleged breach of contract. Just because a review of facts or documents is laborious does not make it impossible for purposes of the inherently unknowable injury rule.³²

The fraudulently concealed exception requires that Google show that Dr. Konig actively concealed information intending to prevent SRI from inquiring about the invention or obtaining

²⁹ *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 2012 WL 3201139, at *23 (Del. Ch. Aug. 07, 2012).

³⁰ *In re Dean Witter Partnership Litigation*, 1998 WL 442456, at *7 (Del. Ch., July 17, 1998).

³¹ *Sontag Chain Stores Co. v. National Nut Co.*, 310 U.S. 281, 295 (1940); *Medtronic Vascular, Inc. v. Advanced Cardiovascular Sys., Inc.*, Civ. A. No. 98-80-SLR, 2005 WL 388592, at *2 n.4 (D. Del. Feb. 2, 2005).

³² *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 2012 WL 3201139, at *22 n.185 (Del. Ch. August 07, 2012).

knowledge of it.³³ While the statute of limitations may not apply when the acts complained of are fraudulently concealed from the plaintiff, such application is suspended only until his rights are discovered by the exercise of reasonable diligence.³⁴ Thus, the statute begins to run again as soon as facts exist which would put a person of ordinary intelligence and prudence on inquiry notice such that, if pursued, they would lead to the discovery of such facts.³⁵

³³ *Medtronic Vascular, Inc. v. Advanced Cardiovascular Sys.*, No. 98–80–SLR, 2005 WL 46553, at *4 (D. Del. Jan 5, 2005) (internal citations omitted) *aff'd*, 182 F. App'x 994 (Fed. Cir. May 26, 2006).

³⁴ *Wright*, 2002 WL 31357891, at *2 (citing *Giordano v. Czerwinski*, 216 A.2d 874, 876 (Del. 1966)); *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A. 2d 312, 319 (Del. Supr. 2004) (internal quotation marks and citations omitted).

³⁵ *Lecates v. Hertrich Pontiac Buick Co.*, 515 A.2d 163, 176 (Del. Super. Ct. 1986); *Wal-Mart Stores, Inc. v. AIG Life Inc. Co.*, 860 A.2d 312, 319 (Del. 2004); *Wright v. Dumizio*, No. 08-292, 2002 WL 31357891, at *3 (Del. Super. Ct. Oct. 31, 2002); *Medtronic Vascular, Inc. v. Advanced Cardiovascular Sys., Inc.*, No. Civ. 98-80-SLR , 2005 WL 46553, at *4 (D. Del. Jan. 5, 2005), *aff'd*, 182 F. App'x 994 (Fed. Cir. May 26, 2006).

5.2 BREACH OF CONTRACT

5.2.1 ASSIGNMENT OF CONTRACT RIGHTS

You must determine whether the contract assigned SRI's breach of contract right Google contends that it acquired SRI's right to assert SRI's breach of contract claim against Dr. Konig.^[1] PUM contends that, pursuant to § 4 of the SRI/Google Purchase Agreement, no such transfer took place. Google must prove by a preponderance of the evidence that it lawfully acquired SRI's rights, if any, against Dr. Konig such that Google can assert SRI's breach of contract claim.

5.2.2 BREACH OF CONTRACT ELEMENTS

If you decide that the statute of limitations does not bar the breach of contract claim, and that Google acquired SRI's right to assert a breach of contract claim against Dr. Konig, to find Dr. Konig liable for breach of contract to SRI, Google must prove all of the following by a preponderance of the evidence:

1. That Dr. Konig and SRI entered into a contract;
2. That SRI did all, or substantially all, of the significant things that the contract required it to do or that it was excused from doing those things;
3. That Dr. Konig materially breached the contract; and
4. That SRI was injured by that failure.

As I will now explain, in determining whether Dr. Konig materially breached his employment agreement, you must decide whether Dr. Konig conceived of the inventions while

^[1] Google incorrectly states that the parties do not contest whether SRI assigned to Google a right to bring a breach of contract claim against Dr. Konig. Google Proposed Final Jury Instructions at § 3.1. This is a contested issue.

he was employed at SRI and, if so, whether the inventions fall within the scope of the agreement or are otherwise protected under section 2870 of the California Labor Code. [3]

I will address each of these in turn.

5.3 CONCEPTION

As I just mentioned, in determining whether Dr. Konig breached his employment agreement, you must first determine whether he conceived of the inventions while he was employed by SRI. To do this, you must first determine the meaning of the word “conception” as used in Dr. Konig’s employment agreement. Once you decide the meaning that was intended, you must then decide whether Dr. Konig conceived of the inventions while he was employed at SRI. If you find that Dr. Konig conceived of the inventions after he left SRI, then they cannot be subject to the employment agreement.

Google claims that the term “conceived” under the Employment Agreement was intended by the parties to mean in the “layman’s sense,” such that Dr. Konig had to assign all inventions he got the idea for while employed at SRI. PUM claims that the term “conceived” relates to the technical definition of “conception” according to patent law, which I will explain to you. Google must prove by a preponderance of the evidence that its interpretation of what the parties intended is correct.

I will now explain the patent law definition of conception.³⁶ Under the law, conception is the formation in the mind of the inventor of a definite and permanent idea of the complete and operative invention as it is thereafter to be applied in practice, even if the inventor did not know at the time that the invention would work. Conception of an invention is complete when the idea is so clearly defined in the inventor’s mind that, if the idea were communicated to a person having ordinary skill in the field of the technology, he or she would be able to make the invention without undue research or experimentation or the exercise of inventive skill. An idea

³⁶ Late in the evening the night the instructions were due, Google inserted a lengthy footnote seeking to re-argue its summary judgment argument on conception, already decided by the Court. This argument is improper and should be stricken. PUM will respond to Google’s proposed instruction, if necessary, at an appropriate time.

is definite and permanent when the inventor has a specific settled idea, a particular solution to the problem at hand, not just a general goal or research plan he hopes to pursue.³⁷ Conception must include every feature or limitation of the claimed invention.

This requirement does not mean that the inventor has to have a prototype built, or have actually explained the invention to another person. But, there must be some evidence beyond the inventor's own testimony that confirms the date on which the inventor had the complete idea. An inventor cannot prove he or she possesses a complete mental picture of her invention until she can describe the complete invention with particularity.³⁸ Conception may be proven when the invention is shown in its complete form by drawings, disclosure to another person, or other forms of evidence presented at trial.

The rules about when conception occurs ensure that an inventor can claim rights to an invention "only when an idea is so far developed that the inventor can point to a definite, particular invention."³⁹

An agreement requiring an employee to disclose all improvements, discoveries and inventions developed by him while employed and specifying that such matter becomes the property of the employer does not give an employer a mortgage on all thoughts occurring to the employee, but is limited to those ideas which are not mere alternatives drawn from the employee's general knowledge, but can in fact be deemed an improvement, discovery or invention and are sufficiently concrete to be considered a 'development' or 'conception'. Ideas which do not meet these standards do not become the property of the employer.⁴⁰

³⁷ *Burroughs Wellcome Co. v. Barr Labs, Inc.*, 40 F.3d 1223, 1228 (Fed. Cir. 1994).

³⁸ *Burroughs Wellcome Co. v. Barr Labs, Inc.*, 40 F.3d 1223, 1228 (Fed. Cir. 1994).

³⁹ *Id.*

⁴⁰ *Koehring Co. v. E. D. Etnyre & Co.*, 254 F. Supp. 334, 362 (D.C. Ill. 1966).

5.4 CONTRACT INTERPRETATION

In deciding the meaning of the term “conception,” you must determine the usage that was intended in the context of the employment agreement at the time the contract was created. In making this determination, you must consider the objective intent of the parties as evidenced by the words of the contract, and the surrounding circumstances, rather than the subjective intent of one of the parties.

A party’s undisclosed intent or understanding is irrelevant to contract interpretation.⁴¹ What is relevant is the outward manifestation of that party’s intent whether in written or spoken words, or deeds, or from the surrounding circumstances.

In deciding what the words of a contract objectively mean, you should consider the whole contract, not just isolated parts. You should use each part to help you interpret the others, so that all the parts make sense when taken together. You should also consider the circumstances surrounding the signing of the agreement.

You should assume that the parties intended technical words used in the contract to have the meaning that is usually given to them by people who work in that technical field, unless you decide that the parties clearly used the words in a different sense.

In determining the meaning of a term of the contract, you must first consider all of the other instructions that I have given you. If, after considering these instructions, you still cannot agree on the meaning of the term, then you should interpret the contract term against the party

⁴¹ *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.*, 135 Cal. Rptr. 2d 505, 514 (Cal. Ct. App. 2003) (internal quotation marks, alterations and citations omitted); *see also Progressive Int’l Corp. v. E.I. du Pont de Nemours & Co.*, 2002 WL 1558382, at *7 (Del. Ch. July 9, 2002).

that drafted the term. Ambiguities also should be construed against the employer in a contract to assign inventions.⁴²

⁴² *California Civil Jury Instructions 303 (Breach of Contract - Essential Factual Elements), 314 (Interpretation - Disputed Term), 316 (Interpretation - Meaning of Technical Words), 317 (Interpretation - Construction of Contract as a Whole), and 320 (Interpretation - Construction Against Drafter) and Cal Civil Code section 1654; Hercules Glue Co. v. Littooy, 25 Cal. App. 2d 182, 186 (Cal. Ct. App. 1938).*

5.5 EXCEPTION TO EMPLOYMENT AGREEMENT UNDER SECTION 2870 OF THE CALIFORNIA LABOR CODE

PUM and Dr. Konig maintain that even if you were to find that Dr. Konig “conceived” the inventions at issue while employed at SRI, Dr. Konig did not breach the agreement because Section 2870 of the California Labor Code protected those inventions from assignment to SRI.

Section 2870 prohibits an employer from requiring that an employee assign his invention rights to the employer unless certain conditions are met, and it specifically exempts from assignment inventions that an employee develops entirely on his or her own time without using the employer’s equipment, supplies, facilities, or trade secret information. There is no dispute that Dr. Konig did this.

The inventions will not be exempted from an employment agreement, however, if they either: (1) relate at the time of conception or reduction to practice of the invention to the employer’s business, or actual or demonstrably anticipated research or development of the employer; or (2) result from any work performed by the employee for the employer.

The purpose of this provision is to limit an employee’s duty to assign his or her inventions under an employment agreement to those inventions that are within the subject matter of the employment relationship.⁴³ Any employment agreement provision which purports to apply to an invention that is not covered by the exceptions of Section 2870 is against the public policy of the State of California and is void and unenforceable.

An invention may be found to be not related to an employer’s business even when the invention is in the same general field, or where the employee had expertise in the technology

⁴³ Cal Labor Code. § 2870; *Applera Corp.--Applied Bios. Grp. v. Illumina, Inc.*, 375 F. App’x 12, 17 (Fed. Cir. 2010).

prior to working for the employer or the employer knew about the invention for many years but did nothing to assert ownership even after the patents issue.⁴⁴

If you find that Google has proven by a preponderance of the evidence that Dr. Konig conceived of the inventions while he was also employed by SRI, then you must decide whether PUM has established by a preponderance of the evidence that section 2870 protects Dr. Konig's inventions.

⁴⁴ *Applera-Applied Biosys. Grp. Corp. v. Illumina, Inc.*, Civ. A. No. 07-2845, 2008 WL 170597, at *1-2, 4 (N. D. Cal. Jan. 17, 2008).

6. DELIBERATION AND VERDICT

6.1 INTRODUCTION (JOINTLY SUBMITTED)

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.

6.2 UNANIMOUS VERDICT (JOINTLY SUBMITTED)

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.

6.3 DUTY TO DELIBERATE (JOINTLY SUBMITTED) ⁴⁵

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.

⁴⁵ *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 (JOINTLY SUBMITTED) ⁴⁶

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.

⁴⁶ *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 (JOINTLY SUBMITTED) ⁴⁷

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.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ Regina Murphy

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⁴⁷ *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).

February 21, 2014

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2014, 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 February 21, 2014, upon the following individuals in the manner indicated:

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