IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PERSONALIZED USER MODEL, L.L.P., Plaintiff, v. GOOGLE INC., Defendant.	)	C.A. No. 09-525-LPS **JURY TRIAL DEMANDED** **PUBLIC VERSION**
GOOGLE, INC. Counterclaimant, v. PERSONALIZED USER MODEL, LLP and YOCHAI KONIG Counterdefendants.	)	

REPLY BRIEF IN SUPPORT OF GOOGLE'S *DAUBERT* MOTION TO EXCLUDE CERTAIN OPINIONS OF DR. MICHAEL PAZZANI

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I. DR. PAZZANI HELD HIMSELF OUT AS A LEGAL EXPERT IN HIS REPORT

The heart of Personalized User Model, L.L.P.'s ("PUM") Opposition is devoted to the argument that "Dr. Pazzani Does Not Offer Legal Opinions." (Opp. at 2) (emphasis in original). Yet, this is exactly what Dr. Pazzani has offered. The very title of the challenged section from Dr. Pazzani's report reads [redacted] and is, itself, a legal conclusion. (Pazzani Report § XI, p. 296.) Dr. Pazzani is not qualified to offer such an opinion, or even provide an analysis of all the issues necessary to make such a determination. PUM does not argue to the contrary.

Also non-credible is PUM's argument that "[r]ather than base his opinions on an interpretation of a California statute, Dr. Pazzani bases opinions on his experience, technical expertise, and review of these complex technologies." (Opp. at 3-4.) In paragraph ¶ 577 of his report, Dr. Pazzani states that he has been provided with a copy of Cal. Labor Code § 2870 and is [redacted] due to his experience as Vice-President of Research and Development at Rutgers. Thus, the sum total of his bona fides for opining that SRI did not acquire rights to the patents-in-suit is Dr. Pazzani's *ex post facto* exposure to Cal. Labor Code § 2870 and his claimed expertise in "this issue" based on his experience at a New Jersey institution. (Pazzani Report ¶ 577.)

Dr. Pazzani confirmed in deposition that he is holding himself out as a legal expert and offering legal opinions, when describing the process by which he rendered his opinion that SRI did not acquire rights to the Asserted Patents:

[redacted]

(Sohn Decl., Ex. A (Pazzani Dep.) at 249:3-14.) As explained in Google's Opening Brief, this is all improper. Dr. Pazzani is not a legal expert or an expert in Section 2870, and for Dr. Pazzani to profess expertise in this area and then apply the statute to determine that "SRI did not acquire rights to the inventions in the patents-in-suit" violates Rule 702 and *Daubert*. Dr. Pazzani's proffered testimony would also be unduly prejudicial under Rule 403, as explained in Google's Opening Brief, since Dr. Pazzani's claimed expertise would likely confuse and mislead the jury into thinking that Dr. Pazzani actually has relevant expertise in legal issues surrounding the meaning and interpretation of Section 2870, or even such ownership disputes generally. (Opening Br. at 7.)

II. DR. PAZZANI'S INEXPERIENCE WITH SECTION 2870 CAUSES HIM TO FATALLY MISAPPLY THE STATUTE

As explained in Google's Opening Brief, Dr. Pazzani's inexperience with Section 2870 also caused him to fatally misapply the statute, by conflating the separate "resulting from" and "relating to" prongs of the statute. (Opening Br. at 10-11.) California law makes clear that these two prongs are "independent scenarios" that can each render an invention-assignment contract enforceable. (*Id.*)

PUM has no persuasive rebuttal to Google's explanation of how Dr. Pazzani conflated these two prongs. PUM just quotes the concluding sentence of Dr. Pazzani's report, which states that "the inventions in the patents-in-suit did not result from Dr. Konig's work at SRI nor were they related to any other work SRI was doing or then contemplated." (Opp. at 8.) But PUM again ignores the real issue. As Google pointed out in its Opening Brief, Dr. Pazzani's opinion on the "resulting from" prong was explicitly based on his analysis of the "related to" prong. (Opening Br. at 10 (citing Pazzani Report ¶ 580.)) Dr. Pazzani makes this clear in paragraph 580

of his report, the paragraph that explains why the "resulting from" prong is not satisfied. The first and last sentences in this paragraph state Dr. Pazzani's ultimate conclusion that the patented invention did not result from Dr. Konig's work at SRI. But the rest of this paragraph, which purports to support this conclusion, is explicitly devoted to the relatedness of [REDACTED] to the patented personalized search inventions. (Opening Br. at 10 (quoting Pazzani Report ¶ 580 [REDACTED]

(emphasis added)). Moreover, PUM's Opposition Brief actually embraces the fact that Dr. Pazzani conflated the "resulting from" and "relating to" prongs. On page 9, PUM states:

> [C]hallenges to Dr. Pazzani's understanding of what Dr. Konig worked on at SRI have no effect on Dr. Pazzani's opinion that speech recognition and speaker verification research did not result in the patented technologies in this case. *See* Pazzani Report ¶ 580 ("Personalized user search is no more related to speech recognition and speaker verification than are medical diagnosis or computational science that may use machine learning techniques."))

(Opp. at 9) (emphasis added). In other words, PUM seeks to sidestep Dr. Pazzani's analysis (or lack thereof) of Konig's work at SRI by saying that this has "no effect" on Dr. Pazzani's opinion about whether the patented inventions resulted from Konig's work, and by admitting that his opinion that on that subject flows entirely from the relatedness of personalized search to speech recognition.

Even more, as explained in Google's Opening Brief, there is no indication in his report that Dr. Pazzani has applied – or even understands – the California rule requiring that the "related to" prong of Section 2870 be interpreted "broadly." (Opening Br. at 7.) In response, PUM argues that "Google [] does not assert that Dr. Pazzani's testimony is inconsistent with

those interpretations." (Opp. at 7.) To the contrary, Google does assert, and has shown, that Dr. Pazzani's opinion on the "related to" prong is inconsistent with the California law requiring that this phrase be interpreted broadly. Google has consistently asserted and shown that the patented inventions do "relate to" SRI's business and research under the proper, broad interpretation of this phrase. (*See, e.g.*, D.I. 413 at 5-6.) By contrast, Dr. Pazzani contends that the patented inventions do not "relate to" SRI's business or research under Section 2870, and he does so apparently unschooled in the requirement that this phrase be interpreted "broadly." Again, PUM cannot contend that Dr. Pazzani's "related to" opinion is a purely technical opinion rather than a legal application of Section 2870, because Dr. Pazzani relies on this opinion to reach the legal conclusion that [REDACTED] (Pazzani Report § XI, p. 296.)

PUM cannot brush aside Dr. Pazzani's legal errors in the interpretation and application of Section 2870 by saying that this is an issue for cross-examination rather than exclusion. (Opp. at 8.) A misapplication and mischaracterization of law – such as Dr. Pazzani's legally erroneous application of Section 2870 – is precisely the sort of error that warrants this Court's *Daubert* gatekeeping authority. Indeed, there really would be no way for the jury to discern what the law actually requires from a cross-examination. Nor should the jury be tasked with doing so. Rather, as the Federal Circuit has said: "We encourage exercise of the trial court's gatekeeper authority when parties proffer, through purported experts, not only unproven science, but markedly incorrect law." *Hebert v. Lisle Corp.*, 99 F.3d 1109, 1117 (Fed. Cir. 1996).

III. DR. PAZZANI PROVIDES NO TECHNICAL ANALYSIS OF KONIG'S WORK AT SRI

As explained in Google's Opening Brief, a proper expert inquiry into whether the patented inventions resulted from Konig's SRI work would have required Dr. Pazzani to conduct

a thorough technical analysis of that work, as befits a technical expert. Instead, in just two sentences, Dr. Pazzani states that [redacted] (Pazzani Report ¶ 576.) He does not cite a single technical document to support this statement or give any further technical details on Konig's work. As explained in Google's Opening Brief, Dr. Pazzani's lack of analysis into Dr. Konig's work means that he lacks a reliable basis for his opinion that the patented inventions did not result from that work. (Opening Br. at 8-9.)

PUM's attempt to rehabilitate Dr. Pazzani's analysis (or lack thereof) again falls flat. PUM points to Dr. Pazzani's list of "materials considered" that includes publications relating to Konig's SRI work, Konig's emails from his time at SRI, and deposition transcripts of various SRI scientists. (Opp. at 8-9.) But PUM does not dispute that Dr. Pazzani failed to cite or discuss <u>any</u> of these materials when discussing the subject-matter of Konig's work. His discussion of Konig's work is limited to the two bare sentences from ¶ 576, recounted above. Fed. R. Civ. P. Rule 26(a)(2)(B)(i), however, requires that an expert provide "the basis and reasons for" his opinions. Dr. Pazzani's report gives only a purported conclusion with no indication as to what extent he actually read or thought about those materials. In other words, Dr. Pazzani provided no basis or reasoning for his opinions about the nature and scope of Konig's SRI work, much less the laundry list of documents included in his materials considered but not actually addressed in the report. And Dr. Pazzani will not be able to provide the jury with any technical education about Dr. Konig's work, beyond his two sentences stating that Dr. Konig did speech recognition/speaker verification and used common machine learning tools. Fed. R. Civ. P. 26(a)(2)(B)(i); *Medtronic, Inc. v. Boston Sci. Corp.*, 777 F. Supp. 2d 750, 769 n. 112 (D. Del. 2011) ("an expert cannot testify at trial beyond the opinions offered in his/her expert report.")

As explained in Google's Opening Brief, these two high-level sentences do not provide anything above and beyond what PUM's own counsel could tell the jury, and so will not "help the trier of fact to understand the evidence" under Rule 702.

IV. DR. PAZZANI MAKES SWEEPING STATEMENTS THAT FAIL TO EVEN ADDRESS THE EVIDENCE CONTRADICTING HIS OPINIONS

Based on his two-sentence description of Konig's SRI work as [REDACTED] is not closely related to personalized search, Dr. Pazzani makes the sweeping conclusion that the patented inventions could not have resulted from Konig's work at SRI. (Pazzani Report ¶ 580.) As explained in Google's Opening Brief, however, Dr. Pazzani fails to even address the documents from Utopy (Konig's own company) that flatly contradict this conclusion. For example, the Powerpoint entitled [REDACTED] (Opening Br. at 9.) The Powerpoint entitled [REDACTED] says that the Personal Web technology was [REDACTED] (*Id.*) There can be no real dispute that these documents contradict Dr. Pazzani's conclusion that the patented technology could not have resulted from Konig's speech research at SRI. Nor is there any dispute that Dr. Pazzani failed to address these documents in reaching his conclusion.

The same goes for the testimony of Doug Bercow, SRI's 30(b)(6) representative, who testified unequivocally that SRI was doing [REDACTED] research during Konig's SRI tenure to solve the [REDACTED] problem, the same problem that the patented Internet search inventions were designed to solve. (Opening Br. at 12.) PUM does not dispute that Dr. Pazzani failed to address this pivotal 30(b)(6) testimony in opining that the patented inventions did not relate to SRI's business or research.

In response to Google's cited caselaw about how exclusion is proper when an expert fails to consider contrary data, PUM asserts that "[n]or does Google point to contrary *data* to support the opposite conclusion that Dr. Konig's work at SRI did relate to or result in the patented technology." (Opp. at 12) (emphasis in original). Apparently PUM is trying to distinguish Google's caselaw by saying that the [REDACTED] and Bercow testimony discussed above are not "data." But this is just illogical. By any reasonable interpretation, these materials are highly relevant data points (some from the inventors' own company's materials) supporting the position that the patented technology resulted from Konig's speech research at SRI and related to SRI's business or research. PUM does not explain what definition of "data" would exclude these materials, or why the rule requiring experts to consider contrary data would not extend to these materials.

PUM also says that Google's cited caselaw involves experts who make "sweeping statements without support." (Opp. at 12.) But that is precisely the case here. Based on a two sentence description of Konig's work, bereft of any evidentiary support, Dr. Pazzani states that the patented inventions could not have resulted from that work.

V. PUM CANNOT BRUSH ASIDE DR. PAZZANI'S RELIANCE ON THE WRONG DATE

As explained in Google's Opening Brief, Dr. Pazzani also conducted his "related to" inquiry under the wrong date. He says that the patented inventions were not related to SRI's business or research as of [REDACTED] 1999. But PUM does not dispute the relevant analysis is whether the inventions related to SRI's business or research as of August 1999 or earlier, during Konig's SRI tenure. (Opening Br. at 13-14.) It is unclear what more PUM expects Google to

provide on this issue.[1] Indeed, PUM and Dr. Pazzani can hardly dispute that reliance on the wrong date renders his opinions irrelevant, since Dr. Pazzani himself contends that one of SRI's projects [redacted] is irrelevant to the "related to" inquiry because it did not commence until a couple years after Konig left SRI. (Pazzani Report ¶ 582.) And it is well-accepted in a variety of contexts that courts should grant *Daubert* motions where an expert proffers testimony that is pegged to a demonstrably incorrect or irrelevant date. *See, e.g., In re Xcelera.com Sec. Litig.*, No. 00-11649, 2008 WL 7084626, *1 (D. Mass. April 25, 2008) (granting *Daubert* motion given expert's "[f]ailure to use relevant event dates"); *see also* Peter Menell et al., PATENT CASE MANAGEMENT JUDICIAL GUIDE at 7-26 (Federal Judicial Center 2009) ("Another commonly brought motion seeks to exclude an expert opinion on the grounds that the expert used the wrong date for the hypothetical negotiation . . . in the case where the date used bears no logical relationship to the date of first infringement, the court should grant the motion.") Finally, because it is PUM and Konig who bear the burden of proving entitlement to the Section 2870 exemption, not Google,[2] Dr. Pazzani's analysis regarding a legally irrelevant date cannot help them meet this burden.

VI. CONCLUSION

For the foregoing reasons, Google respectfully requests that the Court exclude the opinions in Section XI of Dr. Pazzani's report.

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[1] PUM's suggestion that Dr. Pazzani's date error was "inadvertent" (Opp. at 11 n. 11) does not change its impact.

[2] *See* Cal. Labor Code § 2872 ("the burden of proof shall be on the employee claiming the benefits of [Section 2870].")

Respectfully submitted,

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CERTIFICATE OF SERVICE

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