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.	)	

REPLY IN SUPPORT OF PUM'S MOTION IN LIMINE TO PRECLUDE GOOGLE FROM REFERRING TO RECENT CHANGES IN THE ACCUSED TECHNOLOGY

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March 5, 2014

Argument or evidence that Google no longer uses (or plans to stop using) accused functionalities will confuse and prejudice the jury. The jury will likely believe Google has stopped using the patented technology, that current or future versions of Google's products do not infringe, and that the patented technology must not have been important to Google's success. This is why Google wants to introduce such evidence. Resp. at 2. But there is no reason to believe the replacement technology does not also infringe. Although Google asserts it no longer uses or plans to use certain accused functionalities, PUM cannot now evaluate whether Google has actually changed its functionality or still infringes without discovery. PUM thus does not have a meaningful opportunity to rebut Google's argument. This is not shifting the burden to Google to prove non-infringement, but acknowledging that PUM has not had the opportunity to determine what these changes actually mean. Further, any such changes are not relevant because they do not address the commercial success of these products when introduced, and damages are for another day. Further, any minimal relevance is outweighed by the prejudice to PUM.[1]

The timing of Google's disclosures is not coincidental. Google told PUM that it had replaced the Kaltix twiddler with the "Merlin" twiddler in 2012, but refused to produce documents unless PUM would agree to further delay the case. Google then sat on this information for two years without supplementing its production, only to produce documents eight days ago that purportedly show it no longer uses the rephil, category navboost, or session profilers. Had these changes actually been material, however, Google had a duty to seasonably supplement under Rule 26(e) in 2012, not on the eve of trial. Google should not be allowed to benefit from the uncertainty caused by its own delay.

[1] Google's argument that it may need to reference the changes so witnesses can provide "truthful answers" is a diversion. There are less prejudicial ways to do so and that is a far cry from arguing, as Google proposes, that Google's cessation of using accused instrumentalities shows the patented technology was not important to Google's success.

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 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 March 5, 2014, upon the following individuals in the manner indicated:

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