



1313 North Market Street
P.O. Box 951
Wilmington, DE 19899-0951
302 984 6000
www.potteranderson.com

Richard L. Horwitz
Partner
Attorney at Law
rhowitz@potteranderson.com
302 984-6027 Direct Phone
302 658-1192 Fax

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VIA ELECTRONIC MAIL

The Honorable Leonard P. Stark
United States District Court
District of Delaware
844 North King Street
Wilmington, DE 19801

Re: *Personalized User Model LLP v. Google Inc.*, C.A. No. 09-525-LPS

Dear Judge Stark:

Google respectfully files this letter in response to PUM's March 8, 2014 disclosure of deposition testimony to be played at trial. Google sought to include the below explanation of its positions in the parties' joint letter to the Court, but PUM refused this request. Accordingly, Google is setting forth its additional grounds for objecting to PUM's disclosures below.

In addition to those objections set forth in the chart filed with the Court as an attachment to the parties' joint letter to Court, Google objects to the entirety of PUM's deposition designations for March 11 because they are drastically different from what PUM disclosed when it made its pretrial disclosures. Specifically, at the 3 p.m. March 8 deadline for PUM to identify deposition designations for use during trial on Tuesday, March 11, PUM served on Google designated deposition testimony from 10 separate witnesses. PUM had originally designated approximately 950 minutes of testimony from these witnesses, but its March 8 designations totaled only 92 minutes. This means that the testimony designated is drastically different than the testimony Google previously reviewed for objections and counter-designations. This last-minute reduction effectively requires Google to re-review the entirety of all 10 deposition transcripts to identify counter-designations. It may be that Google did not previously counter-designate certain testimony because PUM had already designated that testimony. Now that PUM has withdrawn those designations, Google needs to re-review the testimony to determine if any of PUM's previous designations should be counter-designated for completeness.

Google has made a good faith effort to respond to the new, reduced designations, pulling attorneys away from other pre-trial responsibilities two days before trial to try to address the designations in the time allotted. But, these are not just one or even a few depositions that PUM has changed. It is 10. Google could not conceivably complete in such a limited timeframe the full review of the 10 depositions necessary to ensure that PUM did not remove any key testimony from its final trial designations. Accordingly, Google reserved the right to identify additional counter designations to cure the resulting prejudice and ensure that its counter-designations are complete in light of PUM's recent and drastic changes. But, this does not cure the prejudice to Google. Given the amount of work necessary to analyze PUM's changes to its designations, Google may not be able to complete that work by Tuesday, March 11, the day

PUM plans to play the testimony, and certainly will not be able to do so without diverting Google's attorneys from other pretrial work. Google's trial preparations should not be interrupted simply because PUM finally tried to narrow its case on the eve of trial.¹

There is no reason why this drastic change could not have been done earlier. Google has been asking PUM to reduce its deposition designations (which amounted to about 34 hours in the Pre-Trial Order) for weeks. And since PUM presents its case first at trial, it has always been in a position to reduce these designations, as they would not be dependant on anything other than how PUM chose to present its own case. PUM's explanation for its drastic change in its deposition designations was that it "lost five hours of trial time," presumably referring to the Court limiting each party to 17 hours of trial time, rather than 22 hours. This does not justify PUM's last-minute changes. First, the Court never told the parties that they would have 22 hours per side; the Court said that it would give the parties no more than 22 hours. Second, the Court limited the parties to 17 hours per side on February 27, nine days before PUM's trial deposition designations were served. Nothing prevented PUM from reducing at least some of its deposition designations earlier. Indeed, PUM waited until three minutes before its deadline on March 8 to reduce its designations. Finally, PUM reduced its designations from these ten witnesses by about 14 hours—not the 5 hours of trial time PUM "lost." Google is working with PUM to, if possible, find a solution to the problem caused by PUM's changed deposition designations.

A second issue that has arisen is whether deposition testimony from the same witness can be played in different phases of the trial. PUM indicates it may present deposition testimony of the same witnesses in Phase 3 of the trial, even though paragraph 22 of the Pretrial Order indicates that deposition testimony will all be played together. Google did not understand the Court's subsequent order stating that there would be four phases of the trial to change this. Google does not object to PUM's plan for playing depositions, but only if it is acceptable to the Court and mutual—meaning that Google may play deposition testimony from the same witness in multiple phases of the case as well. Google further requests that if it is necessary to counter-designate testimony in Phase 3, which was already played in Phase 1, for completeness, that Google be permitted to do that, and that Google not get charged for that time.

Respectfully,

/s/ Richard L. Horwitz

Richard L. Horwitz

Enclosures

cc: Clerk of the Court (via electronic mail)
Counsel of Record (via electronic mail)

¹ During the parties' meet and confer process PUM stated that Google should have no basis to object to PUM's drastic reductions because the agreed the time between disclosure of deposition designations and counters and objections is 30 minutes longer than Google had originally proposed. This additional 30 minutes, however, obviously does not provide the time needed to remedy these drastic changes to PUM's designations.