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March 13, 2014

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

BY ELECTRONIC FILING

Re: *Personalized User Model, L.L.P. v. Google, Inc.*
C.A. No. 09-525 (LPS)

Dear Judge Stark:

PUM should be permitted to use on cross examination of Jonathon Alferness two letters (PTX 1446 and 1447, Exs. A and B) that it sent to Google on January 22, 2008, and February 15, 2008, respectively, offering to sell or license the patents-in-suit, to which Google never responded. These letters should be admitted to remedy the prejudice caused to PUM by Mr. Alferness' testimony that he travelled from California to testify because Google takes "very seriously" intellectual property rights. This is compounded by the fact that Google has sought to portray PUM in this trial as a shell company with no offices that exists for no purpose other than to sue Google.

PUM raised just this concern during the pretrial conference when PUM's counsel argued that the letters are relevant and admissible to rebut the anticipated Google argument that Google is a company that respects intellectual property rights:

> The letters are relevant because Google is going to presumably get up and say they're a company that respects intellectual property, that they take patent threats seriously. And the jury is going to know why we're here and why we got here. And we certainly should have the opportunity to tell the jury how we got here and counter that story that they're likely to tell: That they're such a great company and they respect intellectual property. It's background information that is important for the jury to know how we got here.

Pretrial Conf. Tr. 50:6–15 (Ex. C).

The Court then asked Google's counsel whether PUM's concern was well-founded:

> I think my main question is are you going to get up and say how wonderful Google is and it always respects patents right [sic], et cetera, et cetera? If so, doesn't that open up the door to the background here?

Id. at 51:13–16.

Google's counsel did not answer whether Google would indeed seek to introduce evidence that Google respects intellectual property rights, but instead responded that "we say we don't infringe, and that is the reason why we respect intellectual property," and that such evidence would not "open the door" to the letters. *Id.* at 51:19–24.

The March 13 testimony of Google's corporate representative, Jonathan Alferness, went well beyond Google's representation at the pretrial conference and opened the door to the letters. Specifically, Google's counsel asked Mr. Alferness, "why did you come from California to this courthouse to testify today," March 13, 2014, Trans. 1162:18–19 (Ex. D), and Mr. Alferness testified that he came because of how seriously Google takes intellectual property rights:

> Google, Google works hard to innovate. We believe very strongly in continually innovating and trying to invent the future and we feel strongly about this not just from Google's perspective, but from the broader ecosystem perspective across all of technology. As such, ***we take intellectual property and intellectual property rights very seriously.*** So I'm here today to represent that on Google's behalf.

Id. at 1162:20–1163:2 (emphasis added).

PUM has no way to meaningfully cross-examine Mr. Alferness on this point or otherwise rebut the assertion that has been made to the jury about how seriously Google takes patent rights, and Google's characterization of PUM of dragging Google to suit "all the way from California" to Delaware, without introducing the two letters at issue. The jury should now be permitted to hear that Google did *not* take this matter seriously and instead ignored PUM's letters, and that it avoided any effort to negotiate which could have prevented a suit.

To the extent that Google may argue the letters are unfairly prejudicial, Rule 403 provides that a district court may only exclude relevant evidence based on prejudice if "its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. "As a threshold matter, evidence is excludable only if it is 'unfairly' prejudicial, in that it has 'an undue tendency to suggest decision on an improper basis.'" *Old Chief v. United States,* 519 U.S. 172, 193 (1997) (O'Connor, J., dissenting) (quoting Advisory Committee's Notes on Fed. R. Evid. 403. Evidence must be "unfairly prejudicial;" mere prejudice cannot suffice

because "virtually all evidence is prejudicial or it isn't material." *Carter v. Hewitt*, 617 F.2d 961, 972 n.14 (3d Cir. 1980). The Third Circuit has stated that evidence is unfairly prejudicial if it:

> appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than the established propositions in the case.

Id. at 617 F.2d at 972.

Set against that standard, the allegedly prejudicial impact of the letters is minor at most. The letters will be used simply to demonstrate that PUM reached out to Google and offered it the opportunity to purchase or license the patents. Mr. Alferness' personal knowledge of the letters is immaterial as he is a corporate representative testifying about Google's respect for intellectual property rights. He has made a representation that PUM is entitled to rebut. Further there is no unfairness because there is no dispute that Google did not respond to the letters. PUM further agrees to keep the questioning minimal, limited to the introduction of the letters and asking the witness whether he knows that there was no response. There is no prejudice to this truthful testimony. But even if there were, the letters are necessary to remedy the prejudice to PUM based on Google having opened the door in this manner.

The Court previously granted Google's motion *in limine* to exclude the letters because "inducement and willfulness are not parts of this case," thereby rendering "evidence of pre-suit knowledge" irrelevant this phase of the trial. D.I. 606 at 8. But by now choosing to emphasize its own serious commitment to intellectual property rights, and that Google had to come to court in Delaware to protect them, Google has substantially increased the probative weight of the letters. The letters are not being offered as relevant to inducement or willfulness, but as relevant to rebut issues Google has raised. That increased probative value is not substantially outweighed by unfair prejudice.

PUM therefore requests that the Court overrule Google's objection to PTX 1446 and 1447 and allow the letters into evidence.

Respectfully,

/s/ Karen Jacobs

Karen Jacobs (#2881)

KJ/dam
cc: Clerk of the Court (by hand)
All Counsel of Record (by e-mail)
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