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April 9, 2014

The Honorable Leonard P. Stark
United States District Court
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:

The parties submit herewith their proposals for how this case should proceed in response to the Court's April 7, 2014 letter. (D.I. 677).

PUM's Proposal

PUM proposes that the Court enter a non-final judgment in accordance with its tentative views set forth in its April 7, 2014 letter opinion (the "letter opinion"). (D.I. 677).

Breach of contract and related counterclaims. PUM requests that the Court enter judgment as a matter of law ("JMOL") in favor of PUM on Google's breach of contract claim for the reasons set forth in the Court's letter opinion. (D.I. 677 at 6–8).¹ As set forth in PUM's March 26, 2014 submission (D.I. 676), the Court has discretion to grant or deny the losing party's Rule 50(a) motion where judgment has not yet been entered on the jury verdict. *See, e.g., Nichols Constr. Corp. v. Cessna Aircraft Co.*, 808 F.2d 340, 355–56 (5th Cir. 1985) (holding that "failure to file a motion for judgment n.o.v. did not prevent the district court from granting Cruse's motion for directed verdict on which decision had previously been reserved" where court did so before judgment was entered and within the time for the party to file a renewed motion for directed verdict); *First Safe Deposit Nat'l Bank v. Western Union Tel. Co.*, 337 F.2d 743, 745–46 (1st Cir. 1964) (finding that where a timely motion for JMOL could still be filed, trial court has

¹ In its section below, Google states its understanding that in asking the parties "to propose as compressed a schedule as possible for the submission of short briefs so the Court can determine in an efficient manner whether to adhere to its inclinations [on JMOLs] and enter judgment," that the Court is requesting briefs in connection with the parties' Rule 50(a) motions before the Court enters judgment. PUM has a similar understanding.

discretion to act on a party's "reserved pre-verdict motion" and that to find otherwise, where "court could have asked the defendant to file an immediate Rule 50(b) motion, and have acted upon it" "would be to insist upon form over substance."² Google has now been fully heard on the matter (D.I. 678), such that no further briefing is needed for the Court to enter judgment. Therefore, Google's request for another three rounds of briefing, notwithstanding that Google has already filed its opposition to PUM's Rule 50(a) motion, should be denied. PUM respectfully submits that judgment should also be entered on Google's related counterclaims for declaration of ownership, conversion, and constructive trust for the same reasons. (D.I. 677 at 6–8). As the Court indicated in its letter opinion, if the Court enters judgment on Google's breach of contract claim, Google's request for further proceedings on these claims also will be moot. (*Id.* at 8).

If the Court enters JMOL on Google's breach of contract claim, then the Court need not reach the remaining grounds for PUM's motion. PUM, however, reserves the right to renew those alternate grounds pursuant to Rule 50(b) in the event the Court were to decide not to enter judgment at this time in accordance with its inclinations.

Infringement and Invalidity. Should the Court be inclined to deny PUM's Rule 50(a) motion for JMOL on infringement and invalidity, as the Court has indicated in its letter opinion, PUM does not believe that any further briefing is needed prior to the entry of a non-final judgment on the verdict on these issues.³ PUM, however, reserves the right to file a motion for a new trial and/or JMOL on the issues of infringement and invalidity after the entry of judgment on the verdict pursuant to Rules 50(b) and 59(b).⁴ PUM proposes that its opening brief be filed within 21 days of entry of judgment on the verdict, that the combined answering brief be filed 21 days thereafter, and that the reply brief be filed 14 days thereafter. PUM further proposes that, pursuant to D. Del. LR 7.1.3(a)(4), the page limits for opening and answering briefs shall be no more than 20 pages, and the page limits for reply shall be no more than 10 pages.

² Contrary to Google's suggestion, *Donald M. Durkin* did not hold that a Rule 50(a) motion must be denied as moot. *Donald M. Durkin Contracting v. City of Newark*, No. 04-163, 2007 WL 2710451, at *1 (D. Del. Sept. 17, 2007). Rather, in the circumstances there, the Court exercised its discretion to deny the Rule 50(a) motions as moot following entry of judgment on the jury verdict. No judgment on the jury verdict has yet been entered here. Notably, Google does not, and cannot, argue that these cases are wrongly decided, but merely contends that they are "old" and allegedly address a different issue. Despite Google's attempt to distinguish them, these cases clearly address and recognize the Court's authority to enter judgment on a party's "reserved pre-verdict motion." *First Safe Deposit Nat'l Bank*, 337 F.2d at 746.

³ This Court has previously recognized a judgment on the verdict is not final because it is subject to post-trial motions. See D.I. 676 at Ex. C.

⁴ As indicated above, it appears that both PUM and Google understood the Court's comments to be directed to a compressed schedule regarding briefs on Rule 50(a) motions, rather than a schedule for post-trial motions, which are governed by the time frames set forth in Rules 50(b) and 59(b) (i.e., requiring such motions to be filed with 28 days of judgment on the verdict). PUM nonetheless proposes here a more compressed schedule for resolution of post-trial motions than provided by those rules.

If, however, the Court were to defer or deny PUM's Rule 50(a) motion on breach of contract, as Google requests, then PUM proposes that its renewed Rule 50(b) motion and/or a motion for a new trial be briefed in the same time frames set forth above. In this instance, PUM further proposes that opening and answering briefs on the combined Rule 50(b) and 59 motions be limited to 30 pages collectively, and the reply brief limited to 15 pages collectively.

PUM's proposed form of non-final judgment is attached as Exhibit A.

Google's Proposal

Google understands that in asking the parties "to propose as compressed a schedule as possible for the submission of short briefs so the Court can determine in an efficient manner whether to adhere to its inclinations [on JMOLs] and enter judgment," that the Court is requesting briefs in connection with the parties' Rule 50(a) motions before the Court enters judgment. Respectfully, Google believes that the appropriate course is for the Court to enter judgment based on the jury's verdict, and that judgment should take the form of that proposed by Google in the parties' March 26, 2014 letter to the Court. (D.I. 676, Ex. D.)⁵ Google's proposed form of judgment is attached as Exhibit B. Where, as here, a jury has returned a verdict against a Rule 50(a) movant, the pending Rule 50(a) motion should be denied as moot. *See E.g., Donald M. Durkin Contracting, v. City of Newark*, No. 04-163, 2007 WL 2710451, *1 (D. Del. Sept. 17, 2007) (denying Rule 50(a) motion as moot in light of jury verdict, but permitting losing party to renew its motion pursuant to Rule 50(b)). As PUM's Rule 50(a) motion is moot, any request for JMOL by PUM should be done in the context of a Rule 50(b) motion, which authorizes parties to seek reversal of adverse jury verdicts. *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48, 51 (1952); Wright & Miller, 9B Fed. Prac. & Proc. Civ. § 2533 (3d ed.). PUM's case citations to the contrary are not persuasive. Both cases are from other jurisdictions and are decades old. Moreover, both address a different issue—whether a party complied with Rule 50(b).

Google understands that PUM does not oppose the Court's denial of PUM's Rule 50(a) motion as to non-infringement and invalidity, and that PUM believes no further briefing on these issues is appropriate. Google does not take any position in relation to PUM's decision to not further pursue these issues based on the Court's statements in its April 7, 2014 letter.

If the Court is going to rule on PUM's Rule 50(a) motion, as opposed to denying it as moot based on the jury's verdict for the reasons stated above, Google would accept the Court's invitation for the parties to submit short briefs regarding whether the Court should "adhere to its inclinations [on JMOLs] and enter judgment." Google would like to have the opportunity to explain to the Court why it should *not* adhere to its inclinations as they relate to Google's breach

⁵ As explained in its portions of the parties' March 26 joint letter to the Court (D.I. 676), Google believes that the Court should proceed with scheduling a bench hearing on equitable issues and the damages phase of the case, and should not issue judgment until after these phases of the case are completed. It appears from the Court's April 7, 2014 letter to the parties that the Court intends to proceed otherwise, and Google makes this submission in response to the Court's request therein.

of contract counterclaim. Respectfully, Google believes that the Court's reasoning set forth in the Court's April 7 letter is incorrect. Google proposes that it be permitted to file a 10-page brief on this issue within 7 days of the Court granting Google leave to do so; PUM shall file a 10-page responsive brief 7 days thereafter, and Google will file a 5-page reply 7 days after PUM files its response.⁶

PUM further proposes that the Court enter judgment on Google's other counterclaims for declaration of ownership, conversion, and constructive trust. This would not be proper. There have been no findings as to these other claims.

PUM also suggests that *non*-final judgment be entered on non-infringement and invalidity. Preliminarily, assuming the Court is going to enter judgment without first scheduling a bench hearing on equitable issues and the damages phase of the case, or after it addresses Rule 50(a) motions, judgment should *not* be entered until the Rule 50(a) issues are resolved—including the additional short briefing invited by the Court.⁷

Finally, PUM proposes briefing schedules for a Rule 59(b) motion and, in the alternative a Rule 50(b) motion. This presupposes, however, that Google will not file a short brief on the breach of contract counterclaim, and that the Court will not revisit its inclination on the breach of contract issues. This also appears to be beyond the scope of what the Court requested in its April 7 letter. Nevertheless, the briefing schedule and page limitations are set forth in the Federal and Local Rules.

Respectfully,

/s/ Karen Jacobs

Karen Jacobs (#2881)

KJ/lm

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

⁶ PUM argues that Google is requesting another three rounds of briefing. Google is not certain what PUM is referencing. Google merely proposes a schedule for the short briefs the Court invited the parties to file.

⁷ Google asked PUM what it means by *non*-final judgment, and PUM responded that the judgment will be non-final because it is subject to post-trial motions. But, final judgments are subject to post-trial motions. *See* Fed. R. Civ. P. 50(b) (deadline for filing Rule 50(b) motion is not later than 28 days “after the entry of judgment”) (emphasis added); Fed. R. Civ. P. 59(b) (“a motion for a new trial must be filed no later than 28 days after the entry of judgment”) (emphasis added).