

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 BRIEF IN SUPPORT OF  
PERSONALIZED USER MODEL, L.L.P.'S RULE 59(a) MOTION FOR NEW TRIAL**

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In its brief, Google does not dispute that it used its breach of contract claim as a springboard to present inflammatory and highly prejudicial evidence to the jury having nothing to do with infringement or validity.<sup>1</sup> Such evidence dominated the trial from opening through closing statements. As a result, it is likely that the jury—tasked with deciphering an otherwise complex patent case—was swayed by that evidence and reached its verdict on the patent claims on an improper basis. Google does not dispute this. Instead, Google lays out numerous irrelevant hurdles to avoid addressing the central issue of the integrity of the jury verdict.

Google first attempts to invoke the “extreme remedy” of judicial estoppel as a complete bar to this motion. Not only does Google ignore two of the three elements the Third Circuit mandates for this doctrine, but more fundamentally, it mischaracterizes its own motion in 2011 that Personalized User Model, L.L.P. (“PUM”) opposed. The relief that Google sought in its letter brief was to discover and try its breach of contract claim first, while putting PUM’s infringement claims on hold. Google sought to prioritize that claim notwithstanding that the case had been pending for two years and fact discovery was about to close. It was this relief that PUM opposed. That Google itself did not believe that this letter briefing barred PUM is demonstrated by the fact that Google never raised it on any of the multiple occasions where PUM sought bifurcation,<sup>2</sup> instead raising it for the first time in its opposition to PUM’s new trial motion. Google thus cannot use judicial estoppel to deprive PUM of its right to a fair trial.

Next, Google argues that PUM never “properly” asked the Court to dismiss Google’s contract claim. Google does not dispute, however, that PUM in fact sought dismissal of the

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<sup>1</sup> Indeed, Google devotes much of its brief to arguing the propriety of its arguments and evidence to the issue of breach of contract. It does not, and cannot, dispute that the contract evidence likely influenced the jury verdict on the infringement and validity issues as well.

<sup>2</sup> Notably, Google acknowledges that PUM repeatedly sought bifurcation prior to trial.

claim. Moreover, the Court has tentatively agreed with PUM, indicating that it is inclined to rule that no reasonable jury could find for Google based on the undisputed facts. (D.I. 677, 6-8) Yet there is little doubt that the jury was swayed by this legally insufficient evidence to reach the entirety of its verdict. In any event, regardless of whether dismissal was “properly” sought, the issue raised here is the prejudice of having the contract case heard with PUM’s infringement case, which PUM repeatedly and properly preserved. (*See, e.g.*, D.I. 705, 2-4)

Google also tries to excuse its actions at trial by arguing those actions did not rise to the level of “misconduct.” But Google once again relies on the wrong legal standard. Unfair prejudice warrants a new trial where that evidence had a “substantial prejudicial effect.” *Burchfield v. CSX Transp., Inc.*, 636 F.3d 1330, 1333 (11th Cir. 2011); *see also Magnivision, Inc. v. Bonneau Co.*, 115 F.3d 956, 960 (Fed. Cir. 1997) (remanding case for new trial because alleged infringer prejudiced jury throughout trial with evidence regarding inequitable conduct, explaining that “a trial need not be perfect; it must, however, be fair). PUM asserts—and Google does not dispute—that the contract claim evidence at trial improperly influenced the jury’s findings on infringement and invalidity. This warrants a new trial.

Finally, the jury was incorrectly instructed as to both tolling under the inherently unknowable exception and section 2870. And because Google cannot show it is “highly probable” these errors did not affect the outcome, each incorrect instruction also warrants a new trial.

**I. Google’s Should Not Be Permitted To Rely On A Misapplication Of The Judicial Estoppel Doctrine To Allow An Unjust Verdict To Stand.**

Google misapplies the doctrine of judicial estoppel in an attempt to sweep away PUM’s entire motion for new trial. The Third Circuit has made clear that judicial estoppel is an “extreme remedy.” *Chao v. Roy’s Const., Inc.*, 517 F.3d 180, 186 (3d Cir. 2008). It “should

only be applied to avoid a miscarriage of justice.” *MD Mall Assoc., LLC v. CSX Transp., Inc.*, 715 F.3d 479, 486 (3d Cir. 2013). Indeed, “judicial estoppel’s sole valid use . . . is to remedy an affront to the court’s integrity.” *Montrose Med. Group Participating Savings Plan v. Bulger*, 243 F.3d 773, 778 (3d Cir. 2001). And contrary to Google’s implications, “a given set of circumstances does not . . . necessarily compel its application.” *In re Kane*, 628 F.3d 631, 638 (3d Cir. 2011); *see also New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (explaining judicial estoppel is “invoked by a court at its discretion”). At a minimum, the Third Circuit requires that “there must be: (1) irreconcilably inconsistent positions; (2) adopted in bad faith; and (3) a showing that estoppel addresses the harm and no lesser sanction is sufficient.” *MD Mall Assoc., LLC*, 715 F.3d at 486-87. Google does not identify—let alone attempt to satisfy—these requirements.

On the issue of “irreconcilably inconsistent” positions, Google makes much of its earlier request to sever the contract claim, but tells only part of the story. Google’s request had nothing to do with avoiding prejudice and everything to do with delay. Nineteen months into the case, after hundreds of thousands of documents had been produced, numerous depositions taken, and on the eve of the then-close of fact discovery, Google sought to sever its newly acquired contract claim from the patent case in a maneuver to bring PUM’s entire infringement case to a sudden and complete stop. (D.I. 193, 1) (seeking to “stay discovery on all other issues pending resolution of the ownership issue”). PUM opposed Google’s request because it would “unnecessarily delay the resolution of the case-in-chief.” (D.I. 194, 2) Google now tries to use PUM’s opposition to Google’s request to stay PUM’s infringement case (perhaps indefinitely) as a blanket prohibition on PUM seeking any future relief to unfair prejudice. That is not the law. PUM’s opposition to a total stoppage of its infringement case three years ago is not

“irreconcilably inconsistent” with PUM’s position that trying these issues to the same jury would cause unfair prejudice. As a result, Google cannot satisfy even the first hurdle for the “extreme remedy” it seeks.

In addition, Google’s opposition does not even address the second or third factors required for judicial estoppel to apply. *See In re Kane*, 628 F.3d at 640 (“[I]rreconcilable inconsistency is but the first of three prongs in a judicial estoppel analysis, and all three must be satisfied before a court opts to apply the doctrine.”); *Chao*, 517 F.3d 186 (“We have also endorsed the view that judicial estoppel is an extreme remedy, to be used only when the inconsistent positions are tantamount to a knowing misrepresentation to or even fraud on the court.”). That Google could not show bad faith is demonstrated by the fact that it did not rely on PUM’s statements in opposing any of PUM’s prior requests to address the contract claim separately to avoid prejudice. Nor could Google show that estoppel is the only way to address the “harm.” The only harm here is the prejudice caused to PUM by having the contract evidence heard with PUM’s patent case, which can only be remedied by a new trial.

## **II. PUM Properly Put The Court On Notice Of The Unfair Prejudice That Would Result By Trying The Breach Of Contract And Patent Claims Together.**

PUM properly preserved the issue of unfair prejudice and Google does not argue to the contrary. Nor could it. Prior to trial, PUM specifically argued that trying the breach of contract and patent claims together could cause the jury to decide the patent issues on an improper basis. (D.I. 610, 9-10) (“Submitting the breach of contract claim to the jury . . . creates a serious risk that the jury will decide the unrelated infringement and validity issues based on its views of the contract dispute.”). This alone sufficed to preserve the issue on which PUM now moves for a new trial. *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469-70 (2000) (preservation merely requires “that the lower court be fairly put on notice as to the substance of the issue”).



Google does not dispute that PUM repeatedly argued that it would be unfairly prejudiced by the trial of the breach of contract and patent claims together. PUM's current motion is not based on the denial of any particular motion but on the unfair prejudice that occurred by having those claims tried together. There can be no question that PUM preserved that issue.

Google's assertion of alleged procedural shortcomings is thus beside the point. It does not matter whether PUM asked for a separate *bench* trial or a separate *jury* trial (D.I. 713 at 7),<sup>3</sup> but simply whether PUM raised the concern of unfair prejudice. PUM did. *See, e.g., Guidance Endodontics, LLC v. Dentsply Int'l, Inc.*, 749 F. Supp. 2d 1235 (D.N.M. 2010) (new trial may be granted on grounds called to court's attention during trial).

Google next argues that PUM waived its objections to each individual inflammatory argument and piece of evidence presented at trial by not objecting at the time.<sup>4</sup> This, too, misses the mark. PUM timely objected to the unfair prejudice from trying the claims together, precisely because doing so would open the gates for Google's inflammatory arguments and evidence. (D.I. 610 at 9-10). After the Court rejected PUM's position and proceeded to try all claims

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<sup>3</sup> Because the right to a jury trial does not attach to equitable issues such as tolling, PUM properly requested a bench trial. *See Agfa Corp. v. Creo Prod., Inc.*, 451 F.3d 1366, 1375 (Fed. Cir. 2006) (holding trial judge retains "discretion to conduct a bench trial on the equitable issues").

<sup>4</sup> Google cites *Murray v. Fairbanks Morse*, 610 F.2d 149 (3d Cir. 1979) for this argument, which is inapposite. *Murray* is a negligence and strict liability case in which the court determined the defendant waived grounds for a new trial by not objecting during trial to plaintiff's counsel spoon-feeding the jury the damages amount to be awarded. Here, PUM did object prior to trial, but its objection was overruled.

together, there was nothing more for PUM to do. A new trial is needed because PUM was unfairly prejudiced by trial of these issues before the same jury.<sup>5</sup>

### **III. PUM Suffered Unfair Prejudice That Calls The Jury Verdict Into Question.**

The jury that decided Google’s breach of contract claim—and thus heard the inflammatory material—should not have also decided infringement and invalidity. Google ignores this issue and instead focuses on whether its actions amount to “misconduct.” Indeed, Google does not dispute much of the evidence or argument in PUM’s opening brief:

- Google does not dispute PUM’s recitation of the argument and evidence that was placed before the jury on the breach of contract claim.
- Google does not dispute that the breach of contract argument and evidence it presented to the jury was highly inflammatory.
- Google does not dispute that juries are particularly susceptible to reach decisions on improper bases in patent infringement cases, making the risk of unfair prejudice especially significant.
- Google does not dispute that courts nationwide routinely try patent claims separately from other claims that disparage the inventors to prevent “extreme prejudice.”
- Google does not dispute that it deliberately emphasized the breach of contract issues far more than the infringement and invalidity issues throughout the trial and in its closing argument.
- Google does not dispute that the breach of contract claim thematically dominated the entire trial, which should have instead been primarily focused on complex patent issues.

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<sup>5</sup> In any event, a failure to formally object does not automatically waive grounds for a new trial if a court agrees that an error has been made which needs to be corrected. *See LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 70 (Fed. Cir. 2012) (determining that district court had discretion to consider issue upon motion for new trial although defendant made no pre-verdict objection nor raised any challenge during course of trial).

- Google does not dispute that argument and evidence about breach of contract likely influenced the jury’s decisions on infringement and invalidity.

Google nevertheless asserts these facts do not justify a new trial because—regardless of how they may have affected the jury—its actions at trial do not amount to “misconduct.” (D.I. 713, 8). In making this argument, Google relies on *Lucent Techs., Inc. v. NewBridge Net Corp.*, 168 F. Supp. 2d 181, 260 (D. Del. 2001). *Lucent*, however, does not limit the availability of a new trial to only instances of misconduct. Instead, its holding there was based on the allegation of attorney misconduct: “*In the case of alleged attorney misconduct*, the party seeking a new trial must demonstrate that the attorney’s conduct constitutes misconduct, and not merely aggressive advocacy . . . .” *Id.* (emphasis added). Google’s emphatic, multi-page argument that it did not commit misconduct is thus misplaced. Again, erroneously admitted evidence alone can warrant a new trial if that evidence had a “substantial prejudicial effect.” *Burchfield v. CSX Transp., Inc.*, 636 F.3d 1330, 1333 (11th Cir. 2011).

Google concedes that its language was inflammatory and emotional, but attributes this to purportedly effective advocacy because it considered the evidence “within the bounds of relevance.” (D.I. 716, 11). The issue here, however, is not whether Google’s arguments were “within the bounds of relevance,” but whether those “bounds” were incorrectly drawn to include the breach of contract claim. As a result, Google’s conduct led the jury to decide the case on an improper basis. This is a basis for a new trial.

Additionally, contrary to Google’s assertion, both *Magnivision, Inc. v. Bonneau Co.*, 115 F.3d 956 (Fed. Cir. 1997), and *Lucent Techs., Inc., v. Extreme Networks, Inc.*, 229 F.R.D. 459 (D. Del. 2005), support PUM’s contention that unfairly prejudicial statements warrant a new trial. Google misinterprets *Magnivision* by suggesting that a new trial is warranted “only” if the trial conduct was “wrongful.” (D.I. 713 at 10). But that holding is not so limited. *Magnivision*

stands for the broader proposition that repeated emphasis during trial can give rise to unfair prejudice warranting a new trial. *Magnivision*, 115 F.3d at 961 (“the emphasis on this issue at the trial advanced it to unfair prejudice.”)

Google also attempts to distinguish *Lucent* by pointing out that the Court had bifurcated the case. This merely further supports PUM’s contention that the breach of contract and patent claims should not have been tried side-by-side in the first instance.

#### **IV. The Jury Was Incorrectly Instructed On Statute Of Limitations.**

Google continues to misstate the inherently unknowable exception and why the jury was incorrectly instructed on this issue. Google asserts that unless a reasonable inquiry by SRI would have definitively uncovered the precise conception date of the invention at issue, SRI was excused from having to conduct any inquiry into whether it had a claim to the invention. This argument is erroneous, but the corresponding jury instruction followed Google’s argument and directed the jury to focus on only whether SRI was or could have been aware of the exact conception date and whether the inquiry would have been successful. The jury was instructed that unless SRI or Google knew or could have known the conception date, it “must find that the statute of limitations was tolled.” (D.I. 663) As this Court has since clarified, however, “[t]he pertinent inquiry is not whether the claimant would know to a certainty that it had a claim, but rather at what point it had (or through reasonable diligence, would have had) a basis to begin to investigate whether it had a claim.” (D.I. 677, 7) Thus, the jury instruction—which premised tolling entirely on the discovery of the conception date—was in error.

Google’s argument ignores the proper standard and embraces the assertion that tolling continues until every fact necessary to prevail at trial is discovered. In contrast, Delaware courts have made clear that “having all the facts necessary to articulate the wrong is not required.” *In re Dean Witter P’ship Litig.*, No. Civ. A. 14816, 1998 WL 442456, at \*7 n.49 (Del. Ch. July 17,

1998). Tolling only extends the statute of limitations until “observable or objective factors put [the party] on notice of an injury.” *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 2012 WL 3201139, at \*22-23 (Del. Ch. Aug. 7, 2012). Critically, this “inquiry notice does not require actual discovery of the reason for the injury. Nor does it require plaintiffs’ awareness of all of the aspects of the alleged wrongful conduct.” *In re Dean Witter P’ship Litig.*, 1998 WL 442456, at \*7. “Rather, once a plaintiff is in possession of facts sufficient to make him suspicious, or that ought to make him suspicious, he is deemed to be on inquiry notice.” *Id.* at \*7 n.49; D.I. 703, 2-5.

Because the jury could well have been misled to focus solely on whether the conception date “was inherently unknowable to Google and SRI”—rather than more general facts that would support filing a cause of action and seeking formal discovery—a new trial is required.

#### **V. The Jury Was Incorrectly Instructed On California Law.**

Google again misstates California law to justify the Section 2870 instruction given to the jury. For the reasons PUM explained in its opening brief, *Cadence Design Sys., Inc. v. Bhandari*, 2007 WL 3343085 (N.D. Cal. 2007), does not hold that a jury “must interpret the phrase ‘related to’ broadly.” (D.I. 713 at 18-19). Notably, Google does not take issue with PUM’s explanation of *Cadence*. Rather, it faults PUM for not specifically citing to authority to support its position (which is clear from a plain reading of *Cadence* itself). In other words, Google argues that because PUM did not point to authority criticizing Google’s interpretation, that interpretation must be proper. This circular reasoning cannot justify an erroneous jury instruction. Google misinterprets *Cadence Design* to stand for something it does not, and the Section 2870 jury instruction was thus in error.

Moreover, Google cannot show that error was harmless. An erroneous jury instruction “will be deemed harmless only if it is ‘highly probable’ that the error did not affect the outcome

of the case.” *Hill v. Reederei F. Laeisz G.M.B.H., Rostock*, 435 F.3d 404, 411 (3d Cir. 2006). Proving the invention either “related to” or “resulted from” Dr. Konig’s SRI work requires much more of a factual connection than what Google’s selective evidentiary citations imply. *See Burrage v. U.S.*, 134 S. Ct. 881, 889 (2014) (“It is one of the traditional background principles against which Congress legislates that a phrase such as ‘results from’ imposes a requirement of but-for causation.”); *Cubic Corp. v. Marty*, 229 Cal. App. 3d 438, 453 (Cal. App. 4th 1986) (finding invention “related” where employee obtained “company funding” for invention and presented it as “something which would enhance [the employer’s] capabilities”). The invention relates to personalized Internet technology, while Dr. Konig’s work at SRI involved speech recognition technology. (Tr. 446:23-447:9). Two former SRI engineers, Drs. Sonmez and Stolcke, also confirmed Dr. Konig’s limited work scope at SRI. (Tr. 1655:13-18, 1667:3-12). Indeed, the only contrary evidence came from Douglas Bercow who admittedly was not a technical person or “historian on all of SRI’s projects” and stated that technical questions about SRI’s research as “best left . . . for the computer scientists who actually implemented those techniques.” (Tr. 1680:13-20). As a result, Google cannot establish that it was “highly probable” the jury would have reached the same result had it been properly. Thus, the erroneous instruction was not harmless and a new trial should be granted.

### **CONCLUSION**

For the foregoing reasons, PUM respectfully requests that the Court grant its motion for a new trial.

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 10, 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 July 10, 2014, upon the following individuals in the manner indicated:

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