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1		Hon. Marsha J. Pechman	
2			
3	UNITED STATES DISTRICT COURT		
4	WESTERN DISTRICT OF WASHINGTON AT SEATTLE		
5			
6	INTERVAL LICENSING LLC,	Case No. 2:10-cv-01385-MJP	
7	Plaintiff,	JOINT STATUS REPORT	
8	V.		
9	AOL, INC.,		
10	Defendant.		
11	INTERVAL LICENSING LLC,	ORAL ARGUMENT REQUESTED	
12	Plaintiff,	Case No. 2:11-cv-00708 MJP	
13	v.	Lead Case No. 2:10-cv-01385-MJP	
14	APPLE, INC.,		
15	Defendant.		
16	INTERVAL LICENSING LLC,	Case No. 2:11-cv-00711 MJP	
17	Plaintiff,	Lead Case No. 2:10-cv-01385-MJP	
18	V.		
19	GOOGLE, INC.,		
20	Defendant.		
21	INTERVAL LICENSING LLC,	Case No. 2:11-cv-00716 MJP	
22	Plaintiff,	Lead Case No. 2:10-cv-01385-MJP	
23	v.		
24	YAHOO! INC.,		
25	Defendant.		
26			
27	Pursuant to this Court's June 25, 2012, Order Granting Motion to Lift Stay (Dkt. No.		
28	#269), the parties submit the following supple	-	
	JOINT STATUS REPORT Case No. 2:10-cv-01385-MJP	Susman Godfrey LLP 1201 Third Avenue, Suite 3800 Seattle WA 98101-3000	

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I.

PROPOSED SCHEDULE

A. **Court's Revised Scheduling Order**

3 Except as discussed below, the parties agree that the parameters set in the Court's Revised 4 Scheduling Order (Dkt. # 248) should remain in place with respect to the '652 and '314 Patents 5 track.

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В. **Joint Proposed Schedule**

7 The parties submit the following proposed schedule for this case. With the exception of 8 the one issue that is discussed below, the parties have reached agreement on a proposed schedule 9 for this case. The deadlines in the parties' proposed schedule are based in large part on the deadlines in the Court's Revised Scheduling Order (Dkt. No. 248).¹ 10

11					
12	Event	Date			
13	Interval to provide defendants with list of open discovery issues	7/20/2012			
14	ISSUES				
15	Serve supplemental preliminary infringement contentions on any new claims added during reexamination and new accused	7/20/2012			
16	products				
17	Source code for 652/314 products already accused made available for review and meet and confer to discuss making	8/1/2012			
18	source code available for newly identified 652/314 products				
19	Defendants respond by this date to the items on Interval's list	8/4/2012			
20	of open discovery issues, with any meet and confers soon after				
21	Serve supplemental preliminary non-infringement contentions	8/17/2012			
22	Meet and confer as to whether supplemental claim	8/24/2012			
23	construction expert reports are necessary				
24	Any New Terms Selected for Claim Construction	8/24/2012			
25	$\frac{1}{1}$ Defendants reserve the right to object to Interval's supplementation of its infringement				
26	contentions with respect to any claims that were not newly added during reexamination or with respect to any products that are not new products. Defendants also reserve the right to				
27	supplement Defendants' invalidity contentions. Interval likewise reserves the right to object to any supplemental invalidity contentions should Defendants seek a supplementation.				
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Event	Date
Preliminary Claim Chart	8/31/2012
oint Claim Chart and Prehearing Statement	9/14/2012
Serve Supplemental Claim Construction Expert Report on any new issues (if necessary)	9/21/2012
Opening Briefs on Claim Construction	10/5/2012
Response Briefs on Claim Construction	10/26/2012
Markman Hearing	11/9/2012
Close of Fact Discovery	3/1/2013
Opening Expert Reports on All Issues	3/29/2013
Rebuttal Expert Reports Due	4/26/2013
Joint Status Report to Address Trial Issues	5/3/2013
Close of Expert Discovery	5/17/2013
Dispositive Motion Deadline	6/7/2013
Settlement Conference per Local Rule CR 39.1(c)(2) held no later than	7/19/2013
Mediation per Local Rule CR 39.1(c)(3) held no later than	8/16/2013
All Motions in Limine must be filed by and noted on the motion calendar no later than the second Friday thereafter	8/23/2013
Agreed Pretrial Order due	9/6/2013
Trial Briefs, Proposed Voir Dire Questions, Proposed Jury Instructions, and Trial Exhibits due	9/20/2013
Objections to demonstratives, trial exhibits, depositions designations.	10/4/2013
Pretrial Conference	10/8/2013
Frial Date	10/14/2013
JOINT STATUS REPORT	Susman Godfrey LLP

C.

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Remaining Disputes Concerning The Schedule

1. Motion for Summary Judgment on Indefiniteness

Defendants' Position:

A vast majority of the claims of the '652 and '314 Patents include a claim limitation that 4 the Defendants contend is indefinite under 35 U.S.C. § 112, paragraph 1.² Consistent with the 5 6 Court's desire to move this case forward, pursuant to the Court's Standing Order (Dkt. No. 26) 7 Defendants seek leave to file a single joint motion for summary judgment in August 2012 to bring 8 this discrete issue before the Court immediately after the stay has been lifted. Indefiniteness is a 9 question of law that can be decided before claim construction. See Datamize, LLC v. Plumtree 10 Software, Inc., 2004 U.S. Dist. LEXIS 28382, 7-8 (N.D. Cal. July 9, 2004) (granting motion for 11 summary judgment on indefiniteness before the scheduled claim construction hearing), aff'd 417 12 F.3d 1342 (Fed. Cir. 2005).

13 Defendants seek to bring this motion before claim construction because resolution of this 14 question that is common to so many claims may substantially narrow the claim construction 15 disputes that the Court would be asked to address. Interval's response that this dispute should be 16 handled as part of claim construction or by accelerating the whole schedule is inefficient because 17 it will force the Court to receive briefing and address claim constructions for terms that may no 18 longer be at issue if the indefiniteness issue is decided in Defendants' favor. Defendants' 19 proposal on the other hand allows the parties to proceed with the claim construction process, but 20 gives the Court the opportunity to address this single, discrete issue early and thereby potentially 21 reduce the work for both the Court and the parties. Defendants provide a brief explanation of the 22 issue below.

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The claim language at issue refers to displaying images "in an unobtrusive manner" and in 24 a way that "does not distract a user." What exactly is unobtrusive or does not distract a user is 25 never defined in the specification. Defendants assert both terms are inherently subjective because

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2 The limitation at issue is found in each and every claim of the '314 patent and all but 4 of the currently-asserted claims of the '652 patent.

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whether something is unobtrusive or distracts a user (from her primary interaction) depends upon
a particular user's subjective views, what the user was engaged in and how easily a particular user
might be distracted. Under Federal Circuit precedent, claims containing inherently subjective
language are indefinite under 35 U.S.C. § 112, ¶ 2. For example, the Federal Circuit found
similarly subjective language indefinite in *Datamize LLC v. Plumtree Software, Inc.*, 417 F.3d at
1348-1356.

7 8

Resolution of this issue in Defendants favor will result in a substantial streamlining of this case, including discovery, claim construction and trial, because most of the claims at issue will have been held invalid.

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Interval's Position:

11 Defendants have asked to include in the proposed schedule a date of August 2, 2012 for a 12 motion for summary judgment on indefiniteness. Interval believes that such an early deadline is inappropriate for at least three reasons.³ First, the Court already has rejected a similar proposal 13 by Defendants. Before the stay, Defendants told this Court that they planned to submit their 14 15 summary judgment briefing on indefiniteness together with their claim construction briefing, and 16 they requested five additional pages in their claim construction brief to address indefiniteness. 17 04/25/2011 Hearing Transcript at 35-36 (Dkt. #231). The Court suggested that it would reject 18 that request, requiring that Defendants' briefing on indefiniteness be confined to the existing page 19 limitation on the Markman brief. Id. at 35 (THE COURT: "I am all for saving work. I am pretty 20 much against adding pages."). Consistent with the Court's suggestion, Defendants appeared to 21 agree that they would include any summary judgment issue on indefiniteness as part of their page 22 limits on the claim construction briefing. Id. at 36. Defendants' new request for an early motion 23 on indefiniteness appears to be nothing more than a second attempt to increase the page limitation

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- ³ Defendants' statement that indefiniteness is a question of law is misleading at best. "Summary judgment on the issue of indefiniteness is <u>inappropriate</u> where there are issues of fact underlying the indefiniteness determination." *See Am. Med. Sys., Inc. v. Laser Peripherals, LLC*, 712 F. Supp. 2d 885, 910 (D. Minn. 2010) (emphasis added).
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for its briefing—if Defendants cannot add pages to their claim construction brief, then they will
 attempt to file two separate briefs.

Second, the Court's pre-stay schedule did not provide for an early indefiniteness motion.
In fact, Defendants never requested an early deadline for filing of an indefiniteness motion even
though the purported basis for Defendants' motion existed before the stay. Defendants fail to
explain why an early summary judgment motion is justified now when they were prepared to file
the motion as part of their claim construction brief before the stay.

8 Third, as Defendants previously told the Court, the indefiniteness issue goes hand-in-hand 9 with claim construction. Id. at 35. Now, however, Defendants request briefing on the 10 indefiniteness issue months before the claim construction briefing—despite the fact that when 11 Interval suggested starting claim construction briefing at the same time as Defendants suggest it 12 file the motion for summary judgment on indefiniteness, Defendants objected. In compromise, 13 Interval agreed to delay the opening claim construction briefs until October, but Defendants now 14 want to keep an early date for summary judgment. Such a proposal makes no sense and is unfair. 15 See Star Scientific, Inc. v. R.J. Reynolds Tobacco Co., 537 F.3d 1357, 1371 (Fed. Cir. 2008) ("By 16 finding claims indefinite only if reasonable efforts at claim construction prove futile, we accord 17 respect to the statutory presumption of patent validity[.]" (citation omitted) (emphasis added)). If 18 Defendants want the motion for summary judgment due in August, then Opening Claim 19 Construction briefs should be due the same date and the entire schedule (including the claim 20 construction hearing and the trial date) should be moved forward by two months.

21 Dated: July 10, 2012

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- By: <u>/s/ Mark P. Walters</u>
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Respectfully submitted,

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As Whip for Plaintiff's Counsel

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3	I hereby certify that on July 10, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:		
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