

COPY

FILED
CLERK, U.S. DISTRICT COURT
OCT - 3 2013
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

1 SHAWN G. HANSEN (Bar No. CA 197033)
E-mail: shansen@manatt.com
2 MANATT, PHELPS & PHILLIPS, LLP
1841 Page Mill Road, Suite 200
3 Palo Alto, CA 94304-1254
Telephone: (650) 812-1300
4 Facsimile: (650) 213-0260

5 *Attorneys for Plaintiff*
FUHU, INC.

6
7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 WESTERN DIVISION

11 FUHU, INC.,
12 Plaintiff,
13 vs.
14 PERSONAL AUDIO, LLC,
15 Defendant.

Case No. 2:13-cv-05571-BRO-SH
**FIRST AMENDED COMPLAINT
FOR DECLARATORY
JUDGMENT OF PATENT
NONINFRINGEMENT AND
INVALIDITY OF U.S. PATENTS
6,199,076 AND 7,509,178**

16
17 **FIRST AMENDED COMPLAINT**

18 Pursuant to Federal Rule of Civil Procedure 15(a)(1)(B), and consistent with
19 the principles set forth in Section 8.a. of this Court's Standing Order Regarding
20 Newly Assigned Cases (Docket No. 9), Plaintiff Fuhu, Inc. ("Fuhu") alleges as
21 follows for this First Amended Complaint for Declaratory Judgment of Patent
22 Noninfringement and Invalidity ("FAC") against Defendant Personal Audio, LLC
23 ("Personal Audio"):

24 **INTRODUCTION**

25 1. Fuhu brings this action "to clear the air of infringement charges,"
26 *Avocent Huntsville Corp. v. Aten Int'l Co.*, 552 F.3d 1324, 1332 (Fed. Cir. 2008),
27 *Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1360-62
28

1 (Fed. Cir. 1998), by seeking a declaratory judgment that Fuhu is not liable for
2 infringement of properly construed, valid, and enforceable claims of U.S. Patents
3 6,199,076 (“ ‘076 patent”) and 7,509,178 (“ ‘178 patent”) (collectively, “Patents-in-
4 Suit”) and that the properly construed claims of the Patents-in-Suit are invalid.

5 2. Fuhu brings this action in its presumptively convenient home district,
6 *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981), seeking relief against what
7 the June 2013 White House report “Patent Assertion and U.S. Innovation” refers to
8 as a patent assertion entity (“PAE”) or “patent troll.” Attached hereto as **Exhibit 1**
9 is a true and correct copy of “Patent Assertion and U.S. Innovation,” Executive
10 Office of the President, June 2013.

11 3. As described in the White House’s “Patent Assertion and U.S.
12 Innovation” report, the PAE business model is generally seen as combining
13 characteristics such as the following:

- 14 • They do not “practice” their patents; that is, they do not do research or
15 develop any technology or products related to their patents;
- 16 • They do not help with “technology transfer” (the process of translating
17 the patent language into a usable product or process);
- 18 • They often wait until after industry participants have made irreversible
19 investments before asserting their claims;
- 20 • They acquire patents solely for the purpose of extracting payments
21 from alleged infringers;
- 22 • Their strategies for litigation take advantage of their nonpracticing
23 status, which makes them invulnerable to counterclaims of patent
24 infringement;
- 25 • They acquire patents whose claim boundaries are unclear, and then
26 (with little specific evidence of infringement) ask many companies at
27 once for moderate license fees, assuming that some will settle instead
28 of risking a costly and uncertain trial; and

- 1 • They may hide their identities by creating numerous shell companies and
2 requiring those who settle to sign nondisclosure agreements, making it
3 difficult for defendants to form common defensive strategies (for example, by
4 sharing legal fees rather than settling individually).

5 See **Exhibit 1** at p. 4 (citations omitted). Personal Audio exhibits many, if not all,
6 of these characteristics, as discussed further below.

7 4. In a recent opinion in *Network Prot. Scis., LLC v. Fortinet, Inc.*,
8 2013 U.S. Dist. LEXIS 118105, *2-*3 (N.D. Cal. Aug. 20, 2013), Judge William
9 Alsup of the Northern District of California quoted a recent op-ed by Federal
10 Circuit Chief Judge Randall Rader and Professors Colleen Chien and David Hricik
11 that stated:

12 FROM an early age we are taught the importance of fighting
13 fairly. But as the vast number of frivolous patent lawsuits have shown,
14 too many people are rewarded for doing just the opposite.

15 The onslaught of litigation brought by “patent trolls” — who
16 typically buy up a slew of patents, then sue anyone and everyone who
17 might be using or selling the claimed inventions — has slowed the
18 development of new products, increased costs for businesses and
19 consumers, and clogged our judicial system.

20 * * *

21 With huge advantages in cost and risk, trolls can afford to file
22 patent-infringement lawsuits that have just a slim chance of success.
23 When they lose a case, after all, they are typically out little more than
24 their own court-filing fees. Defendants, on the other hand, have much
25 more to lose from a protracted legal fight and so they often end up
26 settling.

27 *Id.*, citing Randall R. Rader, Colleen V. Chien & David Hricik, “Make Trolls Pay in
28 Court,” *New York Times*, June 5, 2013, at A5. A true and correct copy of this *New*

1 *York Times* op-ed is attached hereto as **Exhibit 76**, downloaded from
2 [http://www.nytimes.com/2013/06/05/opinion/make-patent-trolls-pay-in-](http://www.nytimes.com/2013/06/05/opinion/make-patent-trolls-pay-in-court.html?_r=0)
3 [court.html?_r=0](http://www.nytimes.com/2013/06/05/opinion/make-patent-trolls-pay-in-court.html?_r=0).

4 5. Personal Audio has purposefully directed at Fuhu and other residents
5 of the Central District of California and elsewhere in California extensive activities
6 relating to its sole business of patent monetization, including activities related to
7 licensing as well as other enforcement and/or defense of the validity of its patents,
8 as discussed further below. Fuhu's claims in this case arise out of and/or relate to
9 these activities.

10 **PROCEDURAL HISTORY**

11 6. As of the date Fuhu's original Complaint in this matter was filed,
12 August 1, 2013, no other litigation regarding the Patents-in-Suit was pending
13 against Fuhu or any other entity.

14 7. Subsequently, Personal Audio filed a duplicative action for
15 infringement of the Patents-in-Suit against Fuhu in the Eastern District of Texas,
16 Case No. 1:13-cv-00513, filed on August 13, 2013 ("Texas action"). A true and
17 correct copy of Personal Audio's complaint in the Texas action is attached hereto as
18 **Exhibit 2**. Personal Audio's complaint in the Texas action raises the identical
19 issues raised in this case, namely, whether Fuhu infringes the Patents-in-Suit and
20 whether the Patents-in-Suit are invalid. However, Fuhu is not subject to personal
21 jurisdiction in the Eastern District of Texas, and the parties' dispute is properly
22 before this Court pursuant to the "first-to-file" rule. *See Genentech, Inc. v. Eli Lilly*
23 *& Co.*, 998 F.2d 931, 937-38 (Fed. Cir. 1993).

24 8. The Texas action is assigned to Judge Ron Clark. A true and correct
25 copy of the docket entry in the Texas action reflecting the assignment of the Texas
26 action to Judge Clark is attached as **Exhibit 3**.

27 9. Judge Clark presided over previous, now-concluded litigation
28 regarding the Patents-in-Suit against another California company, Apple Inc.

1 Referring to Apple’s unsuccessful motion to transfer the previous litigation from
2 the Eastern District of Texas to the District of Massachusetts, Judge Clark stated to
3 Apple’s counsel:

4 *Just think. If you had asked to transfer venue to California where*
5 *you were instead of Massachusetts where nobody was, a wise judge*
6 *could be handling all of this right now.*

7 Attached as **Exhibit 4** is a true and correct copy of excerpts of the transcript of the
8 January 20, 2011, hearing in *Personal Audio v. Apple et al.*, E.D. Tex. Case No.
9 9:09-cv-00111-RC, in which the above-quoted statement appears on page 50, lines
10 12-15 (emphasis is added above).

11 10. Consistent with Judge Clark’s comments quoted above, the Central
12 District of California, Fuhu’s home district where the accused products are
13 designed, developed, marketed, and sold, is a far more convenient location for this
14 action than the Eastern District of Texas, where Fuhu is not subject to personal
15 jurisdiction and not even Personal Audio had an office or employee until very
16 recently.

17 PATENTS-IN-SUIT

18 11. The ‘076 patent indicates on its face that it is titled, “Audio Program
19 Player Including a Dynamic Program Selection Controller,” that it was filed on
20 October 2, 1996, and that it was issued on March 6, 2001. A true and correct copy
21 of the ‘076 patent is attached hereto as **Exhibit 5**, including an ex parte
22 reexamination certificate issued on November 30, 2012.

23 12. The ‘178 patent indicates on its face that it is titled, “Audio Program
24 Distribution and Playback System,” that it was filed on February 13, 2001, as a
25 division of the application that matured into the ‘076 patent, and that it was issued
26 on March 24, 2009. A true and correct copy of the ‘178 patent is attached hereto as
27 **Exhibit 6**.

1 13. A true and correct copy of a U.S. Patent and Trademark Office Patent
2 Assignment Abstract of Title for the '076 patent is attached as **Exhibit 7**.

3 14. A true and correct copy of a U.S. Patent and Trademark Office Patent
4 Assignment Abstract of Title for the '178 patent is attached as **Exhibit 8**.

5 15. **Exhibits 7 and 8** reflect that the Patents-in-Suit were assigned from
6 the named inventors, James Logan, Daniel F. Goessling, and Charles G. Call, to
7 Personal Audio, Inc., in an assignment executed by the inventors between January
8 15, 1997, and January 5, 1998. *See* **Exhibits 7 and 8**.

9 16. Personal Audio, Inc., then assigned the Patents-in-Suit to James D.
10 Logan in an assignment executed on May 27, 1998. *See* **Exhibits 7 and 8**.

11 17. James D. Logan then assigned the Patents-in-Suit to the James D.
12 Logan and Kerry M. Logan Family Trust in an assignment executed on May 28,
13 1998. *See* **Exhibits 7 and 8**.

14 18. The James D. Logan and Kerry M. Logan Family Trust then assigned
15 the Patents-in-Suit to Personal Audio, LLC, in an assignment dated May 19, 2009.
16 *See* **Exhibits 7 and 8**.

17 19. However, Personal Audio's claim of ownership of the Patents-in-Suit,
18 and thus its standing to license and to assert claims for infringement of the Patents-
19 in-Suit, is called into question by an August 28, 2000, Appellant's Brief filed by
20 coinventor and prosecuting attorney Mr. Call in the prosecution of the application
21 that matured into the Patents-in-Suit, which states that "[t]he real party in interest is
22 Gotuit Media Inc., 300 Brickstone Square, Andover, MA 01810, the assignee of the
23 above-identified application." A true and correct copy of this Appellant's Brief is
24 attached hereto as **Exhibit 75**. No assignment to or from Gotuit Media Inc. appears
25 in the U.S. Patent and Trademark Office's assignment records as reflected in the
26 U.S. Patent and Trademark Office Patent Assignment Abstracts of Title for the
27 Patents-in-Suit attached hereto as **Exhibits 7 and 8**.

28

PARTIES

A. Fuhu

20. Fuhu is a California corporation with its headquarters and principal place of business in the Central District of California at 909 N. Sepulveda Boulevard, Suite 540, El Segundo, California 90245. Fuhu also has offices in San Jose, California; Denver, Colorado; China; Hong Kong; Taiwan; and Japan. Fuhu’s headquarters has been located in the Central District of California since Fuhu’s founding.

21. Fuhu is the award-winning creator of nabi® tablet computers and the leading designer, seller, and innovator of thoughtful consumer products and services for children. See generally <http://www.nabitablet.com/>. Fuhu’s stated mission is to create children’s solutions that are (1) socially responsible, (2) made right, (3) making a difference in people’s lives, (4) “For Parents. By Parents.®,” and (5) dedicated to the intellectual development of children.

22. Fuhu has grown rapidly since its founding in 2008 and recently was named by *Inc. Magazine* as the No. 1 Fastest-Growing Private Company in America in *Inc.*’s exclusive Inc. 500|5000 list. A true and correct copy of the *Inc. Magazine* article about this award, obtained from <http://www.inc.com/magazine/201309/burt-helm/inc.500-2013-number-one-company-fuhu.html>, is attached hereto as **Exhibit 9**.

23. Additional awards and recognition that Fuhu has received include:

- 2013 *Communication Arts* Design Competition Award of Excellence by *Communication Arts Magazine*
- 2013 Product of the Year Award by *Creative Child Magazine*, Creative Child Awards Program
- 2013 Travel Fun Product of the Year by *Creative Child Magazine*
- 2013 Preferred Choice Award by *Creative Child Magazine*
- 2013 National Parenting Publications Award (NAPPA) Gold Awards

- 1 • Mom's Best Award Extraordinary Products 2013
- 2 • *LAPTOP Magazine* Best Tablets 2013
- 3 • *LAPTOP Magazine* Editors' Choice
- 4 • *PC Magazine* Editors' Choice
- 5 • TRUSTe Children's Privacy Seal of Approval
- 6 • "Hottest Companies in Southern California" by *Lead411*

7 General information regarding awards and recognition that Fuhu has received is
8 available on its Web site at <http://www.nabitablet.com/press/awards> and
9 <http://www.nabitablet.com/press/releases>.

10 24. The vast majority of Fuhu's employees, including employees involved
11 in the design, development, marketing, and sales of Fuhu's nabi® tablet computers
12 for which Personal Audio has demanded that Fuhu take a license to the Patents-in-
13 Suit, are located at Fuhu's headquarters in El Segundo, California. Approximately
14 109 employees work at Fuhu's headquarters, and an additional approximately 34
15 employees work in California at Fuhu's San Jose office.

16 25. Substantially all of Fuhu's documents and/or other evidence regarding
17 the design, development, marketing, and sales of Fuhu's nabi® tablet computers for
18 which Personal Audio has demanded that Fuhu take a license to the Patents-in-Suit
19 are located at Fuhu's headquarters in El Segundo, California.

20 26. To the extent that Personal Audio's infringement allegations are
21 directed in whole or in part to the Android® operating system of Fuhu's nabi®
22 tablet computers, Fuhu is informed and believes that all witnesses, documents, and
23 other evidence regarding the same are located in California at or in the vicinity of
24 Google's headquarters in Mountain View. *See, e.g., Exhibit 77*, which is a true and
25 correct copy of Google's Form 10-K Annual Report for the fiscal year ended
26 December 31, 2012, and indicates, inter alia:

27 Working closely with the Open Handset Alliance, a business alliance
28 of more than 75 technology and mobile companies, we developed

1 Android, a free, fully open source mobile software platform that any
2 developer can use to create applications for mobile devices and any
3 handset manufacturer can install on a device. We believe Android will
4 drive greater innovation and choice in the mobile device ecosystem,
5 and provide consumers with a more powerful mobile experience.

6 **Exhibit 77** at p. 6.

7 27. Fuhu distributes its nabi® tablet computers for which Personal Audio
8 has demanded that Fuhu take a license to the Patents-in-Suit on a nationwide basis
9 online at Fuhu's Web site (<https://store.nabitablet.com/>), the Target.com Web site,
10 and the Walmart.com Web Site, as well as in physical stores of national retailers
11 Walmart, Best Buy, and GameStop, and regional retailers such as Fry's Electronics
12 and Abt Electronics and Appliances. Fuhu does not specifically target distribution
13 of the nabi® tablet computers at the Eastern District of Texas.

14 28. Fuhu advertises nationally. Fuhu does not specifically target
15 advertising at the Eastern District of Texas.

16 29. Fuhu does not have any offices or employees located in the Eastern
17 District of Texas.

18 30. Fuhu does not have any documents or other evidence located in the
19 Eastern District of Texas.

20 31. Fuhu is not incorporated or registered to do business in Texas.

21 32. Fuhu has never owed or paid Texas Franchise Taxes.

22 **B. Personal Audio**

23 33. On information and belief, Personal Audio is a Texas limited liability
24 company whose sole business is the monetization of the Patents-in-Suit and related
25 patents.

26 34. Personal Audio asserts that it is the owner of the Patents-in-Suit, and
27 **Exhibits 7 and 8** indicate the same.

1 35. Personal Audio purports to be a Texas entity based in Texas, but, as
2 the Federal Circuit has noted:

3 To be sure, the status of Personal Audio, LLC, as a Texas corporation
4 is not entitled to significant weight, inasmuch as the company's
5 presence in Texas appears to be both recent and ephemeral - its office
6 is apparently the office of its Texas litigation counsel, and it appears
7 not to have any employees in Texas.

8 *See In re Apple Inc.*, 374 Fed. Appx. 997, 999 (Fed. Cir. 2010).

9 36. Personal Audio letterhead purports that Personal Audio's address is
10 3827 Phelan Blvd., Suite 180, Beaumont, Texas 77707. For example, this
11 purported address is shown on **Exhibit 10** hereto, which is a true and correct copy
12 of a letter dated February 5, 2013, from Personal Audio's Vice President of
13 Licensing, Richard A. Baker, Jr., to Fuhu's Chief Executive Officer, James
14 Mitchell.

15 37. Personal Audio's General Counsel, Brad Liddle, testified in a
16 declaration dated July 15, 2013, in opposition to a motion to transfer filed by
17 defendants in other litigation that, inter alia:

- 18 • Mr. Liddle is the "only permanent employee" of Personal Audio (¶ 3);
- 19 • Mr. Liddle works out of Personal Audio's "Licensing Office" located at 340
20 North Sam Houston Parkway E, Suite 165D, Houston, Texas 77060 and
21 resides in a nearby suburb of Houston (¶ 3);
- 22 • "Personal Audio, LLC is a Texas Domestic Limited Liability Corporation
23 founded on April 13, 2009" (¶ 4);
- 24 • "Since its founding, it has maintained a registered agent for service of
25 process in Texas" (¶ 4);
- 26 • "Personal Audio, LLC's principal place of business is located at 3827 Phelan
27 Blvd, Suite 180, Beaumont, TX 77707 and can be contacted through a local
28

1 telephone number whose area code is associated with Beaumont, Texas”
2 (¶ 4);

3 • “A vast majority of Personal Audio, LLC’s documents are located in
4 Beaumont, Texas” (¶ 5);

5 • “Personal Audio, LLC paid Texas Franchise Taxes in 2011 and 2012. In
6 2011, Personal Audio, LLC paid \$29,736 in Franchise Taxes. In 2012,
7 Personal Audio, LLC paid \$46,217 in Franchise Taxes” (¶ 6); and

8 • “Personal Audio, LLC maintains two bank accounts in Beaumont, Texas
9 with nearly \$2 million dollars in the accounts” (¶ 7).

10 A true and correct copy of Mr. Liddle’s July 15, 2013, declaration is attached hereto
11 as **Exhibit 11**. Thus, as recently as July 15, 2013, Personal Audio had no office or
12 employees in the Eastern District of Texas.

13 38. Shortly after Mr. Liddle’s July 15, 2013, declaration was filed,
14 responsive declarations by two private investigators were filed by the defendants in
15 that case. One of these private investigator declarations, by J.R. Skaggs, indicates
16 that Personal Audio’s purported address at 3827 Phelan Blvd., Suite 180,
17 Beaumont, TX 77707 is merely a rented mailbox at a PostNet store. A true and
18 correct copy of the Declaration of J.R. Skaggs dated July 25, 2013, is attached
19 hereto as **Exhibit 12**.

20 39. The other private investigator declaration, by Tony Yarborough,
21 indicates that Personal Audio’s purported “telephone number whose area code is
22 associated with Beaumont, Texas” (*see* **Exhibit 11**, Liddle Decl. at ¶ 4) is routed to
23 Personal Audio’s Vice President of Licensing, Richard A. Baker, Jr., of New
24 England Intellectual Property, LLC, which is located in Massachusetts. A true and
25 correct copy of the Declaration of Tony Yarborough dated July 25, 2013, is
26 attached hereto as **Exhibit 13**.

27
28

1 40. Subsequently, on September 16, 2013, Mr. Liddle signed another
2 declaration in opposition to another motion to transfer by another defendant in other
3 litigation. In this declaration, Mr. Liddle testified that, inter alia:

- 4 • Personal Audio now employs another employee in addition to Mr. Liddle,
5 Jessica Sullivan, who allegedly lives and works in the Eastern District of
6 Texas “as the corporate secretary and marketing coordinator and lives and
7 works in Beaumont, TX” (¶ 4);
- 8 • Personal Audio has a “new principal place of business” at “550 Fannin
9 Street, Suite 1313, Beaumont, TX 77701” (¶ 5);
- 10 • In a slight change from the facts stated in Mr. Liddle’s July 15, 2013,
11 declaration (**Exhibit 11**), “A majority of Personal Audio, LLC’s documents
12 are located in Beaumont, Texas and Houston, Texas. Personal Audio’s
13 original documents are located in a storage location in Beaumont, TX. There
14 are three bankers boxes filled with invention notes and other hand written
15 materials.” (¶ 6); and
- 16 • “Personal Audio will soon move the documents from storage to a secure
17 location on the new premises. Electronic documents, including documents
18 produced in previous litigation in the Eastern District of Texas, are currently
19 located on a hard drive in Personal Audio’s Branch Houston office. These
20 documents are being moved to Beaumont this week.” (¶ 7).

21 A true and correct copy of Mr. Liddle’s September 16, 2013, declaration is attached
22 hereto as **Exhibit 14**.

23 41. Thus, although Personal Audio has attempted to manufacture a sham
24 presence in the Eastern District of Texas for venue purposes, the only potentially
25 relevant evidence located there is “three bankers boxes filled with invention notes
26 and other hand written materials” and a hard drive with electronic documents.

27 42. Attached hereto as **Exhibit 15** is a true and correct copy of a page
28 titled “Our View” from Personal Audio’s Web site at <http://personalaudio.net/our->

1 [view/](#). This page states that it is a reproduction of a feature on Slashdot in which
2 Personal Audio’s founder, James Logan, responded to questions from Slashdot
3 readers. *See Exhibit 15.*

4 43. In this piece, Mr. Logan described Personal Audio’s business as
5 follows:

6 Personal Audio, LLC is a holding company. That is, we own property
7 and our main activities relate to earning a return on that property.

8 Now, it just so happens that our property consists of patents - not real
9 estate, artwork, or copyrights - and that has apparently put us on the
10 wrong side of the patent debate in the eyes of some people

11 The term “patent troll” has emerged in recent years, and to the extent
12 that words matter, this phrase has served as an effective piece of
13 negative branding for those who want to reduce the rights of patent
14 holders. But the debate should go beyond catchy name-calling.

15 Whether we are, or aren’t patent trolls, whatever that term means, isn’t
16 the issue. . . .

17 *See Exhibit 15*, p. 2.

18 44. Upon information and belief, Personal Audio’s patent monetization
19 business activities purposefully directed at California residents include, among
20 other things, patent license sales efforts, extrajudicial enforcement activities
21 including attempts at “wrongful restraint” on the “free exploitation of non-
22 infringing goods” by the “threat of an infringement suit,” *Avocent*, 552 F.3d at
23 1332-33, employing a California expert to perform hundreds or thousands of hours
24 of work in or based from the Central District of California as Personal Audio’s
25 agent in support of patent infringement litigation against California residents and
26 defending the validity of Personal Audio’s patents in proceedings before the United
27 States Patent and Trademark Office adverse to a California resident, paying that
28 expert hundreds of thousands of dollars or more for work on behalf of Personal

1 Audio, collecting millions of dollars of patent licensing fees from California
2 residents, silencing California residents through confidentiality provisions and
3 provisions precluding them from assisting in challenges to the validity of Personal
4 Audio's patents, and incurring ongoing obligations to California residents under
5 patent licensing agreements.

6 **JURISDICTION AND VENUE**

7 **A. Personal Audio's Conduct Gave Rise to Declaratory Judgment Subject**
8 **Matter Jurisdiction Over Fuhu's Claims**

9 45. This action arises under the patent laws of the United States,
10 35 U.S.C. § 1 et seq., with a specific remedy sought under the Federal Declaratory
11 Judgments Act, 28 U.S.C. §§ 2201 and 2202.

12 46. This Court has subject matter jurisdiction over this action pursuant to
13 28 U.S.C. §§ 1331 and 1338(a).

14 47. "Article III jurisdiction may be met where the patentee takes a position
15 that puts the declaratory judgment plaintiff in the position of either pursuing
16 arguably illegal behavior or abandoning that which he claims a right to do." *Arkema*
17 *Inc. v. Honeywell Int'l*, 706 F.3d 1351, 1357 (Fed. Cir. 2013), citing *SanDisk Corp.*
18 *v. STMicroelectronics, Inc.*, 480 F.3d 1372, 1381 (Fed. Cir. 2007).

19 48. As reflected in **Exhibit 10**, Personal Audio sent Fuhu a letter dated
20 February 5, 2013, stating, inter alia:

- 21 • "Personal Audio is the owner of several fundamental patents involving the
22 use of playlists to play music, podcasts, and videos on portable devices."
23 • "We are actively licensing these patents and invite Fuhu to join our growing
24 list of licensees that includes Samsung, Motorola, Amazon, Research in
25 Motion, Coby, SiriusXM, Archos and others."
26 • "Fuhu may wish to have its patent counsel examine Personal Audio's U.S.
27 Patent Nos. 6,199,076 and 7,509,178 to determine whether a non-exclusive
28

1 license is needed under the patents for the Fuhu Nabi 2 Tablet and any other
2 similar products.”

3 • “The ‘076 and ‘178 patents cover important technology related to media
4 players that have the capability to receive playlists and use them to navigate
5 through downloaded content.”

6 • “These patents have been tested in court and at the USPTO.”

7 • “In *Personal Audio, LLC v. Apple, Inc.*, CA 9:09CV111, Personal Audio
8 obtained a judgment for \$12,182,331 in accordance with a jury verdict
9 delivered on July 8, 2011 in which the jury found that Personal Audio’s ‘076
10 and ‘178 [*sic*] were valid and infringed.”

11 • “These patents have also successfully gone through re-exam.”

12 • “We invite Fuhu to take a license to these patents as other major producers in
13 your industry have.”

14 *See Exhibit 10.*

15 49. Fuhu did not have actual or constructive notice of the Patents-in-Suit
16 before it received this first letter from Personal Audio.

17 50. Fuhu’s counsel responded in a letter dated February 15, 2013, a true
18 and correct copy of which is attached as **Exhibit 16**. In this letter, Fuhu’s counsel
19 advised Personal Audio that Fuhu was unaware of any infringement and invited
20 Personal Audio to explain its position, e.g., by providing a claim chart showing any
21 alleged infringement.

22 51. In a letter dated February 19, 2013, a true and correct copy of which is
23 attached as **Exhibit 17**, Mr. Baker stated: “We appreciate your invitation to discuss
24 this matter further. In order to provide additional information to Fuhu, we would
25 like to suggest a WebEx meeting to further explain how Personal Audio views this
26 matter. In this meeting, we will present using PowerPoint slides in our
27 conversation.”

28

1 52. In an email dated February 25, 2013, Mr. Baker forwarded an
2 invitation with a link to attend the WebEx meeting on February 26, 2013. A true
3 and correct copy of this email is attached as **Exhibit 18**.

4 53. Personal Audio presented Fuhu with a set of presentation slides during
5 an online meeting hosted by Personal Audio via WebEx on February 26, 2013.
6 **Exhibits 19, 20, 21, and 22** attached hereto are true and correct copies of screen
7 shots of Personal Audio's presentation to Fuhu during the WebEx meeting on
8 February 26, 2013.

9 54. Personal Audio's response to Fuhu's request for an explanation of
10 Personal Audio's infringement allegations was the generic, uninformative slide
11 shown in **Exhibit 19**, which merely shows the claim language next to images from
12 Fuhu's Web site.

13 55. Personal Audio's slide regarding the alleged validity of the Patents-in-
14 Suit is shown in **Exhibit 20**.

15 56. Personal Audio's slide regarding its purported "royalty calculation" is
16 shown in **Exhibit 21**.

17 57. Personal Audio's slide regarding its licensing proposal to Fuhu is
18 shown in **Exhibit 22**, which reflects Personal Audio's demand that Fuhu choose
19 between two options: pay for a license or stop using the technology and pay for
20 usage from the date of Personal Audio's February 5, 2013, letter to a settlement
21 date.

22 58. In a subsequent email dated February 27, 2013, Mr. Baker forwarded a
23 draft license agreement and copies of Markman orders issued in previous litigation.
24 A true and correct copy of Mr. Baker's email is attached hereto as **Exhibit 23**.

25 59. A true and correct copy of the draft license agreement attached to
26 Mr. Baker's February 27, 2013, email is attached hereto as **Exhibit 24**. Among
27 other provisions, the draft license agreement includes a number of obligations
28

1 Personal Audio would owe to Fuhu under the agreement in Sections 1.1, 3.2, 5.2,
2 5.4, and 6.12.

3 60. As reflected in Schedule A of the draft agreement in **Exhibit 24**, the
4 license would include the Patents-in-Suit as well as related U.S. Patents. *See*
5 **Exhibit 24**, p. 8, Schedule A.

6 61. On April 5, 2013, Mr. Baker left a voicemail for Fuhu's counsel
7 inquiring as to the status of Fuhu's investigation.

8 62. On April 11, 2013, Mr. Baker again called Fuhu's counsel.

9 63. On April 12, 2013, Mr. Baker sent Fuhu's counsel an appointment
10 request for a conference call to be held on April 18, 2013. A true and correct copy
11 of this appointment request is attached as **Exhibit 29**.

12 64. On April 18, 2013, Mr. Baker conducted a telephone call with Fuhu's
13 counsel during which Fuhu provided a counterproposal to Personal Audio's
14 proposal made during the February 26, 2013, WebEx meeting.

15 65. On April 25, 2013, Mr. Baker conducted a telephone call with Fuhu's
16 counsel during which Mr. Baker provided a counterproposal to Fuhu's proposal
17 made during the April 18, 2013, telephone call.

18 66. On May 8, 2013, Mr. Baker conducted a telephone call with Fuhu's
19 counsel during which Fuhu provided a counterproposal to Personal Audio's
20 proposal made during the April 25, 2013, telephone call.

21 67. On May 10, 2013, Mr. Baker conducted a telephone call with Fuhu's
22 counsel during which Mr. Baker provided a counterproposal to Fuhu's proposal
23 made during the May 8, 2013, telephone call.

24 68. On May 30, 2013, Mr. Baker conducted a telephone call with Fuhu's
25 counsel during which Fuhu provided a counterproposal to Personal Audio's
26 proposal made during the May 10, 2013, telephone call.

27 69. On June 5, 2013, Mr. Baker conducted a telephone call with Fuhu's
28 counsel during which Mr. Baker provided a counterproposal to Fuhu's proposal

1 made during the May 30, 2013, telephone call. Mr. Baker also offered during this
2 telephone call to give Fuhu another presentation via a WebEx meeting.

3 70. On June 27, 2013, Mr. Baker conducted a telephone call with Fuhu's
4 counsel during which Mr. Baker discussed potential nonmonetary terms of a
5 license.

6 71. On June 28, 2013, Mr. Baker conducted a telephone call with Fuhu's
7 counsel during which Mr. Baker discussed potential nonmonetary terms of a
8 license.

9 72. On July 15, 2013, Mr. Baker sent an email to Fuhu's counsel
10 requesting a telephone call. A true and correct copy of this email is attached as
11 **Exhibit 30.**

12 73. On July 24, 2013, Mr. Baker sent an email to Fuhu's counsel implicitly
13 threatening litigation. A true and correct copy of this email is attached as
14 **Exhibit 31.**

15 74. On July 29, 2013, Mr. Baker and Mr. Liddle conducted a telephone
16 call with Fuhu's counsel during which Fuhu provided another counterproposal and
17 Mr. Baker again implicitly threatened litigation.

18 75. On July 30, 2013, Mr. Baker and Mr. Liddle left a voicemail at Fuhu's
19 counsel's office.

20 76. On August 1, 2013, Mr. Baker conducted a telephone call with Fuhu's
21 counsel during which Mr. Baker provided a counterproposal to Fuhu's proposal
22 made during the July 29, 2013, telephone call.

23 77. Through at least the above conduct, Personal Audio put Fuhu "in the
24 position of either pursuing arguably illegal behavior or abandoning that which he
25 claims a right to do." *Arkema*, 706 F.3d at 1357; *SanDisk*, 480 F.3d at 1381.

26 78. Fuhu contends that it has not infringed and is not infringing properly
27 construed, valid, and enforceable claims of the Patents-in-Suit, either literally or
28 under the Doctrine of Equivalents. Personal Audio declined Fuhu's invitation to

1 explain its infringement contentions, instead providing the presentation slide
2 attached as **Exhibit 19**, which is generic and not even conclusory as to
3 infringement. Personal Audio never has provided Fuhu with claim charts
4 demonstrating correspondence between the claims of the Patents-in-Suit and Fuhu's
5 products.

6 79. As Judge Mariana R. Pfaelzer of the Central District of California has
7 held, a declaratory judgment claim of no direct infringement "need only plead facts
8 to put the patentee on notice [of the noninfringement claim] and need not be subject
9 to the heightened pleading standards of *Twombly* and *Iqbal*." *Microsoft Corp. v.*
10 *Phoenix Solutions, Inc.*, 741 F. Supp. 2d 1156, 1159 (C.D. Cal. 2010) (Pfaelzer, J.).
11 As Judge Pfaelzer held in *Microsoft v. Phoenix*, "it would be incongruous to require
12 heightened pleading when the pleading standard for infringement does not require
13 facts such as 'why the accused products allegedly infringe' or 'to specifically list
14 the accused products.'" *Id.*

15 80. Fuhu further contends that the properly construed claims of the
16 Patents-in-Suit are invalid for failure to comply with the requirements for
17 patentability of, inter alia, 35 U.S.C. §§ 101, 102, 103, and/or 112. Again, as Judge
18 Pfaelzer held in *Microsoft v. Phoenix*, "it would be incongruous to require
19 heightened pleading [for declaratory judgments of patent invalidity] when the
20 pleading standard for infringement does not require facts such as 'why the accused
21 products allegedly infringe' or 'to specifically list the accused products.'" *Id.*
22 Fuhu's investigation of the invalidity of the Patents-in-Suit is ongoing and may be
23 affected by the construction of the patent claims and/or positions taken by Personal
24 Audio with respect to infringement and/or invalidity issues.

25 81. Nevertheless, notwithstanding that Fuhu's claims for declaratory
26 judgment of invalidity are not subject to heightened pleading standards, and subject
27 to and without waiving Fuhu's right to assert all applicable invalidity defenses
28

1 whether or not expressly alleged here, Fuhu contends that the claims of the Patents-
2 in-Suit are invalid for at least the following reasons:

- 3 • The claims are invalid at least because they include means-plus-limitations
4 subject to the sixth paragraph of 35 U.S.C. § 112 but fail to provide adequate
5 disclosure of the corresponding structures or algorithms for performing the
6 functions of such means-plus-function limitations. *See, e.g., Function*
7 *Media, L.L.C. v. Google Inc.*, 708 F.3d 1310, 1318 (Fed. Cir. 2013) (issued
8 subsequent to any previous litigation of this issue).
- 9 • In addition, the '178 patent is invalid at least because it was under final
10 rejection in U.S. Patent and Trademark Office reexamination proceedings
11 when those reexamination proceedings were terminated for procedural,
12 nonsubstantive reasons.
 - 13 ○ Attached hereto as **Exhibit 78** is a true and correct copy of an Office
14 Action dated April 16, 2010, issued by the U.S. Patent and Trademark
15 Office in the reexamination of the '178 patent;
 - 16 ○ Attached hereto as **Exhibit 79** is a true and correct copy of an Action
17 Closing Prosecution dated March 7, 2011, issued by the U.S. Patent
18 and Trademark Office in the reexamination of the '178 patent; and
 - 19 ○ Attached hereto as **Exhibit 80** is a true and correct copy of a Decision
20 Granting Petition to Terminate and Dismissing as Moot Remaining
21 Petitions dated February 22, 2012, issued by the U.S. Patent and
22 Trademark Office in the reexamination of the '178 patent.
 - 23 ○ Absent the procedural termination of the reexamination of the '178
24 patent, the '178 patent would have been invalidated by the
25 reexamination proceedings.
- 26 • In addition, the Patents-in-Suit are invalid as anticipated and/or obvious in
27 view of at least the DAD System operated using MS-DOS commands, such
28 as DOS COPY and XCOPY commands, which was excluded at the Apple

1 trial. Attached hereto as **Exhibit 82** is a true and correct copy of Judge
2 Clark's June 21, 2011, order ruling on Personal Audio's motions *in limine*,
3 *see p. 1* ruling on motion *in limine* No. 1.

- 4 • In addition, the Patents-in-Suit are invalid as anticipated and/or obvious in
5 view of at least the NewsCOMM thesis that was excluded at the Apple trial,
6 as reflected in **Exhibit 82**, *see p. 5* ruling on motion *in limine* No. 7.
- 7 • In addition, the Patents-in-Suit are invalid at least because they were
8 admitted to be so by one of the inventors of the Patents-in-Suit, Daniel
9 Goessling, during a deposition taken by Apple.

- 10 ○ Attached hereto as **Exhibit 81** is a true and correct copy of excerpts of
11 the transcript of the Deposition of Daniel F. Goessling taken on
12 June 29, 2010, by Apple's counsel.

- 13 ○ **Exhibit 81** was submitted in connection with a motion *in limine* by
14 Personal Audio seeking to exclude such testimony from the Apple
15 trial. Specifically, **Exhibit 81** was submitted as Exhibit A to the
16 Declaration of Patrick M. Arenz dated May 31, 2011 (Docket No. 371
17 in Eastern District of Texas Case No. 9:09-cv-00111), as reflected in
18 the ECF header.

- 19 ○ As reflected in **Exhibit 4**, during a January 20, 2011, hearing, Apple's
20 counsel advised Judge Clark that Mr. Goessling refused to attend the
21 Apple trial in Texas, to which Judge Clark replied, "I suppose you
22 could do him by video." *See Exhibit 4* at 50:16-23.

- 23 ○ However, Judge Clark later granted in part Personal Audio's motion *in*
24 *limine* to exclude portions of Mr. Goessling's testimony, so that
25 testimony was never presented at the Apple trial. Attached hereto as
26 **Exhibit 82** is a true and correct copy of Judge Clark's June 21, 2011,
27 order ruling on Personal Audio's motions *in limine*, *see p. 3* ruling on
28 motion *in limine* No. 4.

1 • In addition, the Patents-in-Suit are invalid for at least the reasons set forth in
2 the Amended Expert Report of Dr. Stephen B. Wicker Regarding the
3 Invalidity of U.S. Patent Nos. 6,199,076 and 7,509,178, a true and correct
4 copy of which is attached hereto as **Exhibit 83**. Personal Audio submitted
5 **Exhibit 83** to the U.S. Patent and Trademark Office as Exhibit D to a Notice
6 of Concurrent proceedings submitted in the reexamination of the '178 patent.

7 82. By virtue of Personal Audio's actions and statements directed at Fuhu,
8 including, without limitation, as alleged herein, there is an actual and substantial
9 controversy between Fuhu and Personal Audio regarding Fuhu's liability for
10 infringement of the Patents-in-Suit and the validity of the Patents-in-Suit.

11 83. This controversy is between parties having adverse legal interests and
12 is of sufficient immediacy and reality to warrant issuance of a declaratory judgment
13 under 28 U.S.C. § 2201(a) as to Fuhu's liability for infringement of the Patents-in-
14 Suit and the validity of the Patents-in-Suit.

15 84. Thus an actual, substantial, and continuing justiciable controversy
16 exists between Fuhu and Personal Audio that requires a declaration of rights by this
17 Court, and this Court has subject matter jurisdiction over Fuhu's declaratory
18 judgment claims.

19 **B. Personal Audio Is Subject to General Personal Jurisdiction and Specific**
20 **Personal Jurisdiction in the Central District of California**

21 85. In addition to Personal Audio's patent enforcement activities directed
22 at Fuhu as detailed above, Personal Audio has systematically, continuously, and
23 purposefully directed other activities at other California residents relating to the
24 enforcement and/or defense of the validity of Personal Audio's patents that subject
25 Personal Audio to general personal jurisdiction and specific personal jurisdiction in
26 the Central District of California.

27 86. In a patent case, the law of the Federal Circuit applies to the
28 determination of whether the district court can properly exercise personal

1 jurisdiction over an out-of-state accused defendant. *Nuance Commc'ns., Inc. v.*
2 *Abby Software House*, 626 F.3d 1222, 1230 (Fed. Cir. 2010). Federal Circuit law
3 applies equally in declaratory judgment actions where the patentee is the defendant.
4 *Elecs. for Imaging, Inc., v. Coyle*, 340 F.3d 1344, 1349 (Fed. Cir. 2003).

5 87. “Personal jurisdiction over an out-of-state defendant is appropriate if
6 the relevant state’s long-arm statute permits the assertion of jurisdiction without
7 violating federal due process.” *3D Sys., Inc. v. Aarotech Labs., Inc.*, 160 F.3d
8 1373, 1376-77 (Fed. Cir. 1998). “Because California’s long-arm statute is co-
9 extensive with federal due process requirements, the jurisdictional analyses under
10 California law and federal law are the same.” *Nuance*, 626 F.3d at 1230.

11 88. Under federal law, “due process requires only that in order to subject a
12 defendant to a judgment in personam, if he be not present within the territory of the
13 forum, he have certain minimum contacts with it such that the maintenance of the
14 suit does not offend traditional notions of fair play and substantial justice.” *Int’l*
15 *Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotation marks
16 omitted).

17 89. A court may have two types of personal jurisdiction over a defendant:
18 general and specific. *See Avocent Huntsville Corp. v. Aten Int’l Co.*, 552 F.3d
19 1324, 1330 (Fed. Cir. 2008).

20 90. General jurisdiction “requires that the defendant have ‘continuous and
21 systematic’ contacts with the forum state,” and that such activity “confers personal
22 jurisdiction even when the cause of action has no relationship with those contacts.”
23 *Silent Drive, Inc. v. Strong Indus., Inc.*, 326 F.3d 1194, 1200 (Fed. Cir. 2003),
24 citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16
25 (1984).

26 91. “To establish specific jurisdiction, a plaintiff must demonstrate that the
27 defendant has purposefully directed his activities at residents of the forum, and the
28 litigation results from alleged injuries that arise out of or relate to those activities.”

1 *Avocent*, 552 F.3d at 1330 (internal quotation marks and citations omitted).
2 Specifically, the Federal Circuit employs a three-prong test, in which the court must
3 determine whether (1) the defendant purposefully directed its activities at residents
4 of the forum, (2) the claim arises out of or relates to those activities, and
5 (3) assertion of personal jurisdiction is reasonable and fair.

6 92. With respect to the last prong, the burden of proof is on the defendant,
7 which must present a compelling case that the presence of some other
8 considerations would render jurisdiction unreasonable under the five-factor test
9 articulated by the Supreme Court in *Burger King*. See *Breckenridge Pharm., Inc. v.*
10 *Metabolite Labs., Inc.*, 444 F.3d 1356, 1363 (Fed. Cir. 2006). The five *Burger*
11 *King* factors include (1) the burden on the defendant, (2) the forum state's interest
12 in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and
13 effective relief, (4) the interstate judicial system's interest in obtaining the most
14 efficient resolution of controversies, and (5) the shared interest of the several states
15 in furthering fundamental substantive social policies. *Avocent*, 552 F.3d at 1331,
16 citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-77 (1985).

17 93. In the context of an action such as this for declaratory judgment of
18 noninfringement and invalidity, the patentee is the defendant, and the claim asserted
19 by the plaintiff relates to the “wrongful restraint [by the patentee] on the free
20 exploitation of non-infringing goods . . . [such as] the threat of an infringement
21 suit.” *Avocent*, 552 F.3d at 1332-33 (citation omitted). Thus the nature of the
22 claim in a declaratory judgment action is “to clear the air of infringement charges.”
23 *Id.*

24 94. Such a claim arises out of or relates to the activities of the defendant
25 patentee in enforcing the patent or patents in suit. *Id.* The relevant inquiry for
26 specific personal jurisdiction purposes then becomes to what extent has the
27 defendant patentee “purposefully directed [such enforcement activities] at residents
28

1 of the forum,” and the extent to which the declaratory judgment claim “arises out of
2 or relates to those activities.” *Breckenridge*, 444 F.3d at 1363.

3 95. Because declaratory judgment actions raise noninfringement,
4 invalidity, and/or unenforceability issues central to enforcement of the patents in
5 question, the Federal Circuit has looked beyond the “arises out of” inquiry and has
6 found jurisdiction where such “other activities” in some identifiable way “relate to”
7 enforcement of those patents in the forum. *Avocent*, 552 F.3d at 1334-37.

8 96. “[T]he [declaratory judgment] plaintiff need not be the forum resident
9 toward whom any, much less all, of the defendant’s relevant activities were
10 purposefully directed.” *Id.* (citations omitted).

11 97. However, the Federal Circuit has required the patentee to have
12 engaged in “other activities” that relate to the enforcement or the defense of the
13 validity of the relevant patents. *Id.*

14 98. Examples of these “other activities” include initiating extrajudicial
15 patent enforcement within the forum or entering into a license agreement or other
16 undertaking which imposes obligations with a party residing or regularly doing
17 business in the forum. *See Campbell Pet Co. v. Miale*, 542 F.3d 879, 886
18 (Fed. Cir. 2008) (finding jurisdiction over a patentee based on “extrajudicial patent
19 enforcement” activity of asking a third party -- who refused -- to remove
20 defendant’s products from a trade show that was being held in the forum state).

21 99. In *Coyle*, the Federal Circuit held that there was a prima facie case of
22 specific personal jurisdiction against a Nevada patentee in the State of California.
23 *Coyle*, 340 F.3d at 1351. There, the patentee purposefully directed his activity
24 toward California when (1) he hired a California patent lawyer who contacted the
25 opposing party frequently to update them on the status of the patent application,
26 (2) the patentee telephoned the opposing party regarding the subject matter of the
27 patent frequently, and (3) two of the patentee’s representatives visited the opposing
28 party to demonstrate the invention. *Coyle*, 394 F.3d at 1350-51.

1 100. Further, the Federal Circuit in *Avocent* recognized that the Supreme
2 Court has also instructed that personal jurisdiction may be “proper because of [a
3 defendant’s] intentional conduct in [another state] calculated to cause injury to [the
4 plaintiff] in [the forum state].” *Avocent*, 552 F.3d at 1331, citing *Calder v. Jones*,
5 465 U.S. 783, 791 (1984). Thus Personal Audio’s patent licensing and other
6 enforcement activities outside California targeting California residents are
7 calculated to cause injury and have caused injury to residents of California and
8 support personal jurisdiction over Personal Audio in the Central District of
9 California.

10 101. “To survive a motion to dismiss in the absence of jurisdictional
11 discovery, plaintiffs need only make a prima facie showing of jurisdiction.”
12 *Nuance*, 626 F.3d at 1231, citing *Trintec Indus., Inc. v. Pedre Promotional Prods.,*
13 *Inc.*, 395 F.3d 1275, 1282 (Fed. Cir. 2005) (emphasis added). “In evaluating this
14 showing, the district court must construe all pleadings and affidavits in the light
15 most favorable to the plaintiff.” *Trintec*, 395 F.3d at 1282-83, citing *Silent Drive*,
16 326 F.3d at 1201. A plaintiff may make a prima facie showing of either general or
17 specific personal jurisdiction over a defendant. *Avocent*, 552 F.3d at 1330.

18 102. In an effort to meet and confer and avert the filing of Personal Audio’s
19 motion to dismiss (Docket No. 14) consistent with the principles stated in
20 Section 8.a. of this Court’s Standing Order Regarding Newly Assigned Cases
21 (Docket No. 9), Fuhu provided Personal Audio with a nonexhaustive summary of
22 Personal Audio’s activities purposefully directed at California residents that subject
23 Personal Audio to personal jurisdiction in the Central District of California in a
24 letter dated August 22, 2013, a true and correct copy of which is attached as
25 **Exhibit 25**. Also attached as **Exhibits 26, 27, and 28** are true and correct copies of
26 proposed jurisdictional discovery requests attached to **Exhibit 25**, to which
27 Personal Audio has refused to respond and for leave to serve which Fuhu will move
28 the Court if necessary.

1 103. Fuhu hereby repeats and realleges the following statements in the
2 August 22, 2013, letter attached hereto as **Exhibit 25**:

3 To confirm the response I gave you on Tuesday [August 20,
4 2013] to your question whether Fuhu's assertion of personal
5 jurisdiction is based solely on the cease and desist correspondence
6 Fuhu received from Personal Audio, that is not Fuhu's position.
7 Rather, Personal Audio has subjected itself to personal jurisdiction in
8 the Central District of California by the aggregate of at least the
9 following multitude of contacts with California that Fuhu has
10 discovered so far without the benefit of discovery:

- 11 • Personal Audio presented its case against Apple and defended
12 the validity of the Patents-in-Suit in district court and multiple
13 reexamination proceedings through a longtime resident of the
14 Central District of California, University of California, Santa
15 Barbara Professor Kevin C. Almeroth.
- 16 • On information and belief, Dr. Almeroth performed hundreds, if
17 not thousands, of hours of work in the Central District of
18 California in support of the enforcement and/or defense of the
19 validity of the Patents-in-Suit and/or related patents on Personal
20 Audio's behalf.
- 21 • Dr. Almeroth was paid hundreds of thousands of dollars, if not
22 more, by Personal Audio for this work.
- 23 • Dr. Almeroth is an important fact witness regarding the Patents-
24 in-Suit, including without limitation with respect to the
25 reexamination proceedings in which he actively participated by
26 attending at least one examiner interview and submitting
27 testimony.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- Personal Audio has filed litigation to enforce the Patents-in-Suit and/or related patents against numerous California companies and individuals, including:
 - Apple, which Personal Audio has sued three separate times;
 - Google’s subsidiary Motorola Mobility;
 - Archos;
 - NBCUniversal Media;
 - Lotzi Digital;
 - ACE Broadcasting;
 - The “Adam Carolla Partnership”, comprising:
 - Adam Carolla,
 - Donny Misraje,
 - Kathee Schneider-Misraje, and
 - Sandy Ganz;
 - Fox Broadcasting Company;
 - Fox Networks Group; and
 - Fuhu.
 - While Personal Audio made a strategic decision to file the above-listed lawsuits against these California companies and individuals outside of California, Personal Audio pursued its patent infringement enforcement activities in a manner that subjected itself to jurisdiction in California in numerous additional ways discussed below.
- Personal Audio has served process in California on at least some of the above-listed California entities it has sued.
- Personal Audio engaged in extensive extra-judicial enforcement of the Patents-in-Suit in the Central District of California

1 through licensing negotiations seeking to monetize the Patents-
2 in-Suit and/or related patents from California residents.

- 3 • Personal Audio's licensing efforts constitute wrongful restraints
4 on the free exploitation of non-infringing goods through, inter
5 alia, the threat of an infringement suit.
- 6 • Targets of such extra-judicial enforcement efforts by Personal
7 Audio include, without limitation and on information and belief:
- 8 ○ All of the litigants listed above;
 - 9 ○ Earwolf Media;
 - 10 ○ Jeff Ullrich;
 - 11 ○ Marc Maron;
 - 12 ○ Jesse Thorn;
 - 13 ○ Jay Mohr;
 - 14 ○ Joe Rogan;
 - 15 ○ Scott Aukerman;
 - 16 ○ Comedy Bang Bang;
 - 17 ○ At least 3 other unknown entities with Los Angeles
18 addresses(see:
19 <https://trollingeffects.org/search/node/personal%20audio>);
20 and
 - 21 ○ Untold other California residents against whom Personal
22 Audio has directed patent enforcement efforts through
23 licensing correspondence or otherwise.

24 The above-listed multitude of contacts, gleaned without the
25 benefit of any discovery, reflect that Personal Audio has had
26 continuous and systematic general business contacts with California
27 for several recent years. Indeed, Dr. Almeroth's hundreds or
28 thousands of hours of work in California on Personal Audio's behalf,

1 which may be ongoing still, reflect the establishment by Personal
2 Audio of a regular physical place of business in California that is as
3 regular a place of business as any other location where Personal
4 Audio's business is conducted. Accordingly, Personal Audio is
5 subject to general personal jurisdiction in California.

6 Even if it is determined that Personal Audio is not subject to
7 general personal jurisdiction in California, Personal Audio is subject to
8 specific personal jurisdiction here because Fuhu's declaratory
9 judgment claims arise out of and/or relate to the above-referenced
10 activities by Personal Audio in and/or directed at California related to
11 the enforcement and/or defense of the validity of the Patents-in-Suit
12 and/or related patents.

13 *See Exhibit 25*, pp. 2-4.

14 104. Personal Audio's extensive activities purposefully directed at Fuhu in
15 California in connection with Personal Audio's extrajudicial efforts to enforce its
16 patents against Fuhu are detailed above.

17 105. In addition, in previous litigation on the Patents-in-Suit against
18 California resident Apple, Personal Audio relied on University of California, Santa
19 Barbara Professor Kevin C. Almeroth as its expert regarding infringement and
20 invalidity issues raised in that case.

21 106. Because Personal Audio hired Dr. Almeroth to investigate and analyze
22 issues of infringement and invalidity of the Patents-in-Suit, Dr. Almeroth was
23 Personal Audio's agent for those purposes. *See Collins v. Wayne Corp.*, 621 F.2d
24 777, 782 (5th Cir. 1980); *Reyes v. City of Glendale*, 2009 U.S. Dist. LEXIS 80318,
25 *29-*30 (C.D. Cal. 2009) (citing *Collins* and collecting additional authorities
26 holding that a testifying expert's statements are admissions of the party that hired
27 the expert); *Yarbrough's Dirt Pit, Inc. v. Turner*, 65 S.W.3d 210, 214 (Tex. App.
28 Beaumont 2001) ("We hold that a conclusion of an expert witness hired by an

1 opposing party to speak on the subject matter on behalf of the party opponent is
2 admissible against the party opponent, and the conclusion may be relied on in a
3 motion for summary judgment even if the opposing expert witness does not
4 disclose the bases for the conclusion adverse to the expert's client.”).

5 107. Upon information and belief, Dr. Almeroth performed hundreds if not
6 thousands of hours of work in and/or based from his residence in the Central
7 District of California as Personal Audio's agent and/or on Personal Audio's behalf
8 related to the enforcement and defense of the validity of the Patents-in-Suit and/or
9 related patents, and Personal Audio paid Dr. Almeroth more than \$450,000 for this
10 work.

11 108. Attached hereto as **Exhibit 32** is a true and correct copy of excerpts of
12 the court's docket in the Apple case with highlighting on docket entries related to
13 Dr. Almeroth. Although many of the docket entries relating to Dr. Almeroth are
14 not accessible to Fuhu because they are sealed, the docket reflects that testimony by
15 Dr. Almeroth was submitted and/or was the subject of motion practice in
16 34 separate docket entries spanning the period of June 30, 2010, to July 22, 2011,
17 including docket entries 487, 417, 400, 394, 393, 386, 362, 350, 344, 339, 338, 312,
18 295, 281, 273, 269, 263, 260, 256, 249, 248, 247, 246, 245, 244, 231, 199, 198,
19 196, 195, 189, 179, 174, and 163. *See Exhibit 32.*

20 109. Attached hereto as **Exhibit 33** is a true and correct copy of
21 Dr. Almeroth's declaration regarding claim construction issues filed in the Apple
22 case on June 30, 2010. This declaration states that Dr. Almeroth is “a professor in
23 the Department of Computer Science at the University of California in Santa
24 Barbara. At the University of California—Santa Barbara, I am also the Associate
25 Director of the Center for Information Technology and Society, and a founding
26 faculty member of the Media Arts and Technology Program, Technology
27 Management Program and the Computer Engineering Program.” **Exhibit 33** at p.
28 1. Dr. Almeroth's CV attached as Exhibit A to this declaration indicates that Dr.

1 Almeroth has worked at the University of California, Santa Barbara since July
2 1997. **Exhibit 33** at Ex. A, pp. 1-2.

3 110. Attached hereto as **Exhibit 34** is a true and correct copy of
4 Dr. Almeroth's declaration regarding additional claim construction issues filed in
5 the Apple case on July 14, 2010.

6 111. Dr. Almeroth testified for all or part of five of the nine court days
7 during which witnesses were presented in the Apple case.

8 112. Attached hereto as **Exhibit 35** is a true and correct copy of excerpts of
9 Volume 2 of the trial transcript in the Apple case with Dr. Almeroth's trial
10 testimony given on June 24, 2011.

11 113. Attached hereto as **Exhibit 36** is a true and correct copy of excerpts of
12 Volume 3 of the trial transcript in the Apple case with Dr. Almeroth's trial
13 testimony given on June 27, 2011.

14 114. Attached hereto as **Exhibit 37** is a true and correct copy of excerpts of
15 Volume 4 of the trial transcript in the Apple case with Dr. Almeroth's trial
16 testimony given on June 28, 2011. Among other things, Dr. Almeroth testified on
17 June 28, 2011, that he had spent "about 900 hours on this case" at an hourly rate of
18 \$500, totaling about \$450,000 in payments by or on behalf of Personal Audio to
19 Dr. Almeroth as of June 28, 2011, after which Dr. Almeroth continued working in
20 or based from California as Personal Audio's agent regarding infringement and/or
21 invalidity of the Patents-in-Suit, as discussed further below. *See Exhibit 37* at
22 1026:19-1027:10.

23 115. Attached hereto as **Exhibit 38** is a true and correct copy of excerpts of
24 Volume 5 of the trial transcript in the Apple case with Dr. Almeroth's trial
25 testimony given on June 29, 2011.

26 116. Attached hereto as **Exhibit 39** is a true and correct copy of excerpts of
27 Volume 9 of the trial transcript in the Apple case with Dr. Almeroth's trial
28 testimony given on July 6, 2011.

1 117. Personal Audio also relied on Dr. Almeroth for expert testimony in
2 reexamination proceedings regarding the Patents-in-Suit before the U.S. Patent and
3 Trademark Office that were requested by Apple during the Apple case.

4 118. Attached hereto as **Exhibit 40** is a true and correct copy of the Expert
5 Declaration of Dr. Kevin C. Almeroth dated July 16, 2010, submitted on behalf of
6 Personal Audio to the U.S. Patent and Trademark Office in the inter partes
7 reexamination of the '178 patent.

8 119. Attached hereto as **Exhibit 41** is a true and correct copy of the Second
9 Expert Declaration of Dr. Kevin C. Almeroth dated April 22, 2011, submitted on
10 behalf of Personal Audio to the U.S. Patent and Trademark Office in the inter partes
11 reexamination of the '178 patent.

12 120. Attached hereto as **Exhibit 42** is a true and correct copy of the Expert
13 Declaration of Dr. Kevin C. Almeroth dated April 13, 2012, submitted on behalf of
14 Personal Audio to the U.S. Patent and Trademark Office in the ex parte
15 reexamination of the '076 patent.

16 121. Attached hereto as **Exhibit 43** is a true and correct copy of the Patent
17 Owner's Interview Summary & Response to Non-final Office Action dated
18 April 13, 2012, submitted on behalf of Personal Audio to the U.S. Patent and
19 Trademark Office in the ex parte reexamination of the '076 patent. This interview
20 summary cites extensively to Dr. Almeroth's concurrently submitted declaration
21 attached hereto as **Exhibit 42** and provides Personal Audio's description of a
22 personal meeting with the examiner at the U.S. Patent and Trademark Office in the
23 ex parte reexamination of the '076 patent that Dr. Almeroth attended and advocated
24 on behalf of Personal Audio.

25 122. Attached hereto as **Exhibit 44** is a true and correct copy of the
26 examiner's interview summary describing the same interview discussed in
27 **Exhibit 43**, which was mailed from the U.S. Patent and Trademark Office on
28 March 9, 2012 and reflects Dr. Almeroth's attendance.

1 123. As asserted in **Exhibit 25**, Dr. Almeroth’s above-summarized work in
2 and/or based from his residence in the Central District of California as Personal
3 Audio’s agent regarding the enforcement and/or defense of the validity of the
4 Patents-in-Suit and/or related patents constitutes the establishment by Personal
5 Audio of a regular physical place of business in California that is as regular a place
6 of business as any other location where Personal Audio’s business is conducted.

7 124. Furthermore, Personal Audio also has taken one or more depositions in
8 California related to the enforcement and/or defense of the validity of the Patents-
9 in-Suit.

10 125. Among the prior art references asserted by Apple was an existing
11 system referred to as “DAD” and its accompanying manual. Personal Audio
12 deposed the coinventor of the DAD system, Eugene Novacek, in California at the
13 Apple headquarters in Cupertino. Attached hereto as **Exhibit 45** is a true and
14 correct copy of excerpts of the transcript of the deposition of Mr. Novacek taken by
15 Personal Audio on April 1, 2011, in Cupertino, California. This excerpt was filed
16 by Personal Audio as Exhibit C to the Declaration of Daniel Burgess in support of
17 Personal Audio’s motion *in limine* to exclude the DAD System, Docket Entry 383
18 in the Apple case, as reflected in the ECF header.

19 126. Personal Audio also has served process in California on at least some
20 of the California residents that it has sued for infringement of the Patents-in-Suit
21 and/or related patents.

22 127. Attached hereto as **Exhibit 46** is a true and correct copy of Personal
23 Audio’s proof of service of the complaint in the previous Apple case on Apple in
24 California.

25 128. Attached hereto as **Exhibit 47** is a true and correct copy of Personal
26 Audio’s proof of service of a complaint in another case regarding a patent related to
27 the Patents-in-Suit on “A partnership consisting of Adam Carolla, Donny Misraje,
28

1 Kathee Schneider-Misraje, Sandy Ganz & Does 1-10 inclusive D/B/A Ace
2 Broadcasting et al.” in the Central District of California.

3 129. Attached hereto as **Exhibit 48** is a true and correct copy of Personal
4 Audio’s proof of service of a complaint in another case regarding a patent related to
5 the Patents-in-Suit on Lotzi Digital in the Central District of California.

6 130. Attached hereto as **Exhibit 49** is a true and correct copy of Personal
7 Audio’s proof of service of a complaint in another case regarding a patent related to
8 the Patents-in-Suit on Ace Broadcasting Network, LLC, in the Central District of
9 California.

10 131. In addition to serving process in California, Personal Audio has sued
11 numerous California residents for infringement of the Patents-in-Suit and/or related
12 patents.

13 132. Attached hereto as **Exhibit 50** is a true and correct copy of Personal
14 Audio’s original complaint for infringement of the Patents-in-Suit against
15 California resident Apple and California corporation Archos in Eastern District of
16 Texas Case No. 9:09-cv-111. Attached hereto as **Exhibit 51** is a true and correct
17 copy of Personal Audio’s first amended complaint for infringement of the Patents-
18 in-Suit against California resident Apple and California corporation Archos in
19 Eastern District of Texas Case No. 9:09-cv-111. Attached hereto as **Exhibit 52** is a
20 true and correct copy of Personal Audio’s first amended complaint for infringement
21 of the Patents-in-Suit against California resident Apple and California corporation
22 Archos in Eastern District of Texas Case No. 9:09-cv-111.

23 133. Upon information and belief, Personal Audio resolved its claims
24 against California corporation Archos in a settlement agreement. Attached hereto
25 as **Exhibit 53** is a true and correct copy of Personal Audio and California
26 corporation Archos’s joint motion for dismissal with prejudice in Eastern District of
27 Texas Case No. 9:09-cv-111. To the extent that Personal Audio’s settlement
28 agreement with Archos includes provisions like those Personal Audio proposed for

1 a license to Fuhu in **Exhibit 24** and/or other continuing obligations to Archos,
2 Personal Audio owes continuing obligations to California corporation Archos under
3 such settlement agreement.

4 134. Personal Audio subsequently filed two other actions for infringement
5 of the Patents-in-Suit against Apple. Attached hereto as **Exhibit 54** is a true and
6 correct copy of Personal Audio's complaint for infringement of the '076 patent
7 against California resident Apple in Eastern District of Texas Case No. 9:11-cv-
8 120. Attached hereto as **Exhibit 55** is a true and correct copy of Personal Audio's
9 complaint for infringement of the '178 patent against California resident Apple in
10 Eastern District of Texas Case No. 1:11-cv-00531.

11 135. Upon information and belief, Personal Audio resolved its claims
12 against Apple in a settlement agreement. Attached hereto as **Exhibit 56** is a true
13 and correct copy of Personal Audio and California resident Apple's joint motion for
14 dismissal in Eastern District of Texas Case No. 1:11-cv-00531. Attached hereto as
15 **Exhibit 57** is a true and correct copy of Personal Audio and California resident
16 Apple's joint motion for dismissal in Eastern District of Texas Case No. 9:11-cv-
17 00120. Attached hereto as **Exhibit 58** is a true and correct copy of Personal Audio
18 and California resident Apple's joint motion for dismissal in Eastern District of
19 Texas Case No. 9:09-cv-00111. To the extent that Personal Audio's settlement
20 agreement with Apple includes provisions like those Personal Audio proposed for a
21 license to Fuhu in **Exhibit 24** and/or other continuing obligations to Apple,
22 Personal Audio owes continuing obligations to Apple under such settlement
23 agreement.

24 136. Personal Audio also sued Motorola Mobility for infringement of the
25 '076 patent in Eastern District of Texas Case No. 1:11-cv-432. A true and correct
26 copy of the complaint in this case is attached hereto as **Exhibit 59**. During the
27 pendency of that case, Motorola Mobility was acquired by California resident
28 Google. A true and correct copy of Google's May 22, 2012, announcement of this

1 acquisition is attached hereto as **Exhibit 60**. *See also Exhibit 77* at p. 75,
2 discussion of Motorola Mobility acquisition in Google’s Form 10-K Annual Report
3 for fiscal year ended December 31, 2012. Subsequently, upon information and
4 belief, Personal Audio negotiated with Motorola Mobility after it was acquired by
5 California resident Google to enter into a settlement agreement resolving Personal
6 Audio’s claim against Motorola Mobility. Attached hereto as **Exhibit 61** is a true
7 and correct copy of Personal Audio and Motorola Mobility’s joint motion for
8 dismissal in Eastern District of Texas Case No. 1:11-cv-432.

9 137. Attached hereto as **Exhibit 62** is a true and correct copy of Personal
10 Audio’s complaint for infringement of a patent related to the Patents-in-Suit against
11 California resident Ace Broadcasting Network in Eastern District of Texas Case
12 No. 2:13-cv-00014. Attached hereto as **Exhibit 66** is a true and correct copy of
13 Personal Audio’s first amended complaint for infringement in that same case
14 against California residents Lotzi Digital and “a Partnership consisting of Adam
15 Carolla, Donny Misraje, Kathee Schneider-Misraje, Sandy Ganz and DOES 1-10,
16 inclusive, which has upon information and belief, been doing business under the
17 names ‘ACE Broadcasting’ and/or ‘Carolla Digital.’ “

18 138. Attached hereto as **Exhibit 63** is a true and correct copy of Personal
19 Audio’s complaint for infringement of a patent related to the Patents-in-Suit against
20 California resident NBCUniversal Media in Eastern District of Texas Case
21 No. 2:13-cv-00271. Attached hereto as **Exhibit 67** is a true and correct copy of
22 Personal Audio’s first amended complaint for infringement against NBCUniversal
23 Media. Although NBCUniversal Media’s alleged principal place of business is
24 located in New York, NBCUniversal Media, now known as NBCUniversal, Inc., is
25 also a California resident with extensive operations in the Central District of
26 California, including, by way of example and without limitation, administrative
27 offices, television and motion picture production facilities, local and national
28 broadcast facilities, and the Universal Studios Hollywood theme park.

1 139. Attached hereto as **Exhibit 64** is a true and correct copy of Personal
2 Audio's complaint for infringement of a patent related to the Patents-in-Suit against
3 California resident CBS Corporation in Eastern District of Texas Case No. 2:13-cv-
4 00270. Although CBS's alleged principal place of business is located in New
5 York, Personal Audio has asserted that its infringement allegations concern CBS
6 subsidiary CBS Interactive, Inc., which Personal Audio asserts is headquartered in
7 California. These assertions are included, inter alia, in the declaration attached
8 hereto as **Exhibit 65**, which is a true and correct copy of a declaration submitted on
9 behalf of Personal Audio in opposition to a motion to transfer by CBS and
10 NBCUniversal Media.

11 140. Personal Audio also has directed patent enforcement activities at
12 California corporations and residents Fox Broadcasting Company and Fox
13 Networks Group, Inc. (collectively, "Fox"). Attached hereto as **Exhibit 68** is a true
14 and correct copy of a complaint for declaratory relief regarding a patent related to
15 the Patents-in-Suit filed by Fox against Personal Audio in the District of
16 Massachusetts, which reflects at least some of Personal Audio's patent enforcement
17 activities against Fox. Attached hereto as **Exhibit 69** is a true and correct copy of
18 Personal Audio's retaliatory complaint for infringement against Fox filed in the
19 Eastern District of Texas eleven days after Fox filed its declaratory judgment action
20 in Massachusetts.

21 141. In addition to suing California corporations and residents as detailed
22 above, Personal Audio has continued its patent enforcement efforts directed at other
23 California residents, announcing in a press release dated September 12, 2013, a new
24 patent license to SanDisk Corporation of Milpitas. Attached as **Exhibit 70** is a true
25 and correct copy of a Personal Audio press release regarding the license to
26 SanDisk, which was obtained from Personal Audio's Web site at
27 [http://personalaudio.net/wp-content/uploads/2013/09/2013-09-13-Sandisk-Press-](http://personalaudio.net/wp-content/uploads/2013/09/2013-09-13-Sandisk-Press-Release.pdf)
28 [Release.pdf](http://personalaudio.net/wp-content/uploads/2013/09/2013-09-13-Sandisk-Press-Release.pdf). To the extent that Personal Audio's license agreement with SanDisk

1 includes provisions like those Personal Audio proposed for a license to Fuhu in
2 **Exhibit 24** and/or other continuing obligations to SanDisk, Personal Audio owes
3 continuing obligations to SanDisk under such license agreement.

4 142. Personal Audio also has engaged in efforts to enforce its patents
5 against Central District of California residents involved in podcasting. Upon
6 information and belief, these include Earwolf Media, Jeff Ullrich, Marc Maron,
7 Jesse Thorn, Jay Mohr, Joe Rogan, Scott Aukerman, and Comedy Bang Bang. For
8 example, attached hereto as **Exhibit 71** is a true and correct copy of an article
9 entitled “Podcasters Prepare for War Against ‘Podcast Patent’ Owner Personal
10 Audio,” downloaded from the Backstage.com Web site at
11 [http://www.backstage.com/news/podcasters-prepare-war-against-podcast-patent-](http://www.backstage.com/news/podcasters-prepare-war-against-podcast-patent-owner-personal-audio/)
12 [owner-personal-audio/](http://www.backstage.com/news/podcasters-prepare-war-against-podcast-patent-owner-personal-audio/), which includes quotes from Personal Audio’s Vice
13 President of Licensing Mr. Baker and discusses a February gathering of targeted
14 podcasters at Adam Carolla’s home to discuss Personal Audio’s patent enforcement
15 threats and litigation against Mr. Carolla.

16 143. Further, the Electronic Frontier Foundation set up a Web site called
17 Trolling Effects (*see* <https://trollingeffects.org/>) to expose patent trolling activity
18 through, inter alia, collecting copies of letters received from Patent Trolls. Copies
19 of posted letters from Personal Audio can be found at
20 <https://trollingeffects.org/search/node/Personal%20Audio>. Attached hereto as
21 **Exhibits 72, 73, and 74** are true and correct copies of letters obtained from that
22 page that bear Personal Audio letterhead and are addressed to addresses in the
23 Central District of California.

24 144. Personal Audio’s above-alleged activities purposefully directed at the
25 Central District of California are continuous and systematic, and accordingly,
26 Personal Audio is subject to general personal jurisdiction in the Central District of
27 California. *See Silent Drive*, 326 F.3d at 1200; *Helicopteros Nacionales de*
28 *Colombia*, 466 U.S. at 414-16.

1 145. With respect to specific personal jurisdiction, Personal Audio has
2 purposefully directed even more substantial activity at residents of California in
3 general and the Central District of California in particular than the activities the
4 Federal Circuit found sufficient to support personal jurisdiction in *Coyle* and
5 *Campbell Pet Co.* See *Coyle*, 394 F.3d at 1350-51; *Campbell Pet Co.*, 542 F.3d
6 at 886. Accordingly, Personal Audio is subject to specific personal jurisdiction
7 with respect to Fuhu's claims in this case.

8 146. As alleged herein, it is reasonable and fair to assert personal
9 jurisdiction over Personal Audio in the Central District of California under the five
10 *Burger King* factors. *Burger King*, 471 U.S. at 475-77. The burden on Personal
11 Audio would be reasonable in light of its extensive activities in California, its
12 employment of and payment of almost a half million dollars to a California
13 expert/agent, Dr. Almeroth, and the convenience of litigating in the state where the
14 accused products were designed, developed, marketed, and sold. *Id.* California has
15 a strong interest in providing a forum for its residents to challenge the validity of
16 the Patents-in-Suit. *Id.* Fuhu evinced its strong interest in obtaining convenient
17 and effective relief by filing this action in its home district. *Id.* Litigating this
18 matter in Fuhu's home district also serves the interstate judicial system's interest in
19 obtaining the most efficient resolution of this matter and the shared interests of the
20 several states in furthering fundamental substantive social policies. *Id.*

21 **C. The Central District of California Is a Proper and Convenient Venue for**
22 **Fuhu's Claims**

23 147. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391
24 and 1400(b) because a substantial part of the events giving rise to the claims
25 presented in this FAC occurred in the Central District of California, including,
26 without limitation, Personal Audio's systematic and continuous general business
27 contacts with the Central District of California, which are also specifically related
28 to the enforcement and/or defense of the validity of its patents against Fuhu and

1 other residents of the Central District of California. Fuhu’s claims in this case arise
2 out of and/or relate to these activities by Personal Audio.

3 148. Venue further is proper because Personal Audio is subject to personal
4 jurisdiction in the Central District of California and therefore is deemed to reside in
5 the Central District of California pursuant to 28 U.S.C. § 1391(c)(2).

6 149. Fuhu does not have sufficient contacts with the Eastern District of
7 Texas to be subject to personal jurisdiction there (*see, e.g., supra* ¶¶ 20, 24-32), and
8 thus the Eastern District of Texas is not a proper venue for this action.

9 150. In contrast, Fuhu filed this action in its home district, and the Supreme
10 Court has stated that “a plaintiff’s choice of forum is entitled to greater deference
11 when the plaintiff has chosen the home forum.” *Piper*, 454 U.S. at 255, citing
12 *Koster v. (American) Lumbermens Mut. Casualty Co.*, 330 U.S. 518 (1947)
13 (Supreme Court stating “[in] any balancing of conveniences, a real showing of
14 convenience by a plaintiff who has sued in his home forum will normally outweigh
15 the inconvenience the defendant may have shown.”).

16 151. As alleged herein, the Central District of California is the most
17 convenient venue for this action for the parties and the witnesses. The Eastern
18 District of Texas is not a clearly more convenient venue for this action than the
19 Central District of California.

20 152. As alleged herein, the Central District of California is Fuhu’s home
21 district, the location of its headquarters and the vast majority of its employees,
22 documents, and other evidence regarding the design, development, marketing, and
23 sales of the nabi® tablet computers for which Personal Audio has demanded that
24 Fuhu take a license to the Patents-in-Suit.

25 153. Third-party fact witnesses in this case include at least Dr. Almeroth
26 and Google and/or Google employees involved in the design and development of
27 the Android® mobile operating system of the accused nabi® tablet computers.

28

1 154. Dr. Almeroth is a fact witness in this case at least with respect to the
2 reexamination proceedings regarding the Patents-in-Suit in which he actively
3 participated as Personal Audio's agent, as well as the invalidity evidence he
4 reviewed while working as Personal Audio's agent in the Apple case. Dr. Almeroth
5 resides in the Central District of California and thus would be easier to access as a
6 source of proof if the case is venued in the Central District of California than he
7 would be if the case were venued in the Eastern District of Texas.

8 155. Upon information and belief, Google employees and evidence relevant
9 to any allegations involving the Android® mobile operating system are located at
10 or near Google's headquarters in Mountain View, California. *See Exhibit 77* at
11 p. 1. Thus Google would be easier to access as a source of proof if the case is
12 venued in the Central District of California than it would be if the case were venued
13 in the Eastern District of Texas.

14 156. Further, California-based third-party witnesses, such as Dr. Almeroth,
15 Google and/or its employees with knowledge of Android®, and/or other California
16 witnesses, would be subject to compulsory process to secure their attendance at a
17 trial in the Central District of California. California district courts have the power
18 to subpoena witnesses throughout the state pursuant to Federal Rule of Civil
19 Procedure 45(b)(2)(C), which provides that a subpoena may be served anywhere
20 within the state of the issuing court if a state statute allows statewide service.
21 *Brackett v. Hilton Hotels Corp.*, 619 F. Supp. 2d 810, 821 (N.D. Cal. 2008).
22 Section 1989 of the California Code of Civil Procedure is the state statute
23 authorizing such service. *Id.* In contrast, no third-party California witnesses would
24 be subject to compulsory process if the case were venued in the Eastern District of
25 Texas. Neither party has identified any fact witnesses in this case who reside in
26 Texas and would thus be subject to compulsory process if the case were venued in
27 the Eastern District of Texas.

28

1 157. The cost of attendance at trial for Fuhu's employees and/or other
2 willing witnesses will be minimal in the Central District of California, where most
3 of Fuhu's employees reside. It would be much more costly and time-consuming for
4 Fuhu's employees to attend a trial in the Eastern District of Texas, which would
5 require travel, hotel accommodations, and other travel expenses and associated time
6 away from home and work that would not be incurred for a trial in the Central
7 District of California.

8 158. Court congestion also favors venue in the Central District of California
9 over the Eastern District of Texas because the former is less congested than the
10 latter. Attached hereto as **Exhibit 84** is a true and correct copy of Table C-5 from
11 the Federal Judicial Caseload Statistics, March 31, 2012, downloaded from the
12 U.S. Courts' Web site at
13 <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCase>
14 [loadStatistics/2012/tables/C05Mar12.pdf](http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCase). As reflected in **Exhibit 84**, the median
15 time from filing through trial of civil cases in the Eastern District of Texas is 26.2
16 months, compared with 19.5 months in the Central District of California. *Compare*
17 **Exhibit 84**, p. 2 (TX, E) with p. 4 (CA, C).

18 159. Because so many California residents have been targeted by Personal
19 Audio, as alleged herein, the state of California has a particular local interest in this
20 dispute, at least with respect to the invalidity of the Patents-in-Suit. As the Federal
21 Circuit has held, "California [has a] substantial interest in 'providing its residents
22 with a convenient forum for redressing injuries inflicted by out-of-state actors' "
23 such as Personal Audio. *Inamed Corp. v. Kuzmak*, 249 F.3d 1356, 1363-1364
24 (Fed. Cir. 2001), citing *Burger King*, 471 U.S. at 473.

25 160. Further, even though Judge Clark of the Eastern District of Texas
26 previously handled litigation regarding the Patents-in-Suit, Fuhu's technology was
27 not at issue in any previous litigation, and the reexamination proceedings regarding
28 the Patents-in-Suit were ongoing until after Judge Clark's previous rulings

1 regarding claim construction. Thus there is no technology overlap between this
2 case and the previous litigation, and a substantial amount of new claim construction
3 analysis will be necessary to consider how the scope of the claims of the Patents-in-
4 Suit are affected by thousands of pages of reexamination prosecution history,
5 regardless of which court construes the patent claims.

6 161. As the Federal Circuit observed in granting a writ of mandamus
7 ordering the transfer from the Eastern District of Texas to the Northern District of
8 Texas of a previous case in which the primary basis for venue in the Eastern
9 District of Texas was the trial court's previous handling of a lawsuit involving the
10 same patent that settled more than five years before the suit was filed during which
11 reexamination proceedings occurred, "The Eastern District of Texas would have to
12 relearn a considerable amount based on the lapse in time between the two suits and
13 would likely have to familiarize itself with reexamination materials that were not
14 part of the record during the previous suit." *In re Verizon Bus. Network Servs.*, 635
15 F.3d 559, 562 (Fed. Cir. 2011). The Federal Circuit continued:

16 To interpret § 1404(a) to hold that any prior suit involving the
17 same patent can override a compelling showing of transfer would be
18 inconsistent with the policies underlying § 1404(a). We recently
19 advised against such ironclad rules in *In re Vistaprint Ltd.*, 628 F.3d
20 1342, 1347, n.3 (Fed. Cir. 2010) and we heed that advice on these
21 facts. In *Vistaprint*, we stated: Our holding today does not mean that,
22 once a patent is litigated in a particular venue the patent owner will
23 necessarily have a free pass to maintain all future litigation involving
24 that patent in that venue. . . .

25 In this case, there is no assertion that there is an additional
26 pending lawsuit in the Eastern District involving the patent and
27 technology. Absent that, we deem the Eastern District's previous
28 claim construction in a case that settled more than five years before the

1 filing of this lawsuit to be too tenuous a reason to support denial of
2 transfer.

3 *Id.* Accordingly, venue is proper in the Central District of California and is
4 not proper in Personal Audio's proposed transferee district of the Eastern
5 District of Texas.

6 **FIRST CAUSE OF ACTION**

7 **(Declaratory Judgment of Noninfringement of U.S. Patent 6,199,076)**

8 162. Fuhu restates and incorporates by reference as if fully set forth herein
9 the allegations of the foregoing Paragraphs 1-161.

10 163. Personal Audio has asserted and continues to assert that Fuhu must pay
11 for a license under the Patents-in-Suit or stop using the technology claimed in the
12 Patents-in-Suit and pay for usage from the February 5, 2013, date of the letter
13 attached hereto as **Exhibit 10** to a settlement date. *See, e.g., Exhibit 22.*

14 164. Fuhu disputes that it has infringed properly construed, valid, and
15 enforceable claims of the Patents-in-Suit.

16 165. Therefore, an actual and substantial controversy exists between Fuhu
17 and Personal Audio, parties having adverse legal interests, of sufficient immediacy
18 and reality to warrant the issuance of a declaratory judgment that Fuhu has not
19 infringed and does not infringe any properly construed, valid, and enforceable claim
20 of the '076 patent.

21 166. Fuhu accordingly requests a judicial determination of its rights, duties,
22 and obligations with respect to the '076 patent.

23 167. A judicial declaration is necessary and appropriate so that Fuhu may
24 ascertain its rights relative to the '076 patent.

25 **SECOND CAUSE OF ACTION**

26 **(Declaratory Judgment of Noninfringement of U.S. Patent 7,509,178)**

27 168. Fuhu restates and incorporates by reference as if fully set forth herein
28 the allegations of the foregoing Paragraphs 1-167.

1 169. Personal Audio has asserted and continues to assert that Fuhu must pay
2 for a license under the Patents-in-Suit or stop using the technology claimed in the
3 Patents-in-Suit and pay for usage from the February 5, 2013, date of the letter
4 attached hereto as **Exhibit 10** to a settlement date. *See, e.g., Exhibit 22.*

5 170. Fuhu disputes that it has infringed properly construed, valid, and
6 enforceable claims of the Patents-in-Suit.

7 171. Therefore, an actual and substantial controversy exists between Fuhu
8 and Personal Audio, parties having adverse legal interests, of sufficient immediacy
9 and reality to warrant the issuance of a declaratory judgment that Fuhu has not
10 infringed and does not infringe any properly construed, valid, and enforceable claim
11 of the '178 patent.

12 172. Fuhu accordingly requests a judicial determination of its rights, duties,
13 and obligations with respect to the '178 patent.

14 173. A judicial declaration is necessary and appropriate so that Fuhu may
15 ascertain its rights relative to the '178 patent.

16 **THIRD CAUSE OF ACTION**

17 **(Declaratory Judgment of Invalidity of U.S. Patent 6,199,076)**

18 174. Fuhu restates and incorporates by reference as if fully set forth herein
19 the allegations of the foregoing Paragraphs 1-173.

20 175. Personal Audio has asserted and continues to assert that Fuhu must pay
21 for a license under the Patents-in-Suit or stop using the technology claimed in the
22 Patents-in-Suit and pay for usage from the February 5, 2013, date of the letter
23 attached hereto as **Exhibit 10** to a settlement date. *See, e.g., Exhibit 22.*

24 176. Fuhu disputes that it has infringed properly construed, valid, and
25 enforceable claims of the Patents-in-Suit and affirmatively alleges that the properly
26 construed claims of the '076 patent are invalid for failure to meet one or more of
27 the requirements for patentability under, inter alia, 35 U.S.C. §§ 101, 102, 103,
28 and/or 112.

1 177. Therefore, an actual and substantial controversy exists between Fuhu
2 and Personal Audio, parties having adverse legal interests, of sufficient immediacy
3 and reality to warrant the issuance of a declaratory judgment that the properly
4 construed claims of the '076 patent are invalid for failure to meet one or more of
5 the requirements for patentability under, inter alia, 35 U.S.C. §§ 101, 102, 103,
6 and/or 112.

7 178. Fuhu accordingly requests a judicial determination of its rights, duties,
8 and obligations with respect to the '076 patent.

9 179. A judicial declaration is necessary and appropriate so that Fuhu may
10 ascertain its rights relative to the '076 patent.

11 **FOURTH CAUSE OF ACTION**

12 **(Declaratory Judgment of Invalidity of U.S. Patent 7,509,178)**

13 180. Fuhu restates and incorporates by reference as if fully set forth herein
14 the allegations of the foregoing Paragraphs 1-179.

15 181. Personal Audio has asserted and continues to assert that Fuhu must pay
16 for a license under the Patents-in-Suit or stop using the technology claimed in the
17 Patents-in-Suit and pay for usage from the February 5, 2013, date of the letter
18 attached hereto as **Exhibit 10** to a settlement date. *See, e.g., Exhibit 22.*

19 182. Fuhu disputes that it has infringed properly construed, valid, and
20 enforceable claims of the Patents-in-Suit and affirmatively alleges that the claims of
21 the '178 patent are invalid for failure to meet one or more of the requirements for
22 patentability under, inter alia, 35 U.S.C. §§ 101, 102, 103, and/or 112.

23 183. Therefore, an actual and substantial controversy exists between Fuhu
24 and Personal Audio, parties having adverse legal interests, of sufficient immediacy
25 and reality to warrant the issuance of a declaratory judgment that the properly
26 construed claims of the '178 patent are invalid for failure to meet one or more of
27 the requirements for patentability under, inter alia, 35 U.S.C. §§ 101, 102, 103,
28 and/or 112.

1 184. Fuhu accordingly requests a judicial determination of its rights, duties,
2 and obligations with respect to the '178 patent.

3 185. A judicial declaration is necessary and appropriate so that Fuhu may
4 ascertain its rights relative to the '178 patent.

5 **PRAYER FOR RELIEF**

6 WHEREFORE, Fuhu respectfully requests that the Court enter judgment in
7 Fuhu's favor as to all claims asserted in this FAC and, specifically, to enter
8 judgment:

9 A. Declaring that Fuhu is not liable for any infringement of any properly
10 construed, valid, and enforceable claim of the Patents-in-Suit;

11 B. Declaring that the Patents-in-Suit are invalid;

12 C. Finding that this case is exceptional pursuant to 35 U.S.C. § 285,
13 entitling Fuhu to an award against Personal Audio of Fuhu's reasonable attorneys'
14 fees;


15 D. Awarding to Fuhu its costs and disbursements of this action; and

16 E. Awarding to Fuhu such other and further relief as this Court deems
17 just and proper.

18 **DEMAND FOR JURY TRIAL**

19 Pursuant to Federal Rule of Civil Procedure 38(b) and L.R. 38-1, Fuhu
20 hereby demands a trial by jury on all issues so triable.

21
22 Dated: October 3, 2013 MANATT, PHELPS & PHILLIPS, LLP
23 SHAWN G. HANSEN

24
25 By: 
SHAWN G. HANSEN

26 *Attorneys for Plaintiff*
27 Fuhu, INC.

28 310630014.1