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9 UNITED STATES DISTRICT COURT
 10 CENTRAL DISTRICT OF CALIFORNIA
 11

12 PERFECT 10, INC., a California
 13 corporation,

14 Plaintiff,

15 v.

16 GOOGLE INC., a corporation,

17 Defendants.
 18
 19

Case No. CV 04-9484 AHM (SHx)

Before Judge Stephen J. Hillman

**SUPPLEMENTAL MEMORANDUM
 OF LAW OF PLAINTIFF PERFECT 10,
 INC. IN OPPOSITION TO
 DEFENDANT GOOGLE INC.'S
 MOTION TO QUASH SUBPOENAS
 DIRECTED TO SHANTAL RANDS
 POOVALA AND FOR A PROTECTIVE
 ORDER**

**[DECLARATION OF DAVID N.
 SCHULTZ IN SUPPORT THEREOF
 SUBMITTED HEREWITH]**

Date: August 9, 2010

Time: 2:00 p.m.

Place: Courtroom 550, Courtroom of the
 Honorable Stephen J. Hillman

Discovery Cut-Off Date: None Set

Pretrial Conference Date: None Set

Trial Date: None Set

1 Plaintiff Perfect 10, Inc. (“Perfect 10”) submits the following Supplemental
2 Memorandum of Law in connection with Perfect 10’s Opposition to the Motion of
3 Defendant Google Inc. (“Google”) to Quash Subpoenas Directed to Shantal Rands
4 Poovala and For A Protective Order (the “Motion”). Google’s Motion seeks to
5 prohibit Perfect 10 from conducting any deposition whatsoever of Google employee
6 Shantal Rands Poovala (“Ms. Poovala”). As explained in Perfect 10’s portion of the
7 Joint Stipulation in connection with the Motion, Ms. Poovala is a key witness who
8 has never previously been deposed in her individual capacity and whose deposition
9 is critical to this action.¹ Indeed, Ms. Poovala’s July 2, 2009 declaration (the
10 “Poovala Declaration”) and her September 9, 2009 rebuttal declaration **form the**
11 **basis** for Google’s summary judgment motions asserting that it is entitled to a
12 DMCA safe harbor (the “DMCA Motions”). *See* Joint Stipulation at 2-5, 20-28.
13 This Supplemental Memorandum of Law addresses four additional issues, all of
14 which provide further grounds to deny Google’s Motion.

15 **I. THIS COURT’S RECENT ORDER PROHIBITING THE**
16 **DEPOSITION OF DR. ERIC SCHMIDT PROVIDES ADDITIONAL**
17 **GROUND FOR PERFECT 10 TO DEPOSE MS. POOVALA.**

18 In its July 20, 2010 Order (Docket No. 930), this Court granted Google’s
19 Motion for a Protective Order prohibiting Perfect 10 from deposing Dr. Eric
20 Schmidt, Google’s chief executive officer. One of the grounds advanced by the
21 Court in support of its ruling was that Perfect 10 should first depose other lower-
22 level employees rather than “leap-frogging to the pinnacle of [Google’s] corporate
23 pyramid.” As this Court stated, Perfect 10 “still has several more opportunities to
24 depose employees of [Google] who are the most knowledgeable on matters relevant
25 to this lawsuit.” July 20, 2010 Order at 3.

26 _____
27 ¹ Ms. Poovala has only been deposed for less than three hours as part of a Rule
28 30(b)(6) deposition almost two years ago. *See* Joint Stipulation on Google’s Motion
to Quash the Poovala Subpoenas and for a Protective Order (Docket No. 912)
 (“Joint Stipulation”) at 19-20.

1 Ms. Poovala is a lower level Google employee with knowledge of matters
2 relevant to this lawsuit. Indeed, Ms. Poovala's declarations form the basis for
3 Google's DMCA Motions. *See* Joint Stipulation at 20-27. In light of this Court's
4 ruling prohibiting Perfect 10 from deposing Dr. Schmidt, it would be wrong to deny
5 Perfect 10 the opportunity to depose Ms. Poovala.

6 **II. JUDGE MATZ'S JULY 21, 2010 ORDER PROVIDES A FURTHER**
7 **BASIS FOR PERFECT 10 TO DEPOSE MS. POOVALA.**

8 On July 21, 2010, Judge Matz issued an Order requiring the parties "to
9 identify where in the existing briefs on Google's motion for safe harbor under 17
10 U.S.C. § 512(b) there is any reference in any of the 'Group B' 'spreadsheet' notices
11 sent between May 31, 2004 and April 24, 2007 (Poovala Decl. ¶41, Exhs. L1-L48)
12 identifying any specific material on Google's cache as infringing." July 21, 2010
13 Order (Docket No. 931), attached as Exhibit A to the Declaration of David N.
14 Schultz in opposition to Google's Motion, submitted separately herewith ("Schultz
15 Decl."). Judge Matz's Order thus specifically referenced language from, and
16 exhibits to, the Poovala Declaration. Perfect 10's Response to Judge Matz's Order
17 also relied in large part on the Poovala Declaration, quoting Paragraph 10 of the
18 declaration in its entirety. *See* Plaintiff Perfect 10, Inc.'s Response to Minute Order
19 Dated July 21, 2010 (Docket No. 932) at 1-3, found at Schultz Decl., Exh. B.

20 Perfect 10 has never had the opportunity to depose Ms. Poovala regarding
21 Paragraph 10 or any other portion of the Poovala Declaration, even though it has
22 been seeking to take Ms. Poovala's deposition since October 2009. Ms. Poovala's
23 deposition may very well result in additional evidence relevant to this action. Judge
24 Matz's Order, and Perfect 10's Response thereto, demonstrate the importance of Ms
25 Poovala's testimony. Under these circumstances, this Court should deny Google's
26 Motion and issue an Order permitting Perfect 10 to depose Ms. Poovala forthwith.

1 **III. GOOGLE’S FAILURE TO OBTAIN RELIEF BEFORE THE DATE**
2 **SCHEDULED FOR MS. POOVALA’S DEPOSITION PROVIDES A**
3 **FURTHER BASIS TO DENY GOOGLE’S MOTION.**

4 The deposition of Ms. Poovala that is the subject of Google’s Motion was set
5 for May 20, 2010. See Declaration of Andrea Pallios Roberts in support of Google’s
6 Motion (Docket No. 913), Exh. A. (Ms. Poovala’s deposition was originally noticed
7 in October 2009, but that deposition did not take place.) Thereafter, by agreement
8 of the parties, Ms. Poovala’s deposition was continued to June 24, 2010. Schultz
9 Decl. ¶4 and Exh. C. Although Google filed its Motion on June 23, 2010 [see
10 Notice of Motion (Docket No. 904)], neither Google nor Ms. Poovala sought or
11 obtained an order staying Ms. Poovala’s deposition or excusing Ms. Poovala from
12 appearing at the deposition before the scheduled deposition date of June 24, 2010.
13 For this reason alone, Google is not entitled to a protective order and its request to
14 prohibit Ms. Poovala’s deposition should be denied.

15 Such a conclusion is compelled by the Ninth Circuit’s ruling in *Pioche Mines*
16 *Consol., Inc. v. Dolman*, 333 F.2d 257 (9th Cir.1964), cert. denied, 380 U.S. 956
17 (1965).² Although *Pioche* was decided under an earlier version of the Federal Rules

18 ² In *Pioche*, the Ninth Circuit held as follows:

19 Rule 30(b) places the burden on the proposed deponent to get an
20 order, not just to make a motion [for a protective order prior to the date
21 of the deposition]. And if there is not time to have his motion heard,
22 the least that he can be expected to do is to get an order postponing the
23 time of the deposition until his motion can be heard. He might also
24 appear and seek to adjourn the deposition until an order can be
25 obtained. Rule 30(d). But unless he has obtained a court order that
26 postpones or dispenses with his duty to appear, that duty remains.
Otherwise, as this case shows, a proposed deponent, by merely filing
motions under Rule 30(b), could evade giving his deposition
indefinitely. Under the Rules, it is for the court, not the deponent or his
counsel, to relieve him of the duty to appear.

27 *Pioche*, 333 F.2d at 269. See also *F.A.A. v. Landy*, 705 F.2d 624, 634 (2d Cir.) (“It
28 is clear, however, that it is not the filing of such a motion that stays the deposition,
but rather a court order.”), cert. denied, 464 U.S. 895 (1983).

1 of Civil Procedure, it remains good law. In fact, one of the leading treatises cites
2 *Pioche* for the following proposition:

3 **Pendency of motion does not excuse discovery:** A party served with a
4 deposition notice or discovery request must obtain a protective order
5 (e.g., a *stay* of the deposition pending hearing on the motion) ***before the***
6 ***date set for the*** discovery response or ***deposition. The mere fact that a***
7 ***motion for protective order is pending does not itself excuse the***
8 ***subpoenaed party from making discovery:*** “(I)t is for the court, not the
9 deponent or his counsel, to relieve him of the duty to appear.”

10 11 W. Schwarzer, A. Wallace Tashima, and J. Wagstaffe, *California Practice Guide:*
11 *Federal Civil Procedure Before Trial* (The Rutter Group 2010) § 11:1166, quoting
12 *Pioche*, 333 F.2d at 269 (italic emphasis in original; bold and italic emphasis added).
13 See also 8A C. Wright, A. Miller and R. Marcus, *Federal Practice and Procedure*
14 (Thomson Reuters 2010) § 2035, at 151-52 (“with regard to depositions, the order
15 should ordinarily be obtained before the date set for the discovery”).

16 Here, neither Google nor Ms. Poovala obtained a court order preventing Ms.
17 Poovala’s deposition from going forward before its scheduled date of June 24, 2010.
18 Neither Google nor Ms. Poovala sought a stay or a continuance of Ms. Poovala’s
19 deposition while the Motion was pending. Under these circumstances, Ms. Poovala
20 was not excused from appearing for her deposition on June 24, 2010. For this
21 reason alone, this Court should deny the Motion.³

22 _____
23 ³ In its July 20, 2010 Order granting Google’s motion to prohibit the deposition of
24 Dr. Eric Schmidt, discussed in Section I, above, this Court attempted to distinguish
25 *Pioche* by asserting, without more, that *Pioche* “involved a direct flaunting of the
26 authority of a court for a failure to appear based on a motion to quash.” Order at 1
27 n.1. This assertion misreads *Pioche*. The Ninth Circuit based its ruling in *Pioche*
28 not on the deponent’s alleged flaunting of the court’s authority, but on its holding
that the Federal Rules of Civil Procedure at the very least required a prospective
deponent moving for a protective order “to get an order postponing the time of the
deposition until his motion can be heard.” *Pioche*, 333 F.2d at 269. Moreover, as
the treatises cited above state, *Pioche* is not so limited. Rather, ***any party*** served
with a deposition notice must obtain a protective order before the date set for the

1 **IV. THE DEPOSITION OF MS. POOVALA IS NOT POINTLESS, EVEN**
2 **THOUGH JUDGE MATZ JUST RULED LATE TODAY ON**
3 **GOOGLE’S DMCA MOTIONS.**

4 In its portion of the Joint Stipulation, Google asserted that a deposition of Ms.
5 Poovala would be “pointless” because “Judge Matz has now ruled on Google’s
6 DMCA Motions.” See Joint Stipulation at 17-18. Perfect 10 demonstrated,
7 however, that a deposition of Ms. Poovala would not be pointless for at three
8 separate reasons. Two of those reasons were as follows: (1) Even if Judge Matz’s
9 final ruling on the DMCA Motions duplicates his tentative ruling (and it likely will
10 not, because of the various factual errors found in the tentative ruling), Ms.
11 Poovala’s testimony would still be relevant to issues regarding Perfect 10’s
12 copyright infringement claims that remain to be tried; (2) The pending DMCA
13 Motions only cover DMCA notices and Google’s infringing activity through
14 approximately June 2009. Ms. Poovala’s deposition testimony certainly would be
15 relevant to any infringing activity after that date. Joint Stipulation at 3-4, 28-30.

16 Although Judge Matz just issued his ruling on the DMCA Motions late in the
17 afternoon on July 26, 2010,⁴ the deposition of Ms. Poovala still would not be
18 pointless, because of the above two reasons, among others. Thus, Google has not
19 demonstrated the “extraordinary” or “exceptional” circumstances necessary for this
20 Court to issue a protective order barring Ms. Poovala’s deposition. See J. Moore &
21 J. Lucas, *Moore’s Federal Practice* (3d. ed. 2007), § 26.105[2][a], at 26-520.

22
23 deposition in order to excuse the deponent from appearing at the deposition. See 11
24 W. Schwarzer, A. Wallace Tashima, and J. Wagstaffe, *supra*, § 11:1166.

24 ⁴ Because Judge Matz only just issued his ruling, Perfect 10 has not yet had the
25 opportunity to carefully review that ruling. Judge Matz stated in his ruling,
26 however, that he did not consider the declarations of four witnesses that Perfect 10
27 offered because Perfect 10 did not identify those witnesses in its Rule 26(f) Report
28 and “Google was deprived of the opportunity to depose or otherwise directly rebut
these witnesses’ declarations.” July 26, 2010 Order (Docket No. 937) at 8. Ms.
Poovala similarly was not identified in Google’s Rule 26(f) Report and Perfect 10
similarly has been deprived of the opportunity to depose or otherwise directly rebut
her declarations. See Schultz Decl., Exh. D (Google’s Rule 26(f) Report).

1 DATED: July 26, 2010

2 Respectfully submitted,
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4 By: Jeffrey N. Mausner
5 Jeffrey N. Mausner
6 Attorneys for Plaintiff Perfect 10, Inc.
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