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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PERFECT 10, INC., a California corporation,

Plaintiff,

vs.

GOOGLE INC., a corporation; and DOES 1 through 100, inclusive,

Defendants.

AND COUNTERCLAIM

CASE NO. CV 04-9484 AHM (SHx)

GOOGLE INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR REVIEW OF AND OBJECTIONS TO MAGISTRATE HILLMAN'S ORDER OF AUGUST 10, 2010 ON GOOGLE INC.'S MOTION TO QUASH SUBPOENAS TO SHANTAL RANDS POOVALA

Hon. A. Howard Matz

Date: October 4, 2010
Time: 10:00 a.m.
Crtrm.: 14

Discovery Cutoff: None Set
Pre-trial Conference: None Set
Trial Date: None Set

[DECLARATION OF MARGRET M. CARUSO FILED CONCURRENTLY HEREWITH]

PUBLIC REDACTED

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Preliminary Statement

On August 10, 2010, Magistrate Judge Hillman denied Google Inc.'s ("Google") Motion to Quash Perfect 10 Inc.'s ("P10") Subpoenas to Shantal Rands Poovala ("Ms. Poovala"). Declaration of Margret M. Caruso dated August 24, 2010 ("Caruso Decl.") Ex. 1 (Dkt. No. 964) (the "Order"). The Order allows P10 to depose a witness about issues it has previously deposed her about and which have since been resolved as a matter of law. Google respectfully seeks review of that Order as it is contrary to law and clearly erroneous.

The Order fails to reconcile the breadth, burden, and intent of the discovery sought by P10's subpoenas with the considerable narrowing of the case effected by this Court's orders granting in part Google's Motion for Summary Judgment on its DMCA Safe Harbor Eligibility and denying P10's Motion for a Preliminary Injunction. Google respectfully submits that neither the testimony sought nor the documents requested are relevant because they are directed at facts that "are not genuinely at issue." See Fed. R. Civ. P. 56(d)(1). Allowing P10 to conduct additional discovery related to the decided DMCA issues defeats a core purpose of Rule 56 and will encourage P10 continuously to rehash these issues in an effort to re-litigate the DMCA Order.

The Order is also contrary to law in allowing P10 a *carte blanche* deposition of Ms. Poovala—whose relevant knowledge is limited to DMCA notice processing issues and whom P10 already deposed in a Rule 30(b)(6) capacity regarding Google's processing of DMCA notices—and in requiring wholesale production of the subpoenaed documents—which are entirely duplicative of document requests P10 served on Google. Combined with extensive DMCA discovery, including Google's responses to P10's interrogatories and hundreds of RFAs, the prior deposition of Ms. Poovala reveals that the subpoenas directed at her are cumulative and unduly burdensome. Yet the Order denying Google's motion erroneously

ignored the extent of prior discovery and the over breadth of P10's subpoenas. At a minimum, P10's appeal of this Court's orders on its preliminary injunction motion and Google's summary judgment motions warrants postponing any discovery from Ms. Poovala until the scope of the issues remaining in this action has been resolved.[1]

Because the Order is contrary to law, this Court should grant Google's objections and motion for review, quash the subpoenas to Ms. Poovala, and issue a protective order prohibiting further discovery from Ms. Poovala.

Factual Background

P10's Prior Deposition of Ms. Poovala

On November 18, 2008, Perfect 10 deposed Ms. Poovala as Google's Rule 30(b)(6) designee on various DMCA topics. Declaration of Andrea Pallios Roberts in Support of Google's Motion to Quash (Dkt. No. 913) ("Roberts Decl.") ¶¶ 3-4, Exs. C (6/30/08 deposition notice), D (8/28/08 Letter to Mausner) & I (10/5/06 P10 deposition notice). Google designated Ms. Poovala to provide testimony regarding non-technical aspects of Google's processing of DMCA notices, and an engineer, Paul Haahr, to discuss the technical aspects of these topics. Id., Exs. C and D. When designating these witnesses, Google reminded P10 that it was receiving a third day of Rule 30(b)(6) deposition testimony on DMCA issues, and that Google would move for summary judgment regarding its entitlement to DMCA safe harbor after the depositions. Id., Exs. D (8/28/08 Letter to Mausner) and O. Despite Google's warnings and acknowledgement of Ms. Poovala's involvement in

[1] Yesterday the parties requested a stipulated stay of discovery and other proceedings during P10's appeal or alternatively a stipulated briefing schedule on Google's Objections to the Order. Dkt. No. 970. Google's filing of these objections is not done to violate the spirit of that request, but in recognition that it is obligated to comply with the fourteen-day deadline of Local Rule 72-2.1. If the Court approves any delay in the briefing of Google's Objections, Google requests leave to file a revised motion to account for any intervening developments, such as appellate rulings.

Google's processing of DMCA notices, during her deposition, P10 did not [redacted] and wasted time repeatedly asking questions that she had previously answered, [redacted]. Id. ¶¶ 4, 5; Supplemental Declaration of Andrea Pallios Roberts in Support of Google's Motion to Quash (Dkt. No. 950) ("Supp. Roberts Decl."), Ex. 1 (Poovala Depo. Tr.); see e.g., id. at 18:3-22, 43:25-44:22, 59:12-61:3, 62:5-63:24, 67:23-68:9 (repeatedly questioning the witness beyond her personal knowledge). After Google confirmed that the deposition was closed P10 did not request additional time to examine Ms. Poovala or any other Google witness regarding DMCA issues, nor has P10 ever moved to compel additional Rule 30(b)(6) testimony on the grounds that Google's designees were unprepared to provide testimony regarding the noticed DMCA topics. Roberts Decl. ¶¶ 5, 10.

P10 Represents That It Needs No Further Discovery On DMCA Issues.

Months before Ms. Poovala was deposed Google initiated the meet and confer process with P10 regarding Google's planned motion for summary judgment on Google's entitlement to DMCA safe harbor. Roberts Decl., Ex. D (8/28/08 Letter to P10). After Ms. Poovala's deposition, P10 met and conferred with Google regarding P10's anticipated summary judgment on DMCA and other copyright related issues. Id., Exs. P & Q. During these communications, P10 represented that the question of Google's entitlement to DMCA safe harbor was "ripe" for adjudication and that further DMCA-related discovery and depositions would be "a waste of time." Id., Ex. U at ¶ 34. After the parties met and conferred, Google filed its motions for summary judgment regarding the DMCA safe harbor. Roberts Decl. ¶ 18. P10 opposed Google's motions on the merits without making any motion pursuant to Rule 56(f) that it needed additional discovery to do so, and this Court

took the motions under consideration. Dkt Nos. 495, 497, and 498, Roberts Decl. Ex. S (8/13/09 Order).

Following the submission of Google's DMCA summary judgment motions, P10 successfully argued ***against*** further DMCA-related discovery in a hearing on motions to compel brought by Google, stating that it would be wasteful to require "a massive amount of work on things that we may not be awarded damages on." Roberts Decl., Ex. T (9/4/09 Hearing Transcript at 15:2-16:24). Consistent with its position that no further discovery was necessary for the Court to resolve DMCA-related issues, P10 represented to Magistrate Judge Hillman that it "is not seeking a continuance under Rule 56(f)" for discovery relating to Google's DMCA motions (Roberts Decl., Ex. V (12/13/09 Reply in support of P10's Motion for Evidentiary Sanctions at 24)), and did not argue to this Court that it needed additional discovery relating to Google's DMCA motions. Id., Ex. X (4/5/10 Civil Minutes (Dkt. No. 850)) at 6-10.), Ex. Z (5/10/10 Hearing Transcript at 4:24-5:1, 7:19-20).

P10's Cumulative And Overly Broad Subpoenas of Ms. Poovala

Notwithstanding its deposition of Ms. Poovala in her Rule 30(b)(6) capacity about DMCA-related issues—indisputably the only subject she has any relevant knowledge concerning—and its representations that no more DMCA-related discovery was necessary, P10 served document and deposition subpoenas on Ms. Poovala in her individual capacity. Roberts Decl., Ex. A. The subpoenas required an overwhelming number of documents related to Google's DMCA notice processing, including "***[a]ll*** emails and/or other communications between" Ms. Poovala "and any other Google employee relating to the processing of a notice received from ***any person*** claiming to be a copyright owner" and "***[a]ll*** emails, faxes, and/or other communications received by" or "sent by" Ms. Poovala from or to "***any person*** claiming to be a copyright owner." Id., Ex. A (Request Nos. 1-3) (emphasis added). Shortly after receiving the subpoenas, Google began meet and confer efforts regarding them. Id., at ¶ 28. When P10 refused to withdraw them,

Google moved for a protective order and to quash the subpoenas. See Dkt. No. 912 (Joint Stipulation on Google's Motion to Quash the Poovala Subpoenas ("Joint Stipulation")); see also Dkt. No. 951 (Google's Supplemental Memorandum on its Motion to Quash the Poovala Subpoenas ("Supp. Memo")).

Before the hearing on the Motion to Quash, this Court ruled on both Google's Motion for Summary Judgment and P10's second Motion for a Preliminary Injunction. Dkt. Nos. 937 ("DMCA Order") and 953 ("P.I. Order"). Based on these rulings, Google again requested that P10 withdraw the Poovala subpoenas because they had become even less reasonable and more burdensome in seeking evidence relating to issues already decided by this Court, which mooted every reason that P10 identified in its briefing supporting its need for further discovery from Ms. Poovala. Dkt. No. 963-1 (Declaration of Bradley R. Love in Support Of Google Inc.'s Supplemental Statement ("Love Decl."), Ex. 4 (7/31/10 Letter from B. Love to J. Mausner)). P10 refused, and Google filed a supplemental memorandum explaining the impact of this Court's ruling on P10's subpoenas. Dkt. No. 963.

The Hearing and Order On Google's Motion to Quash

During the telephonic hearing on Google's motion to quash, P10 argued that this Court's rulings had not significantly narrowed the action, that many DMCA issues remained, and that any ruling by this Court was subject to revision up until a final order was entered. See Caruso Decl. Ex. 2 (8/9 Hearing Transcript). Rejecting Google's arguments that the case had been substantially limited and that P10 had repeatedly admitted it did not need further discovery on DMCA issues, Magistrate Judge Hillman tentatively ruled against Google's motion. Id. The next day he issued the Order denying Google's motion to quash the subpoenas. The Order reasoned that P10 was free to depose Ms. Poovala in her individual capacity separately from her testimony as a Rule 30(b)(6) witness, that an earlier order granting Google's motion to prevent the apex deposition of Google's CEO weighed in favor of allowing Ms. Poovala's deposition, that alleged discrepancies appeared

to exist in the depth of detail provided in Ms. Poovala's prior deposition testimony and her declarations in support of Google's summary judgment motions, and that despite this Court's rulings on Google's motion for summary judgment and P10's motion for a preliminary injunction, no discovery stay has been sought.[2] Order at 2-3. The Order placed no restrictions or limitations on the subject matter or scope of Ms. Poovala's deposition or the document subpoenas. Id.

Argument

I. STANDARD OF REVIEW

Rulings of magistrate judges on non-dispositive motions may be set aside if "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a); Bhan v. NME Hospitals, Inc., 929 F.2d 1404, 1414 (9th Cir. 1991). The clearly erroneous standard applies to the magistrate judge's factual findings while the contrary to law standard "permits independent review of purely legal determinations by the magistrate judge." Crispin v. Christian Audigier, Inc., 2010 WL 2293238, *3 (C.D. Cal. May 26, 2010) (citations omitted) (granting motion for review of Magistrate Judge's denial of motion to quash subpoenas).

When a magistrate judge grants discovery requests that are not relevant to the claims or defenses of the case, the magistrate commits reversible error. McCormick v. City of Lawrence, Kan., 2007 WL 38400, at *3 (D. Kan. Jan. 5, 2007) ("The magistrate judge's order is ... clearly erroneous and contrary to law insofar as it orders the production of materials which are both irrelevant to this lawsuit and not responsive to defendant['s] original discovery request."). See also Ferruza v. MTI Technology, 2002 WL 32344347, at *6 (C.D. Cal. June 13, 2002) (reversing a magistrate's order compelling disclosure of information as "contrary to law," even absent "precedential authority directly on point"); L.H. v. Schwarzenegger, 2007

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[2] The parties' joint request of a stay of discovery and all other proceedings, Dkt. No. 970, had not been filed at the time of the hearing.

WL 2009807, at *4-5 (E.D. Cal. July 6, 2007) (granting a motion to reconsider a magistrate's order on a motion to compel because the magistrate's legal analysis was incomplete).

II. THE MAGISTRATE JUDGE'S ORDER IS CONTRARY TO LAW BECAUSE IT FAILS TO GIVE EFFECT TO THIS COURT'S DECISIONS ON GOOGLE'S SUMMARY JUDGMENT MOTIONS AND P10'S PRELIMINARY INJUNCTION MOTION.

Pursuant to Rule 56(d)(1) of the Federal Rules of Civil Procedure, all issues resolved by summary judgment are deemed established in the action. Accordingly, further discovery concerning such issues would be improper under Rule 26, which provides that the scope of discovery is limited to "any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). By allowing P10 to pursue irrelevant discovery from Ms. Poovala related to issues already decided by this Court's DMCA Order, Magistrate Judge Hillman's Order is contrary to law.

A. The Opinion On Google's Motions for Summary Judgment Established Certain Facts As No Longer "Genuinely In Dispute."

This Court granted the vast majority of Google's motions for summary judgment on its DMCA safe harbor defense. See DMCA Order. The DMCA Order held that Google is entitled to safe harbor for its cache feature under 17 U.S.C. § 512(d), for its Blogger feature under 17 U.S.C. § 512(c), and for a large portion of the copyright claims relating to Google's web and image search 17 U.S.C. § 512(d). Id. at 2. More specifically, Google is entitled to safe harbor for its web and image search services in relation to copyright claims corresponding to P10's "Group A," and "Group C," DMCA notices and to those links within "Group B" DMCA notices that failed to adequately provide the information required by the DMCA such as those that "contain incomplete URLs, lack image-specific URLs, or do not reference the copyrighted work with specificity." Id. at 13.

In analyzing Google's motions, the Court held that Google satisfied the three "threshold conditions" necessary to be eligible for any of the safe harbors under the DMCA, *i.e.* Google is a "service provider" as defined by 17 U.S.C. § 512(k)(1)(B); Google accommodates and does "not interfere with standard technical measures" used by copyright owners to identify or protect copyrighted works; and Google has implemented a reasonable repeat infringer policy. DMCA Order at 6-9. In finding Google's repeat infringer policy was reasonably implemented, the Court determined that Google could not have a repeat infringer policy for its search products (which lack subscribers or account holders) and that it adequately terminated repeat or blatant infringers using its Blogger service. Id. at 7-8.

Because the DMCA Order did not dispose of the entire action, Fed. R. Civ. P. 56(d)(1) applies to the decision. Under that rule, the facts that are determined to be "not genuinely at issue" are to be specified in an order on a motion for summary judgment, and having been specified in support of the determinations made by the Court, these facts "must be treated as established in the action." Fed. R. Civ. P. 56(d)(1). Thus, the facts determined by the Court as not subject to genuine dispute, including that Google has an adequate repeat infringer policy and that Google is entitled to DMCA safe harbor for a majority of P10's notices, are established for this action and no longer an appropriate subject of discovery.

In subsequent orders, this Court confirmed the narrowed scope of the remaining issues. For example, in denying without prejudice Google's motion to take additional depositions and denying P10's motion for a preliminary injunction, the Court reiterated that "this case has been narrowed substantially as a result of the Court's rulings this week granting Google most of the relief against secondary copyright liability it sought under the Digital Millennium Copyright Act." Dkt. No. 946 at 1. The Preliminary Injunction Order reaffirmed that the DMCA Order established "that Google is entitled to DMCA safe harbor for its web and image

search, caching, and Blogger features with respect to each of P10's Group A and Group C notices, and part of the Group B notices." See P.I. Order at 8.

B. The Magistrate's Order is Contrary to Law Because It Allows Discovery On Established Matters.

Because issues resolved on summary judgment are no longer at issue, they are no longer within the proper scope of discovery under Rule 26. See Fed. R. Civ. P. 26(b)(1) (discovery is limited to "any nonprivileged matter that is relevant to any party's claim or defense"). Accordingly, no further discovery is appropriate concerning Google's eligibility for DMCA safe harbor, the adequacy of Google's repeat infringer policies and the processing of third party DMCA notices, Google's processing of P10's DMCA notices in "Group A" and "Group C," or Google's processing of any notice that does not comply with the DMCA standards set forth in the DMCA Order (*i.e.* the vast majority of the "Group B" notices and all of the post summary judgment notices sent by P10). Dkt. No. 953, P.I. Order at 7-21; see also Tequila Centinela, S.A. de C.V. v. Bacardi & Co. Ltd., 242 F.R.D. 1, 9 (D.D.C. 2007) (limiting discovery to "the requests for production [that] could be construed to be based on one of the remaining issues of the case"); Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 352 (1978) ("it is proper to deny discovery of matter that is relevant only to claims or defenses that have been stricken").

In defiance of this Court's rulings and the Federal Rules of Civil Procedure, P10 defended its irrelevant and cumulative subpoenas by arguing that "the ruling on the summary judgment motion is hardly a final ruling" and that the DMCA Order could be "revised at any time before the entry of a judgment adjudicating all the claims." See 8/9 Hearing Transcript at 6:19-25. According to P10, this justifies reopening discovery concerning issues the Court already directly ruled on, such as Google's repeat infringer policies, as well as issues substantively resolved by the Court's ruling, such as the adequacy of "DMCA Notices" P10 sent Google after Google filed its summary judgment motions. Similarly, P10 asserted that it is

"entitled to depose [Ms. Poovala] regarding those matters" included within her declarations submitted in support of summary judgment "regardless of Judge Matz's ruling." Id. at 7:5-7.

This Court's DMCA ruling was not a nullity, and P10's continued pursuit of testimony on issues that order resolved and other irrelevant topics unduly burdens Ms. Poovala and is forbidden by Rule 45. See Televisa, S.A. de C.V. v. Univision Communications, Inc., 2008 WL 4951213, *2 (C.D. Cal. Nov. 17, 2008) (quashing subpoena where "the testimony and documents sought are irrelevant to the issues presented in this litigation" and because the "unnecessarily large breadth of the request supports a finding that the subpoena constitutes an undue burden.").

Like the unlimited deposition it seeks, P10's overbroad document demands are also directed to issues resolved by the DMCA Order, including documents *relating to*—not merely consisting of—***all*** DMCA notices received by Google, including internal and external communications regarding third party notices. Because such documents are no longer relevant to claims or defenses at issue, P10's subpoenas for them are unduly burdensome and must be quashed. See, e.g., Moon v. SCP Pool Corp., 232 F.R.D. 633, 637 (C.D. Cal. 2005) (quashing subpoena that sought documents irrelevant to claims at issue, especially in light of ability to seek the same documents from opposing party); see also Angelico v. Lehigh Valley Hosp., Inc., 85 Fed. Appx. 308, 311, 2004 WL 75383, 2 (3rd Cir. 2004) (disallowance of discovery appropriate where "the only remaining issue before the District Court when [Plaintiff] sought additional discovery was unrelated to his discovery request.").

Allowing the cumulative, irrelevant, and burdensome discovery sought by P10's subpoenas was contrary to law and cannot be justified by any of the four topics identified by P10 in its portion of the Joint Stipulation, each of which is discussed in more detail below. See Roberts Decl. ¶ 30, Joint Stipulation at 25:17-29:9.

1. P10 Is Not Entitled to Again Take Deposition Testimony from Ms. Poovala On Google's Repeat Infringer Policy and Practices.

The DMCA Order established that "Google employs an adequate repeat infringer policy and practice," because Google "terminates Blogger users who repeatedly or blatantly infringe copyright" and Google is neither required to have a repeat infringer policy for its web search, image search, or caching features, nor able to do so as they have no account holders or subscribers. DMCA Order at 7-9. Thus, Google's repeat infringer practices have been evaluated as a matter of law, removing them from the scope of both the remaining case and the issues appropriate for further discovery. See Angelico v. Lehigh Valley Hosp., Inc., 85 Fed. Appx. 308, 311, 2004 WL 75383, 2 (3rd Cir. 2004) (disallowance of discovery appropriate where "the only remaining issue before the District Court when [Plaintiff] sought additional discovery was unrelated to his discovery request.").

2. P10 Is Not Entitled to Further Discovery Regarding Google's Processing of its Deficient DMCA Notices.

Ms. Poovala's declarations in support of Google's DMCA motions were related to Google's DMCA processing generally and regarding P10's numerous DMCA notices specifically. In connection with the DMCA Order, those statements have already been evaluated. As such, they are no longer the subject of dispute and no additional discovery regarding them is appropriate. See, e.g. Tequila Centinela, S.A. de C.V., 242 F.R.D. at 9.

Moreover, because the DMCA Order established that Google is entitled to safe harbor for all of P10's "Group A" and "Group C" DMCA notices, as well as for any "Group B" notice that failed to satisfy the DMCA requirements for a compliant notice, (DMCA Order at 12-15), none of the deficient notices can form the basis of a copyright claim against Google. Accordingly, discovery about any deficient notices is irrelevant. Of the very few notices that are not deficient, the only remaining material fact concerning Google's DMCA safe harbor eligibility is the

expeditiousness with which Google processed those few notices. See DMCA Order at 14. Yet P10 has neither proposed limiting Ms. Poovala's deposition to that subject nor explained why such a topic would not be duplicative and cumulative of the prior deposition of Ms. Poovala. The Order likewise fails to restrict the deposition or address its cumulative and overly burdensome nature in light of P10's prior opportunity to question Ms. Poovala on this very topic. See also Section IV, A, below.

3. No "Conflict" Exists Between Ms. Poovala's Prior Deposition Testimony and the Consistent Declarations She Made in Support of Google's Summary Judgment Motions.

One of the justifications for the Magistrate Judge's denial of Google's motion was that "there appears to be some conflict between the pleadings defendant has submitted and Ms. Poovala's testimony at the Rule 30(b)(6) deposition." Order at 2. The record reveals, however, that Ms. Poovala's DMCA declarations do not "conflict" with her deposition testimony. For example, P10 asserted that Ms. Poovala's declaration statement that "Google processes all DMCA notices expeditiously" is contradicted by her testimony [redacted]. Joint Stip. at 21:20-24. This is not a contradiction or conflict; [redacted]. Indeed, Ms. Poovala's declaration regarding Google's processing of P10's DMCA notices is consistent with her testimony that [redacted] Supp. Roberts Decl., Ex. 1 (Poovala Depo. Tr.) at 99:21-100:7. Similarly, Ms. Poovala's statement in her rebuttal declaration that her team copied and pasted "one URL at a time from the PDF files" is entirely

consistent with her testimony that [redacted]. Id. at 111:5-14.

Further, Ms. Poovala's statement that P10's Group C notices failed to identify the location of infringing material is consistent with her deposition testimony that [redacted]. Supp. Roberts Decl., Ex. 1 (Poovala Depo. Tr.) at 100:17-101:14. In fact, during her deposition Ms. Poovala testified extensively about [redacted]. See, e.g., id., at 9:17-11:4, 12:11-14:20, 17:21-18:2, 23:4-25:13, 27:3-30:5, 30:15-31:14, 34:3-23, 36:10-37:7. P10's failure to provide Ms. Poovala with relevant exhibits the first time around—such as [redacted]—is not a proper basis for seeking a second deposition. See Google Inc. v. American Blind & Wallpaper Factory, Inc. 2006 WL 2318803, 3 (N.D.Cal. 2006) (denying further deposition where deposing counsel failed to bring relevant documents because "[d]eponents under Rule 30(b)(6) ... need not be subjected to a memory contest.") (citations omitted); Earthlite Massage Tables, Inc. v. Lifegear, Inc., 2006 WL 2056397, *1 (S.D. Cal. July 3, 2006) (quashing subpoena directed at individual who had already been deposed as 30(b)(6) designee); Quiksilver, Inc. v. Quick Sports Int'l B.v., 2005 WL 2339148, *1 (C.D. Cal. Sept. 14, 2005) (denying request to re-depose a corporation's 30(b)(6) witness in his individual capacity because plaintiff already had opportunity to depose him); Roberts Decl. ¶ 5.

Moreover, in connection with the DMCA Order this Court rejected P10's arguments against admitting Ms. Poovala's declarations, including its assertions of discrepancies between Ms. Poovala's declarations and her deposition testimony. See P10's Evidentiary Objections to: Declaration and Rebuttal Declaration of Shantal Rands Poovala in Support of Google's Motions for Summary Judgment re

Google's Entitlement to Safe Harbor, Dkt. No 587 (54-page objection to Ms. Poovala's declarations); DMCA Order at 2-3 n. 5 ("Throughout P10's [pleadings], it purports to 'dispute' a fact, but then states allegations that are consistent with the asserted fact. The Court will not address these immaterial 'disputes,' which do nothing more than strain the Court's resources and distract from the real issues in this litigation.") (internal citation omitted); see also id. at 4, 13-15, and 26. Accepting P10's assertion of "contradictions" without identification of any, when none are apparent from the record, and in disregard of the Court's prior rulings was clear error.

4. P10's New DMCA Notices Are Deficient Under the DMCA Order And Cannot Justify Further Discovery.

The processing of the DMCA notices that P10 submitted after those explicitly included within Google's Motions for Summary Judgment is not a proper subject of further discovery in this matter for reasons set forth in the DMCA Order. Like the defective Group B and Group C notices, P10's recent DMCA notices fail to identify the infringed works (apart from the identification of the alleged infringement). See 17 U.S.C. § 512(c)(3)(A)(ii), DMCA Order at 13-15. Second, post-litigation infringement notices including these sent after Google filed its DMCA motions do not constitute notice within the meaning of the DMCA for the claims at issue in this suit, and are accordingly irrelevant. Perfect 10, Inc. v. Amazon.com, 2009 WL 1334364, *5 (C.D. Cal. May 12, 2009) (November 2008 notice sent to A9's copyright agent during litigation, plus notices produced in discovery, were "legally irrelevant"). Third, P10's theory that it is entitled to deposition testimony about each DMCA notice would perpetually entitle it to depose Ms. Poovala as long as it continued to send DMCA notices to Google. This is not how federal discovery is designed to work, particularly discovery that relates to issues already decided by summary judgment motions.

III. THE ORDER IS CONTRARY TO LAW BECAUSE IT ALLOWS P10 TO CIRCUMVENT RULE 56(F)'S REQUIREMENTS

If P10 wanted additional discovery regarding the issues raised by Google's DMCA summary judgment motions, P10 was required to seek leave from this Court under Fed. R. Civ. P. 56(f) *before* opposing Google's DMCA motions. Having chosen not to do so, P10 waived its right to additional discovery on these issues. Ashton-Tate Corp. v. Ross, 916 F.2d 516, 520 (9th Cir. 1990) (affirming denial of request for additional discovery filed after hearing on summary judgment motion); see also Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15, 23 (1st Cir. 1999) ("a party may not attempt to meet a summary judgment challenge head-on but fall back on Rule 56(f) if its first effort is unsuccessful.") (citation omitted); Access Telecom, Inc. v. MCI Telecomm'ns Corp., 197 F.3d 694, 719 (5th Cir. 1999) (party waived claims of inadequate discovery by failing to file Rule 56(f) motion); Brae Transp., Inc. v. Coopers & Lybrand, 790 F.2d 1439, 1443 (9th Cir. 1986) ("Failure to comply with the requirements of Rule 56(f) is a proper ground for denying discovery and proceeding to summary judgment."). Even if P10 had not *explicitly* waived its right to seek additional discovery on DMCA issues (see Roberts Decl., Ex. V (12/13/09 Reply in support of P10's Motion for Evidentiary Sanctions at 24)), P10 implicitly waived such rights by filing its own motion on DMCA issues. Dkt. No. 436; see Fed. R. Civ. P. 56(f) (limiting relief to party opposing summary judgment motion); Sullivan v. City of Springfield, 561 F.3d 7,16 (1st Cir. 2009) (rejecting plaintiffs' argument that additional discovery was necessary to decide cross-motions for summary judgment motion because "they affirmatively requested that the court resolve the case on the existing evidence" by filing the motion).

P10 has blatantly conceded that it intends to use discovery obtained from Ms. Poovala to re-litigate the issues that have already been decided against it in this action. See 8/9 Hearing Transcript at 6:19-25. But P10 is not allowed to "circumvent the requirements of Fed. R. Civ. P. 56(f)" by presenting "new"

evidence regarding claims that have already been decided on summary judgment. See Kniffen v. Macomb County, 2006 WL 3205364, *3 (E.D. Mich. November 3, 2006) (denying reconsideration where moving party failed to request additional discovery pursuant to Rule 56(f)). Giving P10 the opportunity to seek discovery for such an improper purpose was clearly erroneous and contrary to law.

IV. THE MAGISTRATE JUDGE'S ORDER IS CONTRARY TO LAW BECAUSE IT FAILED TO CONSIDER THE BURDEN OF THE REQUESTED CUMULATIVE DISCOVERY

The Order denying Google's motion to quash the subpoenas failed to consider the burden to Ms. Poovala and Google in light of the breadth of discovery P10 has already obtained and the cumulative and irrelevant nature of the "new" evidence P10 seeks. In permitting P10 to re-depose Ms. Poovala, the Order reasoned that her prior Rule 30(b)(6) testimony did not preclude a deposition in her individual capacity. Order at 2. But on Google's motion to quash, the Magistrate was required not merely to determine whether P10's subpoenas fell within the procedural limits of the Rules, but also to evaluate whether their substantive scope was appropriate in view of the facts and circumstances. See Fed. R. Civ. P. 45(c)(1), (c)(3)(A); see also Moon v. SCP Pool Corp., 232 F.R.D. 633, 637 (C.D. Cal. 2005) (quashing subpoena that sought documents irrelevant to claims at issue, especially in light of ability to seek the same documents from opposing party). In failing to reflect any consideration of these issues, the Order is contrary to law.

A. Further Deposition of Ms. Poovala Would Be Highly Cumulative Of P10's Prior DMCA Discovery And Overly Burdensome.

The Magistrate's Order is contrary to law because it allows P10 to proceed with discovery that is cumulative of P10's DMCA related discovery, and therefore is unduly burdensome. P10 has deposed five Google employees on Google's DMCA policies and procedures and taken four days of testimony on Google's processing of P10's notices (including expeditiousness) and enforcement of its

repeat infringer policies. In response to P10's revised interrogatories, Google has provided narrative descriptions regarding numerous DMCA issues (such as its policies and procedures, and its processing of P10's DMCA notices). Roberts Decl., ¶ 8. P10 concedes the sufficiency of these responses, having not moved to compel further responses in the more than four years since they were served. Id. Google also provided responses to 715 Requests for Admission, most of which concerned Google's DMCA policies and procedures, and P10 has not moved to compel further responses to those requests either. Id. ¶ 9.

Significantly, P10 also had the opportunity to depose Ms. Poovala herself about Google's DMCA processing. That deposition was taken in Ms. Poovala's capacity as a Rule 30(b)(6) witness, and P10 never challenged the sufficiency of the responses or argued that she was inadequately prepared. Roberts Decl. ¶ 10. P10's post-hoc dissatisfaction with that deposition and desire for another bite at the apple cannot justify the deposition it now seeks. See Burdick v. Union Security Ins. Co., 2008 WL 5102851 at *3 (C.D. Cal. Dec. 3, 2008) (denying motion to compel second deposition of Rule 30(b)(6) designee when party could have obtained the information through written discovery responses); see also L.W. ex rel. Whitson v. Knox County Bd. of Educ., 2008 WL 820007, *2, 36 Media L. Rep. 1721 (E.D. Tenn. Mar. 25, 2008) (granting motion to quash deposition subpoena where plaintiff had ample opportunity to previously depose the witness and other witnesses regarding the information sought). Further, on these facts, the order preventing P10 from deposing Eric Schmidt, Google's CEO, does not affect this analysis. Indeed, all of P10's representations concerning the ripeness of DMCA issues for summary resolution and its failure to file a Rule 56(f) motion or move to compel any of Google's DMCA discovery responses were made before it even noticed the deposition of Mr. Schmidt.

In view of the exhaustive nature of prior discovery on DMCA issues, a second deposition of Ms. Poovala regarding repeat infringer policies and

expeditious processing of P10's DMCA notices would be impermissibly cumulative. This alone justifies granting Google's motion, and the Order's failure even to address the question of burden in this context was clear error.

B. P10's Document Subpoenas Are Invalid, Overbroad, and Unduly Burdensome.

The Order is clearly erroneous in failing to quash P10's document subpoenas for over breadth and undue burden. Courts are required to enforce the obligation of the party issuing a subpoena to "take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena," and ***must*** quash or modify document subpoenas that "subject[] a person to undue burden." Fed. R. Civ. P. 45(c)(1), (c)(3)(A); see also Concord Boat Corp. v. Brunswick Corp., 169 F.R.D. 44, 49 (S.D.N.Y. 1996) (quashing subpoena requesting broad categories of documents "with little apparent or likely relevance to the subject matter"); Schaaf v. SmithKline Beecham Corp., 233 F.R.D. 451, 455 (E.D.N.C. 2005) (quashing subpoena requesting all corporate records from a corporate employee related to employment over a multi-year period as "a paradigmatic example of a facially overbroad subpoena").

In disregard of its obligation to avoid undue burden, P10 subpoenaed sweepingly broad categories of documents from Ms. Poovala that address issues that it has already deposed her about and that are entirely duplicative of its requests of Google. For example, P10's subpoenas demand production of:

- "All emails and/or other COMMUNICATIONS between SHANTAL RANDS POOVALA and any other Google employee RELATING TO the processing of a notice received from any person claiming to be a copyright owner" (Request No. 1);
- "All emails, faxes, and/or other COMMUNICATIONS received by" or "sent by" Ms. Poovala from or to "any person claiming to be a copyright owner" (Request Nos. 2 and 3); and

- "All COMMUNICATIONS RELATING TO DMCA notices which Ms. Poovala processed" (Request No. 7). Roberts Decl., Ex. A (emphases added).

On their face, these requests are impossible to comply with. For example, it will not always be clear from a particular document whether its author, recipient, or sender "claims to be a copyright owner." Nor are the requests limited to documents Ms. Poovala had access to in her role as a Google employee, much less as its DMCA processing agent. Thus, personal correspondence to Ms. Poovala from anyone who has authored a published article would be responsive to P10's requests. Even if limited to Google's records, however, the subpoenaed documents would be within Google's control, not Ms. Poovala's. Accordingly, Ms. Poovala is not required to produce them under the Federal Rules. See Clinton v. California Dept. of Corrections, 2009 WL 1308984, *7 (E.D. Cal. May 11, 2009) (employees are not in possession of all documents kept by their employer); Schaaf, 233 F.R.D. at 455 (E.D.N.C. 2005) (holding that "by definition" corporate records are within the control of the corporate party and should be requested from the corporation "even if located in [an individual's] office or her home"). Indeed, recognizing that any potentially relevant documents would be in Google's control, P10 served duplicate requests on Google in P10's 11th and 13th Sets of Requests for the Production of Documents to Google. See Roberts Decl., Exs. A, G and H (attaching requests that are themselves duplicative of multiple prior requests from P10's first ten sets of document requests to Google).

It is additionally cumulative, wasteful, and harassing to demand that Ms. Poovala search for and re-produce the very same corporate documents that can be obtained directly from Google. See Travelers Indem. Co. v. Metropolitan Life Ins. Co., 228 F.R.D. 1115 114 (D. Conn. 2005) (quashing document subpoena to non-party when documents were within the control of a party to the litigation); Graham v. Casey's General Stores, 206 F.R.D. 2515 254 (S.D. Ind. 2002) (same). The impermissibly broad scope of the document requests issued to both Ms. Poovala and

Google confirms the undue burden imposed by P10's attempt to obtain corporate documents from a party in the litigation through a subpoena on an employee. Google has produced documents relating to Ms. Poovala's processing of P10's notices, and has appropriately objected to P10's new requests for documents relating to her processing of third-party notices. See Roberts Decl. Exs. G and H (responses indicating Google's production of documents responsive to P10's 11th and 13th Sets of Document Requests). Despite Google's objections to P10's requests, P10 has not met and conferred with Google to appropriately narrow the objectionable identical requests to Google. Requiring such burdensome and wasteful production from an employee before the parties have met and conferred about the identical document requests served on a party to the litigation is clear error.

Independently, P10's document subpoena and the document requests included with its deposition subpoena should be quashed as invalid because they were issued by the District Court for the Northern District of California and purport to compel production of documents to an address outside the Northern District, in Woodland Hills. Fed. R. Civ. P. 45(a)(2)(C) (a subpoena "for production or inspection [of documents], if separate from a subpoena commanding a person's attendance, [must issue] from the court for the district where the production or inspection is to be made.") Courts routinely quash or otherwise refuse to enforce an invalid subpoena requesting production in another district. See Kremen v. Cohen, 2007 WL 1119396, * 1 (N.D. Cal. 2007) (Northern District of California subpoenas requesting production of documents in the Central and Southern Districts of California were defective on their face); Falicia v. Advanced Tenant Servs., Inc., 235 F.R.D. 5, 11 (D.D.C. 2006) (same); Echostar Commc'ns Corp. v. The News Corp., Ltd., 180 F.R.D. 391, 397 (D. Colo. 1998) (same). The Order is clearly erroneous in failing to even address this facial defect in P10's subpoenas.

Because the Order failed to analyze the waste and burden caused by P10 seeking duplicative and cumulative documents from Ms. Poovala in her individual

capacity, and the invalidity of the document subpoenas, it is contrary to law and should be reversed.

V. P10'S APPEAL OF THE ORDER ON ITS PRELIMINARY INJUNCTION MOTION MAKES ANY DEPOSITION OF MS. POOVALA PREMATURE AT THIS JUNCTURE

The parties have jointly requested that this Court stay discovery and all other proceedings pending resolution of P10's appeal of the denial of its motion for a preliminary injunction. Dkt. No. 970. Even if that request is denied, however, this Court should stay any further discovery of Ms. Poovala until the appeal has been resolved. See, e.g., Fulani v. Brady, 1992 WL 116779 (S.D.N.Y. May 19, 1992) (staying discovery pending appeal of denial of preliminary injunction based on the potentially dispositive nature of the legal determinations at issue); cf. O'Brien v. Avco Corp., 309 F.Supp. 703, 705 (S.D.N.Y. 1969) ("when, as here, the determination of a preliminary question may dispose of the entire suit, applications for discovery may properly be deferred until the determination of such questions"). Such a stay is appropriate here because the pending appeal is (1) "dispositive on the issue at which discovery is directed"—here, the adequacy of Google's repeat infringer policy and P10's DMCA notices—and (2) "can be decided without additional discovery." Hanni v. American Airlines, Inc., 2009 WL 1505286, at *7 (N.D. Cal. May 27, 2009) (ordering stay of discovery allegedly relevant to a pending summary judgment motion); Little v. City of Seattle, 863 F.2d 681, 685 (9th Cir. 1988) (affirming district court's decision to stay discovery until case-dispositive summary judgment motion was decided).

As Dr. Zada stated in support of P10's successful request to stay Google's pending discovery motions while dispositive motions were litigated, holding off additional discovery "make[s] a lot of sense…[b]ecause until such time as we know what the Defendants will be held liable for, if anything, you know, for us to have to go through and do a massive amount of work on things that we may not be awarded

damages on seems premature." Roberts Decl., Ex. T (9/4/09 Hearing Transcript) at 15:2-16:24. In all events, staying P10's proposed discovery from Ms. Poovala until after its appeal of this Court's orders would enable the burdens placed on her by the subpoena to be limited to the discovery actually necessary for the remaining issues in the case. If the Court grants a stay, Google respectfully requests leave to file an amended motion for review of the Order and supporting memorandum after the stay is lifted.

CONCLUSION

For the foregoing reasons, Google respectfully requests that the Court sustain its objections to the Magistrate Judge's Order of August 10, 2010 denying Google's Motion to Quash the Poovala subpoenas and reverse the Order by quashing the subpoenas and issuing a protective order protecting Ms. Poovala from deposition or further response to the subpoenas.

DATED: August 24, 2010

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