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9
 10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA
 12 SAN FRANCISCO DIVISION

13 CALCAR, INC., a California corporation; and
 AMERICAN CALCAR, INC., a Delaware
 14 corporation,

15 Plaintiffs,

16 vs.

17 THE CALIFORNIA CARS INITIATIVE,
 INC., an unknown business entity; and FELIX
 18 KRAMER, and individual,

19 Defendants.

CASE NO. 3:08-mc-80083 MHP

GOOGLE INC.'S OPPOSITION TO
 PLAINTIFF CALCAR, INC.'S MOTION TO
 COMPEL RULE 30(B)(6) DEPOSITION
 TESTIMONY FROM THIRD PARTY
 GOOGLE INC.

[GOOGLE INC.'S CROSS-MOTION FOR
 PROTECTIVE ORDER FILED
 CONCURRENTLY HEREWITH]

[DECLARATION OF ADAM BAREA
 FILED CONCURRENTLY HEREWITH]

20 Date: May 23, 2008
 21 Time: 2:00 pm
 CTRM: 15

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1 Calcar’s motion to compel a deposition of Google regarding Google.org's philanthropic
2 grant to TCCI should be denied.

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4 **Factual and Procedural History**

5 Google.org is the philanthropic arm of Google Inc. and offers grants and other support to
6 organizations acting in the public interest. See <http://www.google.org/about.html>. The underlying
7 action—to which Google is not a party—is a federal trademark infringement suit pending in the
8 Central District of California.¹ The plaintiff in the underlying action is Calcar, Inc., a company
9 whose publicly available website describes its “main products” as “[p]rinted brochures and
10 booklets” that “are not designed to be read, their [sic] designed to answer questions people have
11 about” their automobiles. See <http://www.calcar.net/calcar/products.asp>. The defendants are The
12 California Cars Initiative (“TCCI”), and its founder, Felix Kramer. TCCI is a “Palo Alto-based
13 nonprofit startup of entrepreneurs, engineers, environmentalists and consumers promoting
14 100+MPG plug-in hybrid electric vehicles (PHEVs).” See <http://www.calcars.org/about.html>. Per
15 Calcar’s motion to compel, Calcar has alleged trademark infringement claims against TCCI based
16 on TCCI’s alleged use of the name Calcars and domain name calcars.org, which Plaintiff contends
17 may cause consumers confusion with Plaintiff’s name.

18 TCCI does not buy advertising from Google or sell advertising to Google. See Declaration
19 of Adam Barea, filed herewith, ¶ 12 (“Barea Decl.”). TCCI does not participate in any of
20 Google’s advertising programs (such as AdSense). See id. ¶ 13. Google is not involved in
21 TCCI’s business or marketing practices. See id. ¶ 14. Google is not a customer of TCCI. See id.
22 Google’s only connection to TCCI is that Google.org provided a philanthropic grant to TCCI in
23 2007. See id. ¶¶ 4, 12-14. Nevertheless, on March 18, 2008, Plaintiff served Google with
24 subpoenas for documents and deposition testimony. See Declaration of G. Warren Bleeker in

25 _____
26 ¹ The underlying action is denominated Calcar, Inc. and American Calcar, Inc. v. The
27 California Cars Initiative, Inc. and Felix Kramer, Civil Action Case No. 8:07-cv-00723 (C.D.
28 Cal.). Plaintiff’s Motion to Compel treats “Calcar, Inc.” and “American Calcar, Inc.” as the same
entity, so this Opposition will do the same.

1 Support of Plaintiff’s Motion to Compel, ¶ 3 (“Bleeker Decl.”). Subsequently, Google engaged in
2 several meet-and-confer efforts with Plaintiff regarding both subpoenas. See Bleeker Decl. ¶¶ 5-
3 13; Barea Decl. ¶¶ 6-8, 11. On April 4, 2008, Google indicated that it would likely produce
4 documents responsive to the subpoena for documents, but that it did not believe a deposition of
5 Google was warranted or necessary. Bleeker Del. ¶ 5; Barea Decl. ¶ 6. Later that same day,
6 Google faxed written objections to the deposition subpoena to Plaintiff’s counsel. Bleeker Decl. ¶
7 7. Also that same day, Google received a facsimile from Plaintiff’s counsel Warren Bleeker
8 indicating that, based on Google’s telephonic representation that it would not produce a witness
9 for the deposition, Mr. Bleeker would not travel to San Francisco, California, for a deposition.
10 Bleeker Decl. ¶ 8; Barea Decl. ¶ 7.

11 On April 9, 2008, Google confirmed with Plaintiff’s counsel that it would produce
12 documents responsive to the document subpoena. Bleeker Decl. ¶ 11; Barea Decl. ¶ 8. Google
13 further stated its belief that the documents themselves would be sufficient to give Plaintiff the
14 information he sought, especially given Google’s lack of involvement in the issues raised in the
15 underlying litigation. Barea Decl. ¶ 8. Google thus requested that the deposition issue be deferred
16 until Plaintiff had the opportunity to review the documents. Bleeker Decl. ¶ 11; Barea Decl. ¶ 8.

17 Google produced responsive documents to Plaintiff on April 11, 2008.² Bleeker Decl. ¶
18 12. Google’s production was 47 pages, and consisted of TCCI’s initial grant proposal (dated
19 February 25, 2007), the Grant Agreement (dated March 23, 2007), the grant letter from
20 Google.org (dated April 23, 2007), a status report from TCCI (dated February 15, 2008), an
21 affidavit of Felix Kramer regarding the grant (dated February 21, 2008), and a handful of assorted
22 emails. Barea Decl. ¶ 9. Despite the clear adequacy of the documents for its purposes, and
23 Google’s lack of material connection to the matters presented by the underlying litigation, Plaintiff
24 continued to press for an unnecessary deposition under Rule 30(b)(6). Barea Decl. ¶ 11; see also
25 Bleeker Decl. ¶ 13. In subsequent meet-and-confer efforts, on April 17, 2008, Plaintiff’s counsel

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27 ² Google supplemented its production with two additional responsive documents on April 28,
28 2008. Barea Decl. ¶ 9.

1 instructed Google’s in-house counsel not to bother filing a motion for protective order precluding
2 the deposition, because Plaintiff intended to move to compel the deposition. Barea Decl. ¶ 11; see
3 also Bleeker Decl. ¶ 13. Google’s counsel again asked Plaintiff’s counsel what relevant
4 information it believed Google had regarding the litigation. Plaintiff’s counsel declined to identify
5 anything specific, instead referring Google’s counsel to Calcar’s soon-to-be-filed moving papers.
6 Barea Decl. ¶ 11.

7
8 **Legal Standard**

9 This Court “has discretion to determine whether to grant a motion to compel.” Nemirofsky
10 v. Seok Ki Kim, 523 F.Supp.2d 998, 1000 (N.D. Cal. 2007) (citing Garrett v. City and County of
11 San Francisco, 818 F.2d 1515, 1519 (9th Cir. 1987)). The Court’s exercise of that discretion is
12 guided by the merits of the underlying discovery sought. Under Rule 26(b), discovery is
13 constrained by relevance. If information is irrelevant, mandating that discovery be taken
14 regarding that irrelevant information is “a per se abuse of discretion.” Cacique, Inc. v. Robert
15 Reiser & Co., Inc., 169 F.3d 619, 622 (9th Cir. 1999) (vacating discovery order mandating
16 discovery of irrelevant information). The Federal Rules further require “that when determining
17 the appropriateness of discovery requests courts should consider whether the discovery is
18 duplicative or overly burdensome and whether the burden and expense of discovery outweighs the
19 benefit.” Nemirofsky, 523 F.Supp.2d at 1000 (citing Fed. R. Civ. P. 26(b)(2)). This Court’s Local
20 Rule 37-2 further requires that a motion to compel “must detail the basis for the party’s contention
21 that it is entitled to the requested discovery and must show how the proportionality and other
22 requirements of FRCivP 26(b)(2) are satisfied.”

23 Federal courts in this District and elsewhere have long recognized that the Federal Rules
24 do not permit a party to utilize the discovery process to conduct a “fishing expedition.” See, e.g.,
25 Sathianathan v. Smith Barney, Inc., 2007 WL 2417370, at *6 (N.D. Cal. 2007) (granting
26 protective order against document “requests [that] are nothing more than a fishing expedition”);
27 Milazzo v. Sentry Ins., 856 F.2d 321, 322 (1st Cir. 1988).

1 It is also “well established that nonparties to litigation enjoy greater protection from
2 discovery than normal parties,” and “[t]he standards for nonparty discovery ... require a stronger
3 showing of relevance than for simple party discovery.” Laxalt v. McClatchy, 116 F.R.D. 455, 458
4 (D. Nev. 1986). See also Dart Industries Co. v. Westwood Chemical Co., 649 F.2d 646, 649 (9th
5 Cir. 1980) (holding that discovery should be “limited” in order to “protect third parties from
6 harassment, inconvenience, or disclosure of confidential documents”) (citation omitted).

7 8 **Argument**

9 The Court should deny Plaintiff Calcar’s Motion to Compel for several reasons. Calcar
10 has failed to establish that the discovery it seeks from third-party Google—a philanthropic donor
11 to defendant TCCI—is even remotely relevant to Calcar’s underlying trademark infringement
12 case, or reasonably calculated to lead to admissible evidence in that case. Fed. R. Civ. P. 26(b).
13 Relying solely on attorney argument and bare assertions, Calcar provides no evidence that would
14 entitle it to discovery of the testimony it seeks. Worse, Calcar’s relevance arguments do not track
15 the deposition topics identified in the subpoena itself—in apparent recognition that the topics it
16 did notice are irrelevant. Calcar may not seek to compel testimony it never properly asked for (via
17 subpoena) in the first place. Calcar has also violated Local Rule 37-2 by failing to explain why it
18 is entitled to the requested discovery, and how it has satisfied Rule 26(b)(2)’s limitations on the
19 scope of discovery. In truth, the discovery it seeks is duplicative and overly burdensome, and the
20 burden and expense of this discovery far outweighs any tenuous benefit to Calcar. Calcar’s
21 motion should be denied.

22 **I. CALCAR HAS FAILED TO ESTABLISH THE RELEVANCE OF THE** 23 **DEPOSITION TESTIMONY IT SEEKS**

24 **A. The Subjects Noticed For Google’s Third-Party Deposition Are Irrelevant To** 25 **The Claims and Defenses In The Underlying Case.**

26 Plaintiff has articulated no plausible theory of relevance of the testimony sought in its
27 deposition subpoena to the matters at issue in Calcar’s underlying trademark infringement case
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1 against TCCI. Plaintiff's deposition subpoena identified the following five subject matters for
2 testimony:

- 3 1. Any agreements or contracts between GOOGLE and TCCI
- 4 2. Any agreements or contracts between GOOGLE and Felix Kramer.
- 5 3. Any COMMUNICATIONS between GOOGLE and TCCI.
- 6 4. Any COMMUNICATIONS between GOOGLE and Felix Kramer.
- 7 5. The Google.org grant to TCCI to promote plug-in hybrid vehicle education.

8 Barea Decl., Exh. A (Subpoena for Testimony). Plainly, none of these topics—communications
9 and agreements between Google and TCCI or Kramer and related to Google.org's philanthropic
10 grant—has any bearing on whether TCCI has infringed Calcar's trademarks.

11 As Google's document production in this action confirms, Google's connection to TCCI is
12 minimal and its connection to the issues of this case is non-existent. Google awarded a \$200,000
13 philanthropic grant to defendant TCCI in 2007. Google has already produced the documents
14 related to the grant, including TCCI's grant proposal, the grant agreement, a grant letter from
15 Google.org, a status report from TCCI, an affidavit regarding the grant, and emails.³ See Barea
16 Decl. ¶ 9. Google has no other relationship with TCCI. Accordingly, Google should not be
17 compelled to provide testimony regarding topics (such as Google's provision of the charitable
18 grant) that are irrelevant to whether defendants are infringing Calcar's trademarks in their ongoing
19 business or marketing activities. See Cacique, Inc. v. Robert Reiser & Co., Inc., 169 F.3d 619,
20 622 (9th Cir. 1999).

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³ Many of the documents that Google produced to Calcar had already been produced by
defendant TCCI earlier in this action—making this discovery both irrelevant *and* duplicative. See
Barea Decl. ¶ 10.

1 **B. Calcar’s Claim That Google Could Provide Relevant Testimony Regarding**
2 **Consumer Confusion Fails, Because Calcar Did Not Include Such Topics In Its**
3 **Rule 30(b)(6) Deposition Subpoena And Has Not Shown That Google Has**
4 **Such Knowledge.**

5 Instead of justifying the relevance of the enumerated deposition topics (including the
6 philanthropic grant) to this case, which it cannot,⁴ Calcar’s motion points to trademark
7 infringement jurisprudence, and strains that “Google’s deposition testimony is relevant to at least
8 three of the eight *Sleekcraft* factors—strength of the mark, evidence of actual confusion and
9 marketing channels used.” See Motion at 7:19-21 (referencing AMF, Inc. v. Sleekcraft Boats, 599
10 F.2d 341, 348-349 (9th Cir. 1979) (enumerating factors to be considered in a trademark
11 infringement case)).

12 Fatal to Calcar’s motion, however, *none* of these consumer confusion issues was identified
13 by Calcar as designated topics in its Rule 30(b)(6) deposition subpoena, and thus, none are within
14 the scope of any deposition of Google. See Barea Decl., Exh. A; see also Fed. R. Civ. P. 30(b)(6)
15 (party “must describe with reasonable particularity the matters for examination”). Calcar’s related
16 argument that Google’s testimony “will provide information regarding placement and confusion of
17 the CALCARS mark resulting from Internet searches using Google’s search engine” (Motion to
18 Compel at 7) fails for this same reason. That topic appears nowhere in Calcar’s deposition
19 subpoena. See Barea Decl., Exh. A. Likewise, Calcar’s suggestion that “Google’s deposition
20 testimony will provide evidence of the different marketing channels used by Defendants in
21 promoting the infringing mark” (Motion to Compel at 7-8) suffers from this same infirmity.
22 Indeed, the terms “consumer confusion,” “marketing channels,” “the CALCARS mark,” “search
23 results,” “search engine” and “google.com” do not appear *anywhere* on face of the subpoena. See
24 Barea Decl., Exh. A. Calcar’s attempt to make relevance arguments based on subject matters not

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26 ⁴ Indeed, by failing to argue for the relevance of the subject matters enumerated in its
27 deposition subpoena, Plaintiff has effectively conceded the point. See, e.g., Henry v. Med-Staff,
28 (footnote continued)

1 even mentioned in its deposition subpoena cannot warrant compelling Google to appear for
2 deposition and should be disregarded outright.

3 Second, even if these topics *were* listed on the subpoena (which they are not), CalCar has
4 made no showing that Google has such knowledge—and indeed, Google does not. As Calcar
5 stated in its moving papers, the “key issue in any trademark infringement action is ‘the likelihood
6 of confusion, *i.e.*, whether the similarity of the marks is likely to confuse customers about the
7 source of the products.’” Motion to Compel at 6 (citation omitted). However, Google is not a
8 customer of TCCI, nor is it engaged in any marketing for TCCI. See Barea Decl. ¶ 14. Further,
9 TCCI does not buy advertising from Google or sell advertising to Google, nor does TCCI
10 participate in any of Google’s advertising programs (such as AdSense). See id. ¶¶ 12-13. Calcar
11 has presented no contrary evidence, because it has none.

12 Finally, even if Calcar were to stick to the designated topics, as it must, Calcar fails to
13 explain how the information Google *does* possess regarding the private philanthropic grant to
14 TCCI by Google.org could possibly have any bearing on the three *Sleekcraft* factors it identified.
15 As Calcar itself states, the “key issue” regarding the strength of a mark is consumer confusion.
16 The ordinary method for demonstrating the strength of a mark and likelihood of confusion is to
17 take a survey of consumers in the relevant market. See, e.g., Playboy Enterprises, Inc. v. Netscape
18 Communications Corp., 354 F.3d 1020, 1026 n.28 (9th Cir. 2004) (“Surveys are commonly
19 introduced as probative evidence of actual confusion.”); Perfumebay.com Inc. v. EBAY, Inc., 506
20 F.3d 1165, 1172 (9th Cir. 2007) (expert developed a consumer survey for eBay “to measure the
21 extent to which the word ‘bay’ used in conjunction with a common name causes or is likely to
22 cause confusion, ... or dilution.”). Whether Google.org has given a grant to TCCI has no bearing
23 on whether consumers recognized Plaintiff’s mark or might be confused by Defendant’s mark, or
24 whether consumers are likely to associate the name of either party with any particular product or
25 service.

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27 Inc., 2007 WL 1998653, at *7 (C.D. Cal. 2007) (“Plaintiff does not, however, address the other
28 five *Berry* factors, and accordingly, concedes that these factors weigh in favor of Defendants.”).

1 Calcar has failed to demonstrate why the Court should exercise its discretion to compel
2 Google, a nonparty, to give deposition testimony on information that is irrelevant to the claims and
3 defenses of the underlying case.

4 **II. CALCAR HAS NOT MET ITS BURDEN UNDER LOCAL RULE 37-2 TO SHOW**
5 **THAT ITS SUBPOENA MEETS THE REQUIREMENTS OF FED. R. CIV. P.**
6 **26(B)(2)**

7 Plaintiff's motion ignores this Court's local rule requiring any party moving to compel
8 discovery to "detail the basis for the party's contention that it is entitled to the requested discovery
9 and [] show how the proportionality and other requirements of Fed. R. Civ. P. 26(b)(2) are
10 satisfied." Nemirofsky v. Seok Ki Kim, 523 F.Supp.2d 998, 1000 (N.D. Cal. 2007) (citing Local
11 Rule 37-2). See also Unigene Laboratories, Inc. v. Apotex, Inc., 2007 WL 2972931, at *2 (N.D.
12 Cal. 2007) (same); Union Bank of California 401(K) Plan v. Hansen (In re Coan), 2007 WL
13 128010, at *2 (N.D. Cal. 2007) (same). Similarly, the Federal Rules require "that when
14 determining the appropriateness of discovery requests courts should consider whether the
15 discovery is duplicative or overly burdensome and whether the burden and expense of discovery
16 outweighs the benefit." Nemirofsky, 523 F.Supp.2d at 1000 (citing Fed. R. Civ. P. 26(b)(2)).
17 Calcar ignored this rule because a balancing of these factors weighs strongly in Google's favor.
18 Calcar's motion should be denied for this reason as well.⁵

19 **A. Plaintiff Can Obtain The Discovery It Seeks From Defendant TCCI Directly,**
20 **Or From Publicly Available Sources.**

21 Under Rule 26, "the court must limit the frequency or extent of discovery otherwise
22 allowed ... if it determines that (i) the discovery sought is unreasonably cumulative or duplicative,
23 or can be obtained from some other source that is more convenient, less burdensome, or less
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25 ⁵ Google identified the violations of these standards in its written objections. In Section C.4
26 of its Motion to Compel, Plaintiff summarily contests the validity of those objections. However,
27 in meet and confer efforts, and indeed in this Motion to Compel, Plaintiff has not explained why
28 Google's objections of irrelevance, overbreadth, undue burden, duplication, and availability from
other sources, among others, are somehow invalid. They are not.

1 expensive [or that] (ii) the party seeking discovery has had ample opportunity to obtain the
2 information by discovery in the action.” Fed. R. Civ. P. 26(b)(2)(C) (emphasis added). Plaintiff’s
3 deposition topics seek testimony on agreements, contracts, and communications between Google
4 and TCCI and/or Felix Kramer, and on the Google.org grant to TCCI.

5 First, that information can just as readily be obtained from TCCI, a party to the underlying
6 action, as from Google, which is not. Indeed, Plaintiff has already received the evidence it seeks
7 from this deposition, in the form of the documents produced by Google in April (see Barea Decl.
8 ¶ 9), and the deposition of defendant Felix Kramer, from whom Calcar obtained testimony
9 concerning the grant agreement and interactions between Google.org and TCCI. See id. ¶ 10.

10 Furthermore, as discussed above, Plaintiff may not seek an order compelling a deposition
11 of Google regarding topics outside the scope of its Rule 30(b)(6) deposition subpoena, such as the
12 consumer confusion subject matter Calcar first identified in its moving papers. But even if Calcar
13 could, that information may be obtained more readily from sources other than a deposition of
14 Google. To the extent Plaintiff wants information on the strength of TCCI’s mark and on possible
15 consumer confusion, Plaintiff should seek that information from *consumers*, not from Google.
16 Similarly, to the extent Plaintiff wants information on the appearance of Defendant’s mark in
17 Google search results, Plaintiff may simply go to google.com and run a Web Search.⁶ Lastly, to
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20 ⁶ Although it did not include any such topic in its deposition subpoena (and thus may not take
21 testimony on it), Calcar now claims that it needs information on “placement ... of the CALCARS
22 mark” in Google’s search results. Motion at 7. However, Google’s public website explains
23 website placement in Web Search results. See <http://www.google.com/technology/> (“Google runs
24 on a unique combination of advanced hardware and software. ... The heart of our software is
25 PageRank™, a system for ranking web pages developed by our founders.... PageRank ... us[es] its
26 vast link structure as an indicator of an individual page’s value. ... Using these and other factors,
27 Google provides its views on pages’ relative importance. ... Google combines PageRank with
28 sophisticated text-matching techniques to find pages that are both important and relevant to your
search. ... Google does not sell placement within the results themselves”). Google’s public
website also explains that such placement has nothing to do with any business or advertising
relationship between Google and any website. See, e.g.,
<https://www.google.com/adsense/support/?fulldump=1> (“[Google] search results are unbiased by
our relationships with paying advertisers and publishers.”). To the extent Calcar is suggesting that
it should be entitled to take discovery regarding how Google’s highly proprietary search
(footnote continued)

1 the extent Plaintiff wants information on the “marketing channels” used by TCCI, there is no
2 better source for this information than TCCI itself. Plaintiff had the opportunity to obtain such
3 information in its deposition of Felix Kramer, and should not burden third-party Google with such
4 deposition questions, regarding which Google has little to no knowledge.

5 **B. Plaintiff Has Failed To Show That The Burden Or Expense Of The Proposed**
6 **Discovery Outweighs Its Likely Benefit.**

7 Calcar similarly has failed to demonstrate that the benefits it might obtain from deposing
8 Google about subjects regarding which Google has little to no knowledge outweighs the burden
9 Google would face in having to prepare and sit for a Rule 30(b)(6) deposition. Under the Federal
10 Rules, the Court “must limit the frequency or extent of discovery otherwise allowed ... if it
11 determines that ... (iii) the burden or expense of the proposed discovery outweighs its likely
12 benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the
13 importance of the issues at stake in the action, and the importance of the discovery in resolving the
14 issues.” Fed. R. Civ. P. 26(b)(2)(C)(iii). See also Nemirofsky, 523 F. Supp. 2d at 1000 (“[W]hen
15 determining the appropriateness of discovery requests courts should consider whether the
16 discovery is duplicative or overly burdensome and whether the burden and expense of discovery
17 outweighs the benefit.”) (citing Fed. R. Civ. P. 26(b)(2)). As detailed above, Plaintiff has already
18 obtained (or at a minimum, has had the opportunity to obtain) virtually all of the information it
19 now seeks from third-party Google. Calcar has the proposal, the grant agreement and related
20 correspondence, deposition testimony regarding that grant and other topics from Felix Kramer,
21 and communications between Google and TCCI and Felix Kramer. Plaintiff knows that TCCI
22 does not advertise on Google, and that Google has no involvement in TCCI’s marketing or

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24 technology—possibly the most valuable trade secret in the world—actually functions on an
25 engineering level, Calcar is flat wrong. Calcar is entitled to no such thing, and has made no
26 showing that would even come close to warranting such discovery of non-party Google’s highly
27 confidential information in this case. See, e.g., Dart Industries Co. v. Westwood Chemical Co.,
28 649 F.2d 646, 649 (9th Cir. 1980) (discovery should be limited in order to “protect third parties
from ... disclosure of confidential documents”). To the extent that the Court is even considering
(footnote continued)

1 business activities. Google should not be burdened with a deposition in these circumstances,
2 given the minimal benefit (if any) to Calcar that a deposition would confer.

3 Indeed, Plaintiff’s only articulated basis for subjecting Google to such burdensome
4 discovery is corroboration. Calcar thus claims that “[i]t is important for Calcar to be able to test
5 the reliability of TCCI’s and Kramer’s testimony by learning Google’s knowledge of the
6 communications and relationship,” and that “Calcar certainly ‘has a right to seek to corroborate
7 the information given it by its party-opponent.’” Motion to Compel at 8 (citing Pfizer, Inc. v.
8 Mylan Labs, Inc., 2003 U.S. Dis. LEXIS 24806, at *6 (S.D.N.Y. Dec. 17, 2003)).⁷ By styling its
9 need as one for “corroboration,” Plaintiff essentially concedes that the discovery it seeks is
10 duplicative. And, under the circumstances here, any “right” to corroboration that may exist in
11 appropriate cases is far too thin a reed to support a motion to compel non-party Google to prepare
12 for and appear at a Rule 30(b)(6) deposition on topics about its philanthropic giving that are
13 immaterial to the underlying case.

14 Under Rule 26(b)(2)(C)(iii), “the burden or expense of the proposed discovery [must]
15 outweigh[] its likely benefit, considering the needs of the case” and other factors. Plaintiff argues
16 that the burden on Google is slight because Google is “a large corporate entity” and “likely keep[s]
17 records of any agreements or contracts between itself and the Defendants.” Motion to Compel at
18 9. But the burden of preparation for a Rule 30(b)(6) deposition is substantial no matter how large
19 one’s employer, and the Federal Rules expressly require balancing of burden against likely benefit
20 to the case. Plaintiff already has the agreements and contracts, has already questioned the
21 Defendants about them, and has given no reason to suspect that the evidence it has already
22 obtained is unreliable, untruthful, incomplete, or otherwise suspect. Nor has Calcar explained how

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24 whether to order deposition testimony on this subject, Google respectfully requests the opportunity
25 to file further briefing on the immensely valuable trade secrets such an order might implicate.

26 ⁷ Plaintiff’s only cited authority on this point, Pfizer v. Mylan Labs, was a patent
27 infringement action over hypertension drugs where the third party had direct involvement in the
28 subject matter of the patent infringement case, in that it both supplied the defendant with the active
ingredient for the drug, and developed its own drug to compete directly with both parties. Id.,
(footnote continued)

1 these topics are material to its claim for trademark infringement. In short, Plaintiff has shown no
2 possible benefit other than “corroboration,” and no reasonable need to corroborate these irrelevant
3 facts regarding the Google.org grant.⁸

4
5 **Conclusion**

6 For the foregoing reasons, Google respectfully requests that Plaintiff’s Motion to Compel
7 Google to sit for deposition pursuant to Calcar’s third-party deposition subpoena be denied.

8
9 DATED: May 2, 2008

QUINN EMANUEL URQUHART OLIVER &
HEDGES, LLP

10
11 By /s/ Rachel M. Herrick
12 Rachel M. Herrick
13 Attorneys for Google Inc.

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22 _____
23 2003 U.S. Dist. LEXIS 24806, at *2-4. Pfizer could not be further afield from the facts presented
24 here, where Google’s involvement is merely that of a charitable donor to one of the defendants.
25 ⁸ Plaintiff claims that “Rule 45(c)(3) provides that the only mechanism by which to challenge
26 a deposition subpoena is to file a motion to quash or modify the subpoena,” and that “[w]ith the
27 passage of the original deposition date, Google waived the right to bring either a motion to quash
28 or modify the subpoena.” Motion to Compel at 8 (citing three out-of-circuit cases and one
treatise). As explained in greater detail in Google’s concurrently-filed Motion for Protective
Order, this is both inaccurate and a red herring. Google has *not* filed a motion to quash or modify
the subpoena under Rule 45. Instead, Google is timely *opposing* Plaintiff’s Motion to Compel and
cross-moving for a protective order under Rule 26(c).