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6
 Attorneys for Plaintiff and Counter Defendant
 7 GOOGLE INC.

8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA

11 GOOGLE INC., a Delaware corporation,
 12 Plaintiff,

13 v.

14 AMERICAN BLIND & WALLPAPER
 FACTORY, INC., a Delaware corporation
 15 d/b/a decoratetoday.com, Inc., and DOES 1-
 100, inclusive,
 16 Defendants.

17 AMERICAN BLIND & WALLPAPER
 18 FACTORY, INC., a Delaware corporation
 19 d/b/a decoratetoday.com, Inc.,

20 Counter Plaintiff,

21 v.

22 GOOGLE INC., AMERICA ONLINE, INC.,
 NETSCAPE COMMUNICATIONS
 CORPORATION, COMPUSERVE
 23 INTERACTIVE SERVICES, INC., ASK
 24 JEEVES, INC. and EARTHLINK, INC.,

25 Counter Defendant/
 Third-Party Defendants.

Case No. C 03-5340-JF

**GOOGLE INC.'S OPPOSITION TO
 AMERICAN BLIND & WALLPAPER,
 INC.'S [SIC] MOTION TO AMEND AND
 EXTEND CASE MANAGEMENT ORDER**

Date: June 23, 2006
 Time: 9:00 a.m.
 Dept: 3
 Judge: Honorable Jeremy Fogel

Date Comp. Filed: November 26, 2003

Trial Date: March 16, 2007

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I. INTRODUCTION

This Court should not reward American Blind & Wallpaper Factory, Inc.’s (“ABWF”) ongoing campaign of delay by further delaying a case that has already been pending for two and half years. For months, Google Inc. has asked ABWF to provide outstanding documents and dates for depositions of ABWF personnel. For months, ABWF has strung Google along, by ignoring Google’s requests, then providing belated promises to comply with them, then breaking those promises, and then repeating the cycle. Apparently, ABWF would like to continue indefinitely on its course of neither seriously prosecuting this case nor dismissing it. ABWF has already requested and received one extension of the case deadlines. Now as fact discovery is again about to close, it requests another extension.

The criterion for a motion to extend time is the diligence of the party seeking the extension, and if that party “was not diligent, the inquiry should end and the motion should not be granted.” *Zikovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002) (internal quotations and citations omitted). ABWF’s motion repeatedly acknowledges its lack of diligence: it states that from mid-April to May 18, 2006, it “was unable to dedicate time” to providing Google with discovery and that since May 19, 2006, it “has simply been unable to respond to Google’s request” that ABWF fulfill its discovery obligations. Mot. 3-4.

While ABWF blames its lack of diligence on its own change of management and on Google, neither excuse is valid. ABWF’s lack of diligence began well before it claims that its management change began distracting it. Indeed, ABWF admits that it still has not fully responded to document requests that Google served more than two years ago and to which ABWF promised it would produce documents more than a year ago. ABWF’s attempt to blame Google falls even flatter. Not only are ABWF’s assertions irrelevant, most of them aren’t even true. For example, ABWF claims that “Google has not provided the names” of its remaining 30(b)(6) designees, even though on April 18, 2006, Google sent ABWF an email stating: “The three other witnesses that will address topics set forth in American Blind’s two 30(b)(6) notices are Prashant Fuloria, Rose Hagan and Michael Kwun.” *Compare Mot. 6 with Declaration of Klaus H. Hamm (“Hamm Decl.”)*, filed herewith, Ex. Q. Two of Google’s four 30(b)(6)

1 witnesses have already been deposed, while the deposition of the third was scheduled and then
2 cancelled by ABWF along with the cancellation of its own 30(b)(6) deposition. *See* Declaration
3 of Michael H. Page (“Page Decl.”), filed herewith, ¶ 3. In contrast, ABWF has yet to produce a
4 single witness for deposition, and has only offered dates for those depositions after filing this
5 motion. Hamm Decl. Ex. L. Those dates, however, are a classic case of self-help discovery, as
6 they fall outside of the existing discovery cutoff.

7 As ABWF has not yet produced documents that will be the basis for those depositions,
8 Google has no choice but to accept the *fait accompli* of further delays: it is inevitable that Google
9 will have to take some depositions after the June 27, 2006 close of fact discovery. And—
10 assuming that ABWF finally produces documents and presents its own witnesses for
11 deposition—Google is willing thereafter to permit ABWF to depose Google’s remaining
12 30(b)(6) designees outside of the discovery cutoff. But any modification of the discovery
13 schedule should be limited in both scope and time, allowing only this handful of long-ago
14 noticed depositions to go forward in the next few weeks. *See, e.g., Juell v. Forest Pharm., Inc.*,
15 2006 WL 768722, *1 (E.D. Cal. March 24, 2006) (extending “discovery deadlines solely as they
16 apply to deposing plaintiff’s belatedly disclosed experts and to designating a rebuttal expert”).
17 The Court should not permit ABWF to parlay its own lack of diligence into a further delay in the
18 overall schedule of this case.

19 II. RELEVANT FACTS¹

20 This case is more than two and half years old, and even under the current schedule, the
21 trial will not take place until more than three years and three months after the case began on
22 November 26, 2003. On January 20, 2006—approximately five weeks before fact discovery was
23 previously scheduled to close—ABWF requested an extension of all case deadlines. Joint Fed.
24 R. Civ. P. 26(f) Report, Case Management Statement and Proposed Case Management Order,
25 filed January 20, 2006, 2-3. Although Google opposed this request, the Court extended the close
26

27 ¹ ABWF’s brief contains many factual statements with no evidentiary support directly violating
28 Civil Local Rule 7-5(a)’s requirement that “[f]actual contentions made in support of . . . any
motion must be supported by an affidavit or declaration and by appropriate references to the
record.” The Court should ignore the many unsupported factual assertions made by ABWF.

1 of fact discovery, and the rest of the schedule, by four months. The current schedule requires the
2 completion of fact discovery by June 27, 2006.

3 **A. ABWF did not inform Google that it was unable to conduct discovery until more**
4 **than a month after the fact.**

5 Having obtained a four-month extension, ABWF then did little to advance this case to
6 trial. To date it has taken only two days of 30(b)(6) depositions, and has failed to produce a
7 single witness for deposition by Google. ABWF claims that beginning in mid-April 2006 it
8 became so consumed with selling itself that it could not spend any time responding to Google's
9 discovery. But instead of notifying Google, it both ignored Google's requests and made
10 promises that it would later break. It was not until more than a month later, on May 22, 2006,
11 that ABWF informed Google that it would be further delayed in responding to discovery, and
12 would again need to cancel its own deposition, due to a management change. *See* Page Decl. ¶ 3.
13 Even then, ABWF continued to make promises that it did not keep. On May 22, ABWF
14 promised that it would provide Google with a new schedule for responding to discovery in "a
15 couple of days." *Id.* ¶ 2. On June 1, after first ignoring several inquiries, ABWF's counsel
16 promised to provide Google with documents and deposition dates no later than June 5, but did
17 not do so. *Id.* ¶¶ 4, 5. Indeed, it was not until June 7—just two days before it filed this motion—
18 that ABWF informed Google that it would not be able to complete discovery within the time
19 provided by the Court and requested that Google agree to another extension of the case
20 deadlines. *Id.* ¶ 6.

21 In the meantime, Google had informed ABWF of its intention to file a motion to compel
22 and then did so on June 8, 2006. Page Decl. Ex. A. On June 12, 2006, Magistrate Judge
23 Seeborg ordered the parties to meet and confer further and instructed Google that it may re-file
24 its motion to compel up to seven days after the discovery cutoff.

25 **B. By its own admission, ABWF has not fully responded to requests for production**
26 **that Google served more than two years ago.**

27 On May 21, 2004—in other words, more than two years ago—Google served its first set
28 of requests for production, to which ABWF now argues it requires more time to respond. Hamm
Decl. ¶ 2. That same day, the parties agreed to stay discovery, and that stay remained in place

1 until May 11, 2005. ABWF provided written responses to Google's first set of requests for
2 production and first set of interrogatories on June 10, 2005. *Id.*

3 On October 26, 2005, ABWF produced one banker's box of documents that did not come
4 close to responding to Google's 41 requests for production.² Hamm Decl. ¶ 2. When months
5 went by and ABWF produced nothing more, it became apparent that ABWF would not produce
6 any more documents of its own accord. On March 16, 2006, Google sent ABWF a letter
7 requesting that it respond more fully to the document requests served in May 2004. *Id.* Ex. A
8 After two weeks passed without any response from ABWF, on March 28, 2006, Google sent
9 another letter to ABWF requesting that it respond more fully to Google's document requests. *Id.*
10 Ex. B. ABWF finally responded on April 10, 2006, with a promise that it would produce
11 documents "as soon as practicable." *Id.* Ex. C.

12 On April 21, 2006, ABWF produced approximately 140 pages of documents. Hamm
13 Decl. ¶ 4. Google sent ABWF a letter on May 12, 2006, requesting that ABWF further
14 supplement its production. *Id.* Ex. D. ABWF requested more time to respond to the letter,
15 explaining that its attorney had "been out of town," and promised to respond by May 22, 2006.
16 *Id.* Ex. E. On June 6, 2006, ABWF finally responded to Google's May 12, 2006 letter, stating
17 that it would produce responsive documents by the "next week." *Id.* Ex. F³

18 Nor has ABWF served Google with *any response* to Google's second set of
19 interrogatories and requests for production—not even objections prepared by its attorneys—even
20 though the deadline for doing so has passed. *Id.* ¶ 6.

21 **C. American Blind has not yet produced a designee in response to a Rule 30(b)(6)**
22 **deposition notice that Google served on February 15, 2006.**

23 On February 15, 2006, Google served ABWF with a 30(b)(6) deposition notice, setting

24 ² By contrast, Google has produced approximately 137,000 pages. Hamm Decl. ¶ 15.

25 ³ On June 15, 2006—the day Google filed this opposition—Google received two boxes of
26 documents from ABWF. As a result, Google has not yet had the opportunity to review these
27 documents. But given that this case revolves around ABWF's efforts to advertise and sell
28 products on the Internet and that ABWF claims it conducts more than 400,000 Internet
transactions a year, that it has spent more than \$10 million developing its website and that 50
full-time employees work on its Internet operations, it is inconceivable that ABWF has produced
all documents in its possession that are responsive to Google's requests. *See* ABWF's
Counterclaims ¶¶ 33, 34.

1 the deposition for March 15, 2006. Hamm Decl. Ex. G. Despite its repeated efforts to do so,
2 Google has yet to take this deposition. *Id.* ¶ 7.

3 ABWF first informed Google that its Rule 30(b)(6) designee, Steve Katzman, was
4 unavailable on March 15. Hamm Decl. Ex. H. As a result, the parties rescheduled the deposition
5 for April 20. *Id.* Ex. I. As the April 20 deposition date approached, it became clear that ABWF
6 would not produce documents in advance of the deposition (as described above) so Google again
7 was forced to reschedule the deposition, for May 11, under the mistaken belief that by that date
8 ABWF would have completed its document production. *Id.* Ex. J. Then, just ten days before it
9 was set to take place, ABWF cancelled the May 11th deposition. *Id.* Ex. K. But instead of
10 explaining—as it now claims—that ABWF could not produce its designee because ABWF was
11 too busy attempting to sell the company, it stated that one of its attorneys had a hearing on the
12 scheduled day and that another would be “out of town.” *Id.*

13 The parties then rescheduled the 30(b)(6) deposition yet again, for June 6. On May 22,
14 ABWF unilaterally cancelled the June 6 deposition, finally explaining that the company was
15 undergoing a management change. Page Decl. ¶ 3. At the time, ABWF promised to notify
16 Google “in a couple of days” about rescheduling the deposition. *Id.* Despite multiple requests
17 from Google and a motion to compel the deposition, ABWF has yet to propose a new date. Most
18 recently, it stated that it would propose dates by June 22, 2006. Hamm Decl. Ex. L.

19 **D. American Blind has prevented Google from so far taking the depositions of any**
20 **other former or present American Blind employees.**

21 On May 19, 2006, three days before ABWF informed Google of its change in
22 management and cancellation of its 30(b)(6) deposition, Google notified ABWF of its intention
23 to depose four individuals listed in ABWF’s initial disclosures and asked ABWF to notify
24 Google if any of the proposed dates were problematic. Hamm Decl. Ex. M. Thus, ABWF is
25 simply wrong when it claims that Google noticed those individual depositions opportunistically
26 after learning of ABWF’s management change (“Google pressed forward with new and
27 additional discovery burdens; noticing and then subpoenaing the depositions of four current and
28 former American Blind employees.”). Mot. 4.

1 When ABWF did not respond to Google's May 19 letter, Google sent ABWF another
2 letter on June 1 regarding these depositions. Hamm Decl. Ex. N. That letter also included an
3 individual deposition notice for ABWF's now-former CEO, Mr. Katzman. Because ABWF had
4 previously signaled its intention to make him its 30(b)(6) designee on 25 topics, he clearly has
5 knowledge relevant to the case.

6 Of these five depositions, it appears that one will take place on June 22. Hamm Decl. Ex.
7 O. As for the other four, on June 13, 2006, after filing this motion, ABWF finally responded to
8 Google's attempts to meet and confer on scheduling, but all the dates it has proposed are after the
9 discovery cutoff. Hamm Decl. Ex. L.

10 III. Argument

11 A. Governing Standards

12 A pretrial scheduling order "shall not be modified except upon a showing of good cause."
13 FRCP 16(b). "Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party
14 seeking amendment." *Crosthwaite v. Celik Engineering Corp.*, 2006 WL 1050157, *1 (N.D.
15 Cal. April 20, 2006) (quoting *Johnson v. Mammouth Recreations, Inc.*, 975 F.2d 604, 609 (9 Cir.
16 1992)). While the Court may also examine prejudice to the non-moving party, the "threshold
17 issue" is whether the moving party was diligent and "[i]f that party was not diligent, the inquiry
18 should end." *Id.*

19 In general, extensions of established schedules are frowned upon because they hinder
20 judicial efficiency and the speedy resolution of cases:

21 In these days of heavy caseloads, trial courts in both the federal and state systems
22 routinely set schedules and establish deadlines to foster the efficient treatment and
23 resolution of cases. Those efforts will be successful only if the deadlines are
taken seriously by the parties, and the best way to encourage that is to enforce
deadlines.

24 *Wong v. Regents of the Univ. of Cal.*, 410 F.3d 1052, 1060 (9 Cir. 2005).

25 B. ABWF admits its own lack of diligence in discovery.

26 ABWF admits that it has not diligently pursued or produced discovery. Indeed, ABWF's
27 motion is essentially a *mea culpa*. It states that from "mid April, 2006 through May 18, 2006,"
28 ABWF "was unable to dedicate time to the production responses and interrogatories from

1 Google” and that it did not have “the time necessary to prepare for and attend depositions.” Mot.
2 2-3. It also states that between May 19, 2006 and the time it filed its motion on June 9, 2006, it
3 “has simply been unable to” to respond to Google’s discovery requests. *Id.* at 4.⁴

4 ABWF’s excuse that it was consumed with a change in management does not come close
5 to fully explaining its lack of diligence. ABWF has not completed its production of document
6 requests that ABWF responded to more than a year ago. Google sent meet and confer letters to
7 ABWF on March 16, 2006 and March 28, 2006, before ABWF claims it was too distracted to
8 diligently prosecute this case. ABWF ignored the first letter and responded to the second with a
9 still-unfulfilled promise that it would produce responsive documents. Nor does ABWF explain
10 with any particularity why its management change has undermined its ability to gather and
11 produce documents that Google requested two years ago. Typically, document collection efforts
12 are orchestrated by outside counsel and do not require much, if any, involvement from upper-
13 level management.

14 Similarly, Google noticed the 30(b)(6) deposition of American Blind on February 15,
15 2006, well before ABWF claims it became too distracted to fulfill its discovery obligations. That
16 deposition has had to be rescheduled four times: once because ABWF’s designee was on his
17 honeymoon, once because ABWF admittedly failed to produce documents in advance of the
18 deposition, once because ABWF’s attorneys realized just ten days before the deposition that they
19 would not be available and, finally, because the designee resigned two and half weeks before the
20 deposition. ABWF’s lack of diligence continues to this day. Even though nearly a month has
21 passed since ABWF’s designee resigned, ABWF still has not identified a new designee or
22 proposed a new date for the deposition.

23 ABWF’s admits its lack of diligence in prosecuting this case. As a result, its motion for
24 an extension must be denied. *See Zikovic*, 302 F.3d at 1087 (if the party requesting an extension
25 “was not diligent, the inquiry should end and the motion should not be granted”) (internal
26 quotations and citations omitted).

27
28 ⁴ The motion is silent as to why ABWF did so little to advance this case before April of this year.

1 **C. ABWF’s attempts to blame Google are trivial, and most aren’t even true.**

2 ABWF vainly attempts to blame several supposedly “dilatatory” tactics employed by
3 Google as an excuse for its lack of diligence. It cites the Court’s order granting ABWF’s
4 motions to compel in February and complains that Google supposedly “buried” a document that
5 ABWF now wishes it had used as an exhibit at the April 12, 2006 deposition of one of Google’s
6 witnesses, that one of Google’s witnesses arrived for his deposition two hours late, that the
7 deposition of another Google witness was canceled, and that Google has not identified its
8 remaining 30(b)(6) designees. Mot. 5-6. Each of these points is addressed below:

- 9
- 10 • ABWF does not explain how the Court’s granting, on February 8, 2006, of
11 ABWF’s motions to compel accounts for any delay. The Court issued its order
12 more than four months ago, with a deadline taking into account the current
13 schedule, and Google fully complied with that order.
 - 14 • The document that ABWF claims was “buried” in Google’s April 6, 2006
15 production was the subject of an entire paragraph in the cover letter that
16 accompanied that production. The explanation stated, in part, that the document
17 contains “data from AdsDB, which is a Google database for ad serving and
18 reporting. This data is responsive to many of American Blind’s document
19 requests, including but not limited to request numbers 1-3, 6, 17, 18, 24, 28 and
20 29.” Hamm Decl. Ex. P. Nor was the document produced in an unreadable
21 format as ABWF suggests; instead, Google produced the document on a CD
22 readable on a standard CD-ROM player. Hamm Decl. ¶ 16.
 - 23 • ABWF complains that Google witness Prashant Fuloria was two hours late for his
24 deposition. This isn’t true, but in any case Google already has informed ABWF
25 that it may complete the deposition at a mutually convenient time. Page Decl. ¶ 2.
26 ABWF has made no attempt to schedule the deposition’s completion.
 - 27 • ABWF argues that discovery should be extended because Rose Hagan’s
28 deposition was canceled, but it does not point out that it was ABWF that canceled
the deposition. Page Decl. ¶ 3.
 - ABWF’s claim that Google has not identified its 30(b)(6) designees is wrong.
On April 18, 2006, Google sent ABWF an email identifying its witnesses. Hamm
Decl. Ex. Q.

23 Finally, ABWF’s attempt to blame settlement negotiations for its lack of diligence also
24 fails. ABWF states that during the negotiations, which took place during May and June, “neither
25 party was pressing forward with discovery.” Mot. 4. This claim doesn’t take into account that
26 on May 10, 2006, Google served ABWF with requests for production, requests for admissions
27 and interrogatories; that on May 12, 2006, Google sent ABWF a letter requesting that ABWF
28

1 respond to Google's first set of requests for production; that on May 18, 2006, ABWF took the
2 deposition of Mr. Fuloria; and that on May 19, 2006, Google sent ABWF deposition notices and
3 subpoenas for four current and former ABWF employees.

4 In short, nothing Google has done explains why ABWF has lacked diligence in pursuing
5 discovery.

6 **IV. CONCLUSION**

7 For the foregoing reasons, ABWF's motion for an extension should be denied. Google is
8 willing to take and defend already noticed depositions after the discovery cut-off, but no other
9 scheduling changes are warranted or should be provided.

10 Dated: June 15, 2006

KEKER & VAN NEST, LLP

11
12
13 By: /s/ Klaus H. Hamm

KLAUS H. HAMM

Attorneys for Plaintiff and Counter Defendant
GOOGLE INC.