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AMERICAN BLIND AND WALLPAPER
FACTORY, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GOOGLE INC., a Delaware corporation,

Plaintiff,

v.

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

Defendants.

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

Counter-Plaintiff,

v.

GOOGLE, INC.

Counter-Defendants.

Case No. C 03-5340-JF (RS)

AMERICAN BLIND AND WALLPAPER FACTORY, INC.'S RESPONSE TO GOOGLE INC.'S OBJECTIONS TO MAGISTRATE JUDGE'S ORDER COMPELLING DEPOSITION OF GOOGLE CO-FOUNDER AND PRESIDENT LARRY PAGE

Judge: Hon. Jeremy Fogel

I. INTRODUCTION

Google seeks the extraordinary measure of overturning Magistrate Judge Seeborg's decision on a discovery matter that is clearly within his purview and discretion, and particularly within his specialized knowledge of the travails of discovery in this case. Incredibly, Google fails to adequately explain the single most compelling fact that confronted the Magistrate: on the eve of the close of discovery, the company's Senior Trademark Counsel admitted for the first time under oath that the very trademark policy that Google itself has placed in issue by filing this lawsuit was changed at the direction of one person – company co-founder Larry Page. Despite this testimony, Google argues that Mr. Page has no relevant knowledge, even though it appears Google has not even conferred with Mr. Page to verify this — Google offers only a hearsay attorney declaration, rather than a declaration from Mr. Page himself, in its attempt to prevent the deposition of Mr. Page from moving forward.

Scrambling to avoid having to produce Mr. Page for a limited, three-hour deposition in this case, Google elevates form over substance in advancing several arguments that are without support in the record. First, Google incorrectly claims that American Blind should be denied its right to this discovery because discovery in this case languished for "31 months between when Google filed suit and the close of discovery …." In fact, Google itself sought a stay for most of this period, and even after the stay was lifted, Google did not produce documents in useable form until March 10, 2006, after being ordered to do so by the Magistrate.

Second, Google argues that, even though it doggedly fought American Blind's attempts to extend discovery or to depose any lower-level Google employees, American Blind ought nonetheless to have been required to depose dozens of Google employees first, before deposing Mr. Page. Putting aside the incongruity of this argument, the law does not require a party to depose the full infantry before questioning the general. Even Google admits that the trademark policies that it placed at issue by filing this case were changed "at the directive"[1] of Mr. Page and that "he remains *actively involved* in Google's day to day operations",[2] which is more than

[1] (Obj. at 11:17.)

[2] Kwun Decl. at ¶ 4 (emphasis supplied).

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enough to establish the relevance of his testimony under Rule 26 of the Federal Rules of Civil Procedure.

Third, Google's argument about the propriety and timeliness of the deposition notice at issue is flat wrong. The deposition notice at issue was served ***before*** the June 27th discovery cut-off. Thus, under the kind of strict interpretation favored by Google,[3] technically American Blind was not required to obtain consent or to make any showing of good cause in order to depose Mr. Page. If anything, Google was required to seek a protective order to quash the deposition, which Google failed to do (thus waiving its objection now).

Finally, technical niceties aside, Google's contention that the Magistrate made a *sua sponte* ruling that was contrary to the law is simply incorrect. Although the Latin term is liberally tossed about by Google in its papers, "*sua sponte*" is in fact defined by Black's Law Dictionary to mean: "Without prompting or suggestion; on its own motion." The Magistrate's ruling was not the product of whimsical fancy, as Google's *sua sponte* argument insinuates. Rather, the issue of whether American Blind should be allowed to depose Larry Page was squarely before the Magistrate in American Blind's motion to compel[4] and addressed in Google's opposition papers – with no less than three separate arguments – and further argued at oral arguments. (*See* Docket Item Nos. 142, 174, 183.) It simply is not true to say that Google did not have the opportunity to address this issue. Just because Google failed to convince the Magistrate that American Blind had not established "good cause" to take this deposition of Larry Page during the extension of discovery does not mean that the Magistrate's ruling is clearly erroneous or contrary to law. Google's objection should be overruled.

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[3] Google self-servingly argues for a strict interpretation of court orders only when it will benefit Google. Last month, in arguing that American Blind should not be permitted to depose six lower-level Google employees, Google argued that American Blind's mistaken interpretation of this Court's June 23, 2006 Order extending discovery should preclude it from deposing these individuals. Even though Magistrate Judge Seeborg agreed that American Blind's interpretation was a good faith mistake, he nonetheless strictly construed the Order at Google's urging against American Blind.

[4] As the title would suggest, American Blind's Motion to Compel Discovery Timely Served ("Motion to Compel") was directed to all outstanding discovery, including Mr. Page's deposition.

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II. ARGUMENT

Tellingly, not once in its papers does Google address the stringent standard it is required to meet in order to overturn Magistrate Judge Seeborg's Order. The law is clear that the standard for reviewing a magistrate judge's ruling is extremely deferential and, therefore, it is very difficult to meet the clearly erroneous or contrary to law standard. Federal Rule of Civil Procedure, 72(a), along with Civil L.R. 72-2, govern objections to nondispositive pretrial decisions by magistrate judges. Rule 72(a) provides:

> A magistrate judge to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; ... The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law.

Fed. R. Civ. P. 72(a).

The "clearly erroneous" standard applies to the magistrate judge's findings of fact. *Wolpin v. Morris, Inc.*, 189 F.R.D. 418, 422 (C.D.Cal. 1999) (citations omitted). In finding that the magistrate judge's decision is "clearly erroneous," the Court must "arrive at a 'definite and firm conviction that a mistake has been committed.'" *Id.* (citations omitted) (emphasis added). "This standard is extremely deferential and the Magistrate's rulings should be considered the final decisions of the District Court." *EEOC v. Lexus of Serramonte*, 2006 WL 2567878 (N.D. Cal. Sept. 5, 2006) (defendants' objection to magistrate's order overruled) (citations omitted) (emphasis added); *see also Doe v. City of Chula Vista*, 196 F.R.D. 562, 564 (S.D. Cal. 1999) ("review under the clearly erroneous standard is significantly deferential").

A. The Magistrate's Order was not *sua sponte*

By claiming that the Magistrate's order was s*ua sponte*, Google acts as if it was not involved in the briefing of American Blind's Motion to Compel or any of the events leading up to it. The briefs and correspondence leading up to the Magistrate's decision to order Larry Page's deposition belie Google's feigned surprise. As the briefs and the transcript of the oral arguments show, Google has had more than a fair opportunity to present its arguments against deposing

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Mr. Page. American Blind issued its Notice of Deposition of Larry Page on June 26, 2006 — prior to the original discovery cutoff date — and shortly thereafter met and conferred with Google's counsel about Google's willingness to produced Mr. Page. (Declaration of Caroline C. Plater, "Plater Decl.", Ex. A, B). Google indicated it would not willingly produce Mr. Page for deposition based on its position that the notice was "untimely." (Plater Decl. Ex. A.) Google subsequently responded to Mr. Page's deposition notice with nothing more than a document entitled: "Objections to the Notice of Deposition of Larry Page ("Notice Objection"), based solely on the objection to the timeliness of the notice. (Plater Decl. Ex. C.) For whatever reason, even though American Blind's Notice of Deposition was served before the original discovery cut-off, Google choose not to file a motion for protective order under Rule 26(c).

Instead, Google waited for American Blind to bring the issue to the attention of the court. After American Blind filed its Motion to Compel, which clearly indicated that Mr. Page's deposition was an issue, Google set forth all of its objections to Mr. Page's deposition in its Opposition. Because Google had not objected to Mr. Page's deposition on any grounds other than timeliness at the time of the filing of the Motion to Compel, American Blind did not address any other "potential" objections that Google may have tried to later assert. (*See* Docket Item No.142). Rather, it was up to Google to assert its own additional objections, if any, in its opposition papers, or through a motion for protective order.

Contrary to Google's claims that it reserved the issue of raising any objection beyond timeliness, it had opportunity to and did address several bases for objecting to Mr. Page's deposition in its Opposition. (*See* Docket Item No. 174, at 8-10). Google's Opposition raised three separate bases on which it objected to the deposition of Mr. Page: (1) timeliness (the notice should have been issued earlier) (*Id*. at 8); (2) limited involvement (based on emails that Google had produced in October 2005, but which were not identified as American Blind's basis for claiming that Mr. Page had direct knowledge) (*Id*. at 9); and (3) American Blind had not established Mr. Page's unique knowledge pertinent to the issues in this case. (*Id*. at 9). Thus, Google's current position that it did not have the opportunity to properly raise its objections with the Magistrate is belied by the arguments Google did raise .

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Google's suggestion that the Magistrate "reached out and decided *sua sponte*" this issue is preposterous. (Obj. at 8.) While Google claimed that this issue was not brought before the Magistrate in the "proper form" in oral arguments, the Magistrate rejected Google's form-over-substance argument, stating: "[W]hether or not they presented it in the proper form or not, they did include arguments in the paperwork…that identified a basis for concluding that Mr. Page is a deponent who had something to say on the subject." (Plater Decl. Ex. D at 10:14-22.) Thereafter, the parties engaged in lengthy arguments regarding the propriety of allowing Larry Page's deposition. (*Id*. at 11-18.) During this exchange, the Magistrate made it clear that he was well versed in the law regarding deposition of high-level executives and took that into consideration in reaching his decision. (*Id*. at 16-17). At the end of the hearing, the Magistrate indicated he would take the matter under advisement. (*Id*. at 19.) Google's counsel made no objection and made no attempt to stop the Magistrate from ruling on the issue – such as asking for further briefing on the issue because Google had not had the proper opportunity to address the issue. (*Id*. at 19). It is clear that, at the time, Google felt it had been sufficiently heard on the issue.

Thus, the record shows that this issue was fully briefed and argued and the Magistrate was well within his authority to render a ruling on this discovery dispute. Nothing in the record suggests this was a *sua sponte* decision.[5]

B. Both parties directly addressed whether Mr. Page had relevant knowledge.

Given that significant portions of both parties' written submissions and oral arguments were explicitly dedicated to the issue of whether Mr. Page may be subject to deposition, it is clear that neither party had any intention of reserving this issue, as Google now claims. Again, one must ask, was Google not present for the briefing and argument of the Motion to Compel? Faced with the overwhelming evidence that this issue was fully developed before the Magistrate,

[5] Furthermore, even if it were *sua sponte*, the cases relied upon by Google do not support the contention that non-dispositive discovery issues cannot be decided *sua sponte* — in each instance the *sua sponte* decision of the court was on a dispositive issue. *See Day v. McDonough*, 126 S.Ct. 1675 (2006) (district court *sua sponte* raised issue of timeliness and dismissed petition for a writ of habeas corpus); *Verizon Delaware Inc. v. Covad Comm. Co.*, 377 F.3d 1081 (9th Cir. 2004) (*sua sponte* grant of summary judgment).

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Google points to some boilerplate reservation it made in its Opposition, which is directly at odds with the body of its Opposition and statements made by its lead counsel during oral argument. Google's arguments in this regard stretch credulity.

As described above, in both its written papers and oral argument, Google presented at least three distinct reasons why Mr. Page should not be subject to deposition: (1) timeliness (Docket Item No. 174 at 8); (2) limited involvement (*Id*. at 9); and (3) failure to show that Mr. Page has some unique knowledge pertinent to the issues in this case (*Id*. at 9). The most significant arguments raised by Google, for purposes of this Objection, are the second and third arguments. These are also the exact same arguments that Google submits to this Court and that Google claims it did not have a chance to address with the Magistrate. Aside from exposing the untenable argument that Google is presenting to this Court, the foregoing also establishes that Google had not reserved this issue.

American Blind's Reply in Support of its Motion to Compel in turn addressed the three arguments asserted by Google in seeking to oppose the Motion to Compel with regard to Mr. Page's deposition. Specifically, American Blind addressed Google's claim that Mr. Page had limited involvement. American Blind explained that the documents relied upon by Google (showing Mr. Page as one of many recipients on an email concerning the change in Google's trademark policy) were not part of the analysis American Blind conducted in arriving at the conclusion that it had sufficient evidence regarding Mr. Page's involvement in the decision to change Google's trademark policy, given his high ranking status un the company. Rather, American Blind relied upon the testimony of several lower level Google personnel, statements made under oath by Google's Senior Trademark Counsel, Rose Hagan, and numerous documents produced by Google, which established Mr. Page's unique knowledge regarding the decision to change Google's trademark policy. (Docket Item No. 142 at 3-4; Docket Item No. 183 at 6-8.)

C. American Blind has established that Mr. Page is subject to deposition in this case.

On the merits, Google's position is inconsistent. First, Google complains that American Blind noticed Mr. Page's deposition too late. Then, it complains, after American Blind waited to

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notice Mr. Page's deposition until it had sufficient information that indicated Mr. Page's unique personal knowledge of core issues of the case, that American Blind has not carried its burden to show that Mr. Page has relevant information. Google cannot have it both ways.

American Blind was well aware of the need to have specific factual support justifying the deposition of Mr. Page. That is why the deposition notice was served near the end of the original discovery period, after American Blind had deposed two lower level Google employees, who each testified to Mr. Page's unique knowledge, and after American Blind had received additional documents from Google, on June 22, 2006, concerning Mr. Page's unique knowledge of the decision to change Google's trademark policy.

1. **Google's 30(b)(6) testimony uniformly refers to Mr. Page's unique knowledge regarding in the decision to change the trademark policy.**

American Blind deposed three lower level employees, who were nonetheless quite high in the pecking order, Alana Karen (Policy Manager), Prashant Fuloria (Group Product Manager), and Rose Hagan, (Senior Trademark Counsel), all of whom were listed in the initial disclosures. Each one of these 30(b)(6) witnesses denied possessing knowledge regarding the decisions to change the trademark policy at Google and identified Mr. Page as the person with the knowledge regarding that decision. It defies logic that American Blind should ignore the testimony of three Google employees that Larry Page is the man to talk to about the decision to change the policy, and instead seek to depose "any of the 20 lower level employees that Google listed in its initial disclosures." (Obj. at 10). Moreover, Rose Hagan was the 30(b)(6) witness who testified on the topic of Google's trademark policy and she specifically pointed to Larry Page as the person who made the decisions regarding the change in Google's trademark policy.

Though American Blind had ample evidence supporting its right to depose Mr. Page prior to the Motion to Compel, even more persuasive support for Mr. Page's unique knowledge came to light ***after*** the filing of the Motion to Compel and was addressed by American Blind in its Reply in Support. The Motion to Compel was filed on July 13, 2006. On August 10, 2006, Rose Hagan was deposed on the topic of Google's trademark policy. Ms. Hagan, like other Google 30(b)(6) witnesses before her, including Alana Karen and Prashant Fuloria, identified Mr. Page as

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the person who made the decision to change the trademark policy. None of Google's 30(b)(6) witnesses, by their own admission, possess the same level of knowledge as Mr. Page on the issue of the decision to change the trademark policy. (Docket Item No. 183 at 7.)

Though Google offers one excerpt from the testimony of Prashant Fuloria that identifies Mr. Page as part of a team involved in the approval of the change of the trademark policy, Google cannot distance itself from Ms. Hagan's frank admission identifying Mr. Page alone as someone with relevant information. And if Ms. Hagen misspoke, Google could have easily cleared up the issue by presenting the Magistrate or this Court with an affidavit from Mr. Page, as is commonly done when opposing the deposition of high-level executives. *See Consolidated Rail Corp. v. Primary Industries Corp*., 1993 WL 364471 (S.D.N.Y. Sept. 10, 1993) (deposition of top executives who submitted affidavits attesting to no personal knowledge of the underlying claims deferred "until it has been demonstrated that they have some unique knowledge pertinent to the issues in these cases."). Google did not submit or offer to submit any statement from Mr. Page at any time, electing instead to rely upon a hearsay declaration from a Google attorney that purports to inform the Court that Mr. Page knows nothing.

2. **Google's last minute production contained several documents that demonstrate Mr. Page's unique knowledge regarding in the decision to change the trademark policy.**

American Blind's Reply in Support of the Motion to Compel also addressed several documents which were produced by Google, on June 22, 2006, just days before the original close of discovery, that further supported Mr. Page's role as a central character in the decision to change Google's trademark policy and, thus, his unique knowledge on the topic. (Docket Item No. 183 at 8.) Google argued, erroneously, in both its Opposition and at oral argument that the only documents referring to Mr. Page and the trademark policy were emails where Mr. Page was one of many recipients. Though these emails exist, they are not the documentary support that American Blind relied upon. Documents contained in the June 22, 2006 production revealed that Mr. Page was personally involved in courting eBay in an attempt to persuade eBay to endorse Google's new trademark policy. (*Id.*) Mr. Page also participated in a transcribed meeting with eBay in which he made comments regarding the need to uniformly apply Google's new

trademark policy. (*See Id.*) Mr. Page's position on Google's trademark policy and the difficulty in applying this policy is also referenced in one of the emails contained in the June 22, 2006 production. (*Id.*)

Taken as a whole, the testimony of Google's three 30(b)(6) witnesses along with the contents of Google's June 22, 2006 production, support the conclusion reached by the Magistrate that American Blind had established good cause to proceed with the deposition of Larry Page during the extension of fact discovery.

3. **The change of the trademark policy is a core issue in this case.**

In an effort to avoid the correct conclusion drawn by the Magistrate, Google seems to suggest that Mr. Page merely is merely identified as having approved a policy and if that was followed to its logical end then "every time someone sued a major corporation he could depose their executives…" (Obj. at 9). That, however, does not accurately represent the importance of the policy at issue in this case or the testimony of Google's witnesses regarding Mr. Page's role in instigating and approving the policy. Google, not American Blind, chose to file this lawsuit and to seek this Court's imprimatur that Google's new trademark policy was legal. American Blind's position is that the new policy does violate the law and the decision and reasoning behind changing Google's trademark policy from one that comported with the law to one that violated the law is central to this case for a variety of reasons. For example, whether any infringement was deliberate bears directly on the issue of liability and damages. Moreover, the policy change can be considered an admission against interest.[6] In short, despite Google's strident protests, the Magistrate recognized the relevance of Mr. Page's testimony to the issues in this case.[7] (Plater

[6] These two issues are simply examples of the relevance of Mr. Page's testimony. American Blind is not required to divulge its full strategy for deposing Mr. Page.

[7] The Magistrate is also within his authority to make relevance determinations regarding discovery requests. *See Wolpin*, 189 F.R.D. at 422. "Where the magistrate's decision concerns an evidentiary question of relevance, 'the Court must review the magistrate's order with an eye toward the broad standard of relevance in the discovery context. Thus, the standard of review in most instances is not the explicit statutory standard, but the clearly implicit standard of abuse of discretion.'" *Id.* (citations omitted) (emphasis added). "A judge abuses his discretion 'only when his decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based that decision.'" *Id.* (citations omitted). As discussed herein, the Magistrate

Decl. Ex. D at 15-16.)

Faced with the Magistrate's statement that he considered this a relevant issue, Google now attempts to convince the Court of Mr. Page's limited role and limited knowledge as a means of avoiding deposition. Google, however, has not argued that Mr. Page has no knowledge of the decision to change Google's trademark policy. Rather, Google claims that Mr. Page's testimony would not be relevant because he "has never had any contact with any representative of American Blind & Wallpaper, or with anyone else, concerning American Blind & Wallpaper, its relationship with Google, or its claims in this litigation." (Kwun Decl. ¶6). This position, of course, carefully avoids what Mr. Page does have knowledge of -- the decision to change the trademark policy. Mr. Page does not need to have knowledge of anything specific to American Blind to possess relevant knowledge to this case – which centers on the decision to change Google's trademark policy. Simply put, the parties would not be before the Court if Google had not changed its trademark policy. Mr. Page was at the center of that decision, and the Magistrate properly ordered that he should be deposed.

D. What does Mr. Page have to say on the issue?

Google does not submit the declaration of Larry Page in support of its claims that he has no relevant knowledge and is too busy to be deposed. *Compare Thomas v. International Business Machines*, 48 F.3d 478, 483 (10th Cir. 1995) (deposition of top executive not ordered where executive submitted an affidavit testifying to his lack of personal knowledge of any aspect of the plaintiff's employment in an age discrimination case). Instead, Google submits the declaration of Michael Kwun, Senior Litigation Counsel, on issues regarding Larry Page's personal knowledge and heavy business schedule. Mr. Kwun's declaration is self serving, hearsay, and immaterial to the current issue. Mr. Kwun carefully informs the Court of Mr. Kwun's knowledge of Mr. Page's busy schedule, demonstrating that this is hearsay testimony. (Kwun Decl. ¶5.) Mr. Kwun even declares that "based on a review of corporate records, and excluding privileged, company-internal

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(Footnote Cont'd from previous page)

based his Order on significant factual support viewed through the appropriate legal standard.

communications, Mr. Page has never had any contact with any representative of American Blind & Wallpaper, or with anyone else, concerning American Blind & Wallpaper, its relationship with Google, or its claims in this litigation." (Kwun Decl. ¶6). Again, this is hearsay testimony and should be ignored. Notably, Mr. Kwun does not state that his review of these materials informed him that Mr. Page has no knowledge regarding the decision to change Google's trademark policy or regarding any of Google's claims in this litigation. Even if the Court were inclined to rely on Mr. Kwun's hearsay testimony, his failure to state unequivocally that Mr. Page has no relevant information whatsoever demonstrates why Mr. Page should be deposed.

E. <u>This is a textbook example of when a high level executive should be deposed.</u>

Here, the Magistrate was presented with facts that showed: (1) several lower level employees were deposed and could not provide the same information that Larry Page could; and (2) this testimony and the documents produced by Google showed that Larry Page possesses knowledge relevant to the issues of the case. This is a textbook case where the deposition of a high level executive should be allowed.

There is no *per se* rule barring depositions of top corporate executives. *See Salter v. Upjohn Co*, 593 F.2d 649, 651 (5th Cir. 1979). Courts often restrict efforts to depose top executives where the party seeking the deposition can obtain the same information through a less intrusive means or where the party has not established that the executive has some unique knowledge pertinent to the issues in the case. *Id*. at 650-51. Here, American Blind satisfied both of those criteria in its Motion to Compel and the Magistrate recognized this. As has been amply established in the Motion to Compel and above, the testimony and documents indicate that Mr. Page is in possession of unique knowledge that is relevant to the issues of the case. The corporate depositions have been taken and the corporate designees pointed to Mr. Page as the person most knowledgeable about the decision to change Google's trademark policy. Allowing for Mr. Page's deposition comports with the law in this regard. In fact, the cases relied upon by Google support this approach. *See Folwell v. Hernandez*, 210 F.R.D. 169, 173-174 (M.D. N.C. 2002) (deposition of Sara Lee CEO ordered where lower level employees had been deposed and CEO's special knowledge was demonstrated); *Baine v. General Motors Corp*., 141 F.R.D. 332,

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335 (M.D. Ala. 1991) (deposition of high level executive reserved until corporate depositions were taken to determine if the information sought could be obtained from the corporate depositions); *Cardenas v. The Prudential Ins. Co. of America*, 2003 WL 21293757, *1 (D.C. Minn. May 16, 2003).

Moreover, consistent with the approach that the "court may fashion a remedy which reduces the burden on the executive" where a top executive's deposition is ordered, the Magistrate ordered that Mr. Page only be subject to a three hour deposition. *See Folwell*, 210 F.R.D. at 174. The Magistrate's order compelling Larry Page's deposition followed the letter of the law. Thus, the Magistrate's order was neither clearly erroneous nor contrary to law.

F. American Blind established good cause for the allowance of additional discovery during the extension.

As this Court stated when it granted the extension of discovery, any matters regarding conducting new discovery were to be taken up with Magistrate Judge Seeborg for good cause. Following extensive briefing, Magistrate Judge Seeborg found that American Blind had shown good cause shown for allowing the deposition of Larry Page. This Court also found good cause existed for extending the discovery cut off based on the diversion caused by the change of management at American Blind during the last months of the initial discovery deadline. American Blind sought an extension of time precisely because it needed extra time for discovery.

While Google repeatedly points out that American Blind could have served the discovery at issue during this period of change or even prior to that time, this is a over-simplification of matters. As the Magistrate recognized, Mr. Page's "personal involvement in the policy change did not come to full light until August 10, 2006." (Docket Item No. 182.) Google, quick to dismiss all the testimony and documents that give rise to good cause for Mr. Page's deposition, falls back on the argument that the deposition should have been noticed earlier. Yet, if it had been noticed earlier, Google would have objected that American Blind could not show that Mr. Page had any unique knowledge to the issues of the case, given that the bulk of the support for Mr. Page's deposition came to light near the end of or after the original close of discovery. Google, however, cannot un-ring the bell – the evidence belatedly produced days before the

original close of discovery and elicited in testimony after the close of discovery indicate that Larry Page has unique knowledge regarding a core issue in this case. Whether the documents and testimony regarding Larry Page established good cause for his deposition during the extension of discovery is a matter that this Court directed the parties to submit to the Magistrate for consideration and decision. The Magistrate considered the facts presented and rendered his ruling. This is not a question of law that was erroneously decided.[8]

III. CONCLUSION

While Google may disagree with the Magistrate's ruling, that is not sufficient to vacate the order compelling Larry Page's deposition. The Magistrate's ruling was not *sua sponte* and neither party reserved this issue from consideration. The Magistrate entered a valid order, under the facts presented and the appropriate legal standard was applied, following full briefing, oral arguments and further consideration by the Magistrate of the issues. Nothing in the record even remotely suggests that this order was clearly erroneous or contrary to law.

Accordingly, Google's request to vacate the Magistrate's order compelling the deposition of Larry Page and its request for oral argument regarding the same should be denied.

Dated: October 10, 2006

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[8] Contrary to Google's assertions, American Blind has not "admitted its own lack of diligence" nor "relied on its own lack of diligence in conducting discovery." (Objection at 12.) As this Court is well aware, American Blind's underwent significant corporate disruption just prior to the close of discovery. That is why the extension was granted. During the extension, existing discovery was completed that indicated that the deposition of Larry Page was necessary and amply supported.