

Exhibit D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
(SAN JOSE DIVISION)

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GOOGLE, INC.,

a Delaware corporation,
Plaintiff,

v. Case No. 5-03-cv-05340-JF(RS)

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

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280 South 1st Street
San Jose, California
September 6, 2006

HEARING OF DEFENDANT'S MOTION TO COMPEL
PLAINTIFF TO RESPOND TO DISCOVERY TIMELY
SERVED

Before:

HON. RICHARD SEEBORG, U.S. Magistrate Judge

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A P P E A R A N C E S :

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1 Google v. American Blind & Wallpaper Factory

2 P R O C E E D I N G S

3 MR. RAMMELT: Good morning, Your Honor,
4 David Rammelt on behalf of American Blind.

5 THE COURT: Good morning Mr. Rammelt.

6 MR. PAGE: Good morning, Your Honor,
7 Michael Page on behalf of Google.

8 THE COURT: Good morning, Mr. Page. I
9 had taken a look through the materials you
10 submitted. I'll tell you what my tentative
11 conclusion is. I am inclined to deny the
12 motion except with respect to possibly a
13 limited deposition of Mr. Page that I would
14 think would be -- should be able to be
15 completed in about three hours on the issue of
16 trademark policy.

17 The general -- my general view of this is
18 that it seems to me to be pretty clear that
19 Judge Fogel -- when he made his sixty day
20 extension order -- did not intend for that
21 period to encompass new discovery -- that you
22 needed to show good cause if you wanted
23 something new and bring that to me and to the
24 extent -- as I see it and look through the
25 papers, the only area where I really think

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2 that good cause has been shown is possibly
3 with respect to the deposition of Mr. Page.
4 So, that's my tentative conclusion. So, Mr.
5 Rammelt, I guess it's your turn.

6 MR. RAMMELT: Well, Your Honor I would
7 address two issues. We raised the issue with
8 Judge Fogel and there clearly was, perhaps a
9 misunderstanding about what his ruling was.
10 We believed that we needed an extra two months
11 and we didn't believe that there was a limit
12 on that. When his written order came out, it
13 said that discovery could continue within the
14 pre-existing scope of discovery which, under
15 Rule 26, we interpreted to mean the relevant
16 issues at the time, so we --

17 THE COURT: Well, that's a pretty
18 meaningless period. If you're right about
19 that, that's just saying -- why does he even
20 have to say that? If it's going to be -- he
21 obviously intended some limits on this or else
22 he would have said -- sent something along the
23 lines of -- he's expecting there to be some
24 limitation. If all you're saying is sixty
25 days and you can -- and you're only

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2 constrained by Rule 26 -- you're always
3 constrained by Rule 26.

4 MR. RAMMELT: What I understood his
5 ruling to mean, Your Honor, was that you have
6 to stay within the issues that have been
7 raised in this litigation to date through the
8 pleading practice and then through discovery.
9 You can't keep branching into new issues,
10 raising new theories, seeking discovery about
11 new facts and issues that hadn't been raised
12 yet. That is the way that we interpreted it.
13 If we are wrong, Your Honor, and we ought to
14 have come to this Court for good cause, I
15 would submit that it is a mistake to suggest
16 that we had three years of discovery. As Your
17 Honor knows, we were before the Court in
18 January -- we did not get until March of this
19 year, the 110,000 pages of documents that
20 Google had produced in the Geico Case. We
21 didn't get until March 23rd of this year,
22 American Blind-specific documents. Literally
23 the next month, April and May is when we hit
24 this management turnover within the company
25 and it was during that period -- April and May

1 Google v. American Blind & Wallpaper Factory
2 that we literally didn't know the direction of
3 this ca --

4 THE COURT: Yeah but that -- I think that
5 that plainly is an issue that impacts your
6 ability to respond to discovery. I don't see
7 why the lawyers -- outside lawyers for the
8 company can't propound discovery. I mean,
9 management upheaval in the client doesn't --
10 you know, client's boardroom doesn't -- I mean
11 it's apples and oranges. I don't understand
12 the problem. Companies go through changes all
13 the time and it may well -- as I understand
14 it -- have some impact on their ability to get
15 organized and produce materials -- and that's
16 what I think Judge Fogel was looking at. But
17 there's no constraint on the outside counsel
18 to propound appropriate discovery.

19 MR RAMMELT: Well, there was, I mean,
20 Your Honor, there is, to the extent that we
21 had to go through all of these documents.
22 Now, at this point, by the end of March we
23 have been newly produced and can share with
24 our client 130,000 pages. As these come in
25 and we begin to go through them, we now face a

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2 situation where we don't know what the future
3 of the company is going to be, whether we are
4 going to continue to be retained in this case,
5 whether the company was going to continue this
6 case and we -- this is a small company that
7 doesn't have an inside counsel. We were
8 dealing with the CEO at the time for direction
9 about how much he was willing to spend, who he
10 wanted to depose based on the documents that
11 we were bringing to him and case strategies
12 that we were explaining -- yes, I want you to
13 pursue this area or no, for various reasons we
14 don't want you to pursue this area.

15 Now, we truly were looking to management
16 and guided by management about how extensive
17 discovery would or would not be in this case.
18 I would say, we couldn't do that until we went
19 through all of the documents because as we
20 know from the last time we were here before
21 Your Honor, to the extent that the answer was
22 located somewhere in the documents, we've been
23 told -- well, you should have known that it
24 was in the documents -- it was there for you.
25 So, before we realized which of the forty or

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2 fifty Google employees who may have touched
3 this, we had to get through all those
4 documents and narrow that down to the number
5 that we would depose, which is the manageable
6 level that we have now, I believe it's five.

7 THE COURT: So what you're proposing to
8 do is-- although it's not entirely clear on
9 the face of what you've got -- you initially
10 asked for Mr. Brin and Mr. Page's depositions
11 and now you're acknowledging you don't want
12 to -- you are not pursuing Mr. Brin's
13 deposition?

14 MR. RAMMELT: Correct, Your Honor.

15 THE COURT: Then you've got five
16 additional depositions you want?

17 MR. RAMELT: Correct, Your Honor, five
18 employees.

19 THE COURT: Right, and then you had three
20 Requests for Admission --

21 MR. RAMMELT: Correct.

22 THE COURT: Now, I have to tell you, two
23 of those three -- I don't think are proper
24 Requests for Admission. I mean, I don't think
25 that Requests for Admission about litigation

1 Google v. American Blind & Wallpaper Factory
2 facts is an appropriate use of Requests for
3 Admission --

4 MR. RAMMELT: Right.

5 THE COURT: -- so I have substantive
6 problems with those, although I recognize that
7 the principal objection from your counterparts
8 was a timing objection rather than an
9 objection to the particular requests. But --
10 well, let me ask you, Mr. Page, with respect
11 to -- well, anything you want to tell me, but
12 in particular with respect to Larry Page's
13 deposition --

14 MR. PAGE: Yes, Your Honor. First, let
15 me correct an impression counsel made -- they
16 didn't get these documents this year. They
17 got these documents last year in production.
18 What they got this year was when they came to
19 Your Honor and asked to compel us to identify
20 which of the many requests they had served
21 they were responsive to --

22 THE COURT: Right.

23 MR. PAGE: So, when he says he got them
24 this year, he means he got them with that
25 index this year. But, putting that aside --

1 Google v. American Blind & Wallpaper Factory

2 THE COURT: Right. Mr. Rammelt is saying
3 he got it in -- from his point of view -- a
4 larger than usable form and then he got it in
5 usable form once we had our discussion.

6 MR. PAGE: Nonetheless, that was a long
7 time ago. But as to Mr. Page, this is not a
8 motion for leave to take his deposition after
9 the cutoff of discovery. They have not made
10 that motion. They have not, therefore,
11 presented the Court with any cause -- good
12 cause why that deposition should be taken
13 after --

14 THE COURT: But they -- in their papers,
15 whether or not they presented it in the proper
16 form or not, they did include arguments in the
17 paperwork -- in particular in the Reply
18 Brief -- that's why I want you to have an
19 opportunity to respond to it -- that
20 identified a basis for concluding that Mr.
21 Page is a deponent who has something to say on
22 the subject.

23 MR. PAGE: And because we have not had
24 an -- because that motion was not made and we
25 did not have an opportunity to oppose it --

1 Google v. American Blind & Wallpaper Factory
2 the problem with that motion is that they put
3 Mr. Page in their initial disclosures as a
4 witness with relevant evidence nearly a year
5 ago -- months ago -- or actually, over a year
6 ago. He was in their initial disclosures.
7 They haven't just discovered the existence of
8 one of the most prominent businessmen in
9 America, right? While they could have been
10 taking his deposition he was on the cover of
11 Time, Newsweek, Fortune. There's no question
12 that Larry Page is a significant player at
13 Google, right?

14 THE COURT: Well, what's the prejudice to
15 you --

16 MR. PAGE: The prejudice --

17 THE COURT: -- for you to have his
18 deposition taken now?

19 MR. PAGE: The prejudice is, one: it
20 takes the -- you know -- the senior executive
21 at one of the largest companies in America and
22 requires him to take a day off to prep for a
23 deposition and another day off to attend the
24 deposition --

25 THE COURT: But you admit that --

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2 MR. PAGE: -- on an issue that isn't
3 relevant. That's the next issue.

4 THE COURT: All right. That's the one I
5 want to hear about because --

6 MR. PAGE: Right.

7 THE COURT: -- your timing issue, I hear
8 it -- but had they then noticed it as you
9 think would have been more appropriate a year
10 ago -- the same day off to prepare would have
11 been -- would have been there, so --

12 MR. PAGE: And we would have, at that
13 time said, Your Honor, they should first take
14 the depositions of more junior employees --
15 which they hadn't done either. This is going
16 to be the first individual deposition they
17 have taken in this entire case. But, more
18 importantly, they claim they needed to talk to
19 Mr. Page because he -- among many other
20 people -- were involved in Google's decision
21 as to what its trademark policy would be.

22 THE COURT: Uh-huh.

23 MR. PAGE: They don't connect the next
24 step. They don't suggest any relevance to
25 their claims in this case of the reasons that

1 Google v. American Blind & Wallpaper Factory
2 Google chose that policy. The question is
3 real simple: does that policy violate the
4 trademark laws or does it not? And Google's
5 reasons for choosing it have nothing to do
6 with that question. The policy is what it is,
7 there is no dispute about what that policy is
8 and it either does or doesn't violate the
9 trademark laws. The reasons that Google chose
10 to change its policy -- the process it went
11 through in studying that change doesn't change
12 the question, whether what Google does
13 violates the trademark laws in a way that
14 injures their client. It has nothing to do
15 with that. The policy is what it is.

16 THE COURT: Mr. Rammelt, do you want to
17 respond to that?

18 MR RAMMELT: Yeah I guess, on that point,
19 Your Honor, the change in policy from the old
20 policy to the new policy was a fundamental
21 change and we would argue that the prior
22 policy, in effect, was an admission that what
23 we're claiming, legally, Google had an
24 obligation to do -- they did, in fact have an
25 obligation to do. Once we filed this lawsuit,

1 Google v. American Blind & Wallpaper Factory
2 Google changed its policy and opened up,
3 basically, free bidding on all key words. We
4 learned, three weeks ago from Miss Hagen, that
5 that impetus, that direction came from Mr.
6 Page. He was the one who wanted the old
7 policy changed subsequent to this lawsuit.
8 The reasons for the policy change -- the
9 reasons for the old policy formulation and
10 what went into the decision-making are highly
11 relevant to this case, we would submit. I
12 mean, this case is about whether their current
13 policy violates the trademark laws or not.
14 And the change in trademark policy is
15 fundamental to that, I would submit. I would
16 just add two points, Your Honor.

17 THE COURT: Okay.

18 MR. RAMMELT: The Requests for Admissions
19 we would withdraw. What we are trying to
20 focus on here are the depositions of the
21 additional five employees. That's what we're
22 concerned about. And we worked to schedule
23 the 30(b)(6) depositions first so we would
24 know precisely which employees we had to
25 depose, so that hopefully, we could narrow.

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2 That's why we did it in the order that we did.
3 And we couldn't have started any earlier than
4 the end of March -- it just -- it has not been
5 years and years and years. This has been a
6 limited amount of time in this case.

7 THE COURT: Mr. Page?

8 MR. PAGE: To respond briefly, discovery
9 was open for fourteen months, all right? The
10 fact that they had a management change in the
11 last two months, when they had not chosen to
12 take any individual depositions for the
13 previous year, explains why they need more
14 time to respond and not to take discovery.

15 More importantly, I've heard nothing
16 either in this reply or in what Mr. Rammelt
17 said that answers the question: what is the
18 relevance to their claims of the reasons
19 Google changed its trademark policy? It's not
20 rel -- there's no dispute what the policy is.
21 We allow anyone to bid on trademark terms --
22 we do not block that. That is what they claim
23 violates the trademark laws.

24 THE COURT: No. But I mean the process
25 by which the company got to that --

1 Google v. American Blind & Wallpaper Factory
2 discussions that might have taken place or
3 factors that they considered might implicate
4 some of the things that American Blind is
5 saying are important. Were they even
6 considered by Google? I mean, I don't know --
7 I'm not going to speculate what the facts
8 would be, but I'm not sure I'm with you that
9 there's no relevance at all to the change of
10 policy or the factors that went into it.

11 MR. PAGE: But it's certainly tenuous, at
12 best, all right? It's a very thin reed to
13 come along after the close of discovery and
14 say, we want to go straight to the CEO of the
15 company and ask him questions about policies,
16 because it might kind of, have something to do
17 with it, all right? It's not self-evidently
18 irrelevant, but it's a very tenuous reed to be
19 able to jump straight to the apex of a
20 corporation after the close of discovery and
21 go -- you know, we want to put the leverage on
22 you, of forcing your CEO to show up for
23 deposition. We have dozens of these cases,
24 Your Honor.

25 THE COURT: Oh, I know. And I'm not -- I

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2 understand very well, because I deal with it
3 all the time -- the whole apex witness issue.
4 And you know, on the one hand I'm very aware
5 of those concerns, on the other hand, I'm also
6 aware that if some -- the test for me is, does
7 somebody have particular relevant information
8 that pertains to the lawsuit. If they do, it
9 doesn't matter who they are. But if, in fact,
10 I get the flavor that it's being requested for
11 purposes other than getting relevant
12 information, I agree with you, and I have to
13 be attuned to that. So that's what I'm trying
14 to figure out.

15 MR. PAGE: As we noted, the e-mails that
16 they cite that were copied to Mr. Page on this
17 policy change involved forty-seven separate
18 people at Google. He's the only one that they
19 noticed a deposition of, all right?

20 THE COURT: Uh-huh.

21 MR. PAGE: You know GM, when they make
22 policy decisions as to overall concepts of the
23 company; the CEO is involved, right? The
24 reasons they made those policy changes may
25 very well have some tenuous relevance to every

1 Google v. American Blind & Wallpaper Factory
2 rollover case. It doesn't mean that you get
3 to bring the CEO in over and over and over.

4 THE COURT: Well, but they do give me
5 Miss Hagen's deposition that -- where she
6 identifies Mr. Page. I mean, it's not -- they
7 didn't force her into it, she said Mr. Page.

8 MR. PAGE: Correct. They're missing the
9 question that led to that discussion. The
10 discussion was: where was the idea to study
11 the trademark policy and decide whether it
12 needed to be changed, all right? And she said
13 that that came from Mr. Page.

14 But so what? We know they changed the
15 policy, we know what it was, we know what it
16 is now. The fact that the CEO said "I want
17 you to look at this policy and decide whether
18 to change it," doesn't change whether the
19 current policy violates the trademark law or
20 whether the prior one did. It won't inform
21 that. It will only harass.

22 THE COURT: Okay. The other five you
23 were talking about -- who are these people,
24 just generally, who are they?

25 MR. PAGE: The gentleman who was the boss

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2 of Mr. Faloria, [phonetic] whose deposition we
3 finished on August 9th; a woman named Brittan
4 Mashlein [phonetic] who apparently was one of
5 the key account supervisors between American
6 Blind and Google; and then the two other
7 people were mentioned during Mr. Faloria's and
8 Miss Karen's deposition as being folks were
9 part of a small nucleus of the management team
10 that evaluated the change in trademark policy,
11 the change in the key -- naming the key word
12 suggestion tool, which we touched on briefly
13 during the last hearing --

14 THE COURT: -- All right.

15 MR. PAGE: -- and then also the surveys --
16 to the extent there were any done -- internal
17 experiments analyzing consumer confusion,
18 consumer behavior on the Google Website.

19 THE COURT: Okay. All right. I'll take
20 the matter under submission, I'll give you an
21 order -- it should be in the next couple of
22 days.

23 MR. PAGE: Thank you, Your Honor.

24 MR. RAMMELT: Thank you.

25 THE COURT: Thank you.

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Google v. American Blind & Wallpaper Factory
(Whereupon the proceedings were
concluded.)

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| <p style="text-align: center;">A</p> <p>ability 6:6,14 able 3:14 16:19 account 19:5 acknowledging 8:11 add 14:16 additional 8:16 14:21 address 4:7 admission 8:20,24,25 9:3 13:22 Admissions 14:18 admit 11:25 ago 10:7 11:5,5,6 12:10 14:4 agree 17:12 allow 15:21 America 11:9,21 American 1:10 3:1,4 4:1 5:1,22 6:1 7:1 8:1 9:1 10:1 11:1 12:1 13:1 14:1 15:1 16:1,4 17:1 18:1 19:1,5 20:1 amount 15:6 analyzing 19:17 answer 7:21 answers 15:17 apex 16:19 17:3 apparently 19:4 apples 6:11 appropriate 6:18 9:2 12:9 April 5:23,25 area 3:25 7:13,14 argue 13:21 arguments 10:16 aside 9:25 asked 8:10 9:19 attend 11:23 Attorneys 2:5,12 attuned 17:13 August 19:3 aware 17:4,6</p> <hr/> <p style="text-align: center;">B</p> <p>based 7:10 basically 14:3 basis 10:20 behalf 3:4,7 behavior 19:18 believe 4:11 8:6 believed 4:10 best 16:12 bid 15:21 bidding 14:3 Blind 1:10 3:1,4 4:1 5:1 6:1 7:1 8:1 9:1 10:1 11:1 12:1 13:1 14:1</p> | <p>15:1 16:1,4 17:1 18:1 19:1,6 20:1 Blind-specific 5:22 block 15:22 boardroom 6:10 boss 18:25 branching 5:9 Brief 10:18 briefly 15:8 19:12 Brin 8:10 bring 3:23 18:3 bringing 7:11 Brin's 8:12 Brittan 19:3 businessmen 11:8</p> <hr/> <p style="text-align: center;">C</p> <p>C 2:2 3:2 ca 2:7 6:3 California 1:2,16 case 1:9 5:20 7:4,6,11,17 12:17,25 14:11,12 15:6 18:2 cases 16:23 cause 3:22 4:2 5:14 10:11,12 CEO 7:8 16:14,22 17:23 18:3,16 certainly 16:11 change 13:10,11,11,19 13:21 14:8,14 15:10 16:9 17:17 18:18,18 19:10,11 changed 14:2,7 15:19 18:12,14 changes 6:12 17:24 Chicago 2:15 choosing 13:5 chose 13:2,9 chosen 15:11 cite 17:16 claim 12:18 15:22 claiming 13:23 claims 12:25 15:18 clear 3:18 8:8 clearly 4:8 client 6:9,24 13:14 client's 6:10 close 16:13,20 come 5:14 6:24 16:13 companies 6:12 11:21 company 5:24 6:8 7:3,5 7:6 15:25 16:15 17:23 compel 1:19 9:19 completed 3:15 concepts 17:22 concerned 14:22 concerns 17:5</p> | <p>concluded 20:3 concluding 10:20 conclusion 3:11 4:4 confusion 19:17 connect 12:23 considered 16:3,6 constrained 5:2,3 constraint 6:17 consumer 19:17,18 continue 4:13 7:4,5 copied 17:16 corporation 1:7,11 16:20 correct 8:14,17,21 9:15 18:8 counsel 6:17 7:7 9:15 counterparts 9:7 couple 19:21 Court 1:1 3:5,8 4:17 5:14,17 6:4 8:7,15,19 8:22 9:5,22 10:2,11,14 11:14,17,25 12:4,7,22 13:16 14:17 15:7,24 16:25 17:20 18:4,22 19:14,19,25 cover 11:10 current 14:12 18:19 cutoff 10:9</p> <hr/> <p style="text-align: center;">D</p> <p>D 3:2 date 5:7 David 2:17 3:4 day 3:19 11:22,23 12:10 days 4:25 19:22 deal 17:2 dealing 7:8 decide 18:11,17 decision 12:20 decisions 17:22 decision-making 14:10 Decoratetoday.com 1:12 Defendant 1:13 2:12 DEFENDANT'S 1:19 Delaware 1:7,11 deny 3:11 deponent 10:21 depose 7:10 8:5 14:25 deposition 3:13 4:3 8:13 9:13 10:8,12 11:10,18 11:23,24 12:16 16:23 17:19 18:5 19:2,8 depositions 8:10,16 12:14 14:20,23 15:12 direction 6:2 7:8 14:5 disclosures 11:3,6 discovered 11:7</p> | <p>discovery 1:20 3:21 4:13 4:14 5:8,10,16 6:6,8 6:18 7:17 10:9 15:8,14 16:13,20 discussion 10:5 18:9,10 discussions 16:2 dispute 13:7 15:20 DISTRICT 1:1,2 DIVISION 1:3 documents 5:19,22 6:21 7:10,19,22,24 8:4 9:16 9:17 dozens 16:23 Drive 2:13 DRYE 2:11 d/b/a 1:11</p> <hr/> <p style="text-align: center;">E</p> <p>E 2:2,2 3:2,2 earlier 15:3 effect 13:22 either 12:15 13:8 15:16 employees 8:2,18 12:14 14:21,24 encompass 3:21 entire 12:17 entirely 8:8 ESQ 2:9,17 evaluated 19:10 evidence 11:4 executive 11:20 existence 11:7 expecting 4:23 experiments 19:17 explaining 7:12 explains 15:13 extension 3:20 extensive 7:16 extent 3:24 6:20 7:21 19:16 extra 4:10 e-mails 17:15</p> <hr/> <p style="text-align: center;">F</p> <p>face 6:25 8:9 fact 13:24 15:10 17:9 18:16 factors 16:3,10 Factory 1:10 3:1 4:1 5:1 6:1 7:1 8:1 9:1 10:1 11:1 12:1 13:1 14:1 15:1 16:1 17:1 18:1 19:1 20:1 facts 5:11 9:2 16:7 Falaria 19:2 Falaria's 19:7 fifty 8:2 figure 17:14</p> |
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