



1 Google's Opposition confirms that it knowingly chose not to comply with the terms of  
2 the Protective Order entered in this case. Google admits that it did not review the documents it  
3 produced to American Blind for purposes of this case, and thus it did not designate the documents  
4 produced in accordance with the Protective Order entered in this case. Nonetheless, Google  
5 makes the incredible demand that American Blind review the production for compliance with the  
6 Protective Order and then ask Google to redesignate documents to comply with the  
7 confidentiality provisions of the Protective Order on a piecemeal basis. With over 110,000 pages  
8 of documents in the production thus far, this proposal is onerous to say the least and demonstrates  
9 Google's bad faith.

10 **I. GOOGLE HAS NOT COMPLIED WITH THE PROTECTIVE ORDER.**

11 Following the filing of this motion and its Opposition, Google admitted that its *entire*  
12 document production was only in response to one of American Blind's document requests,  
13 Request No. 44, which sought all documents produced in *Geico v. Google*. (See Andelman Decl.,  
14 Ex. A). Putting aside the fact that this admission reveals Google's failure to produce documents  
15 in response to the other 50 requests and 10 interrogatories for which it indicated it would produce  
16 responsive documents, Google also admitted in its Opposition that it ignored the terms of the  
17 Protective Order when it produced these documents. (Opp. at 4). According to Google, "[w]hen  
18 Google produced to American Blind...24 boxes and 10 CDs that it had reviewed, designated and  
19 produced one year prior in *Geico v. Google*, it did not re-review them for the purpose of  
20 reconsidering what type of confidentiality designations to apply." (Opp. at 4) (emphasis added).  
21 Google further acknowledged, "[u]ndoubtedly, there are documents designated 'Confidential-  
22 Attorneys' Eyes Only' in the *Geico v. Google* document production that – whether because of  
23 passage of time, or differences between the terms of the two protective orders, or simple error –  
24 should be redesignated 'Confidential,' and Google has no objection to doing so." (Opp. at 1)  
25 (emphasis added).

26 But Google cannot dismiss the basis for this motion so easily. Under the terms of the  
27 Protective Order entered in this case, Google had an obligation to review every document it  
28 produced in this litigation, whether it was from *Geico v. Google* or produced originally in this

1 case. Even though Google claims to have reviewed and designated the produced documents  
2 under the protective order in *Geico v. Google*, those designation are meaningless in this case  
3 unless the relevant terms of the protective order in *Geico v. Google* are identical to those of the  
4 Protective Order in effect in this litigation.

5 Google has not and cannot demonstrate that the two protective orders are identical,  
6 because they are not. As it admitted in the first page of its Opposition, certain documents “should  
7 be redesignated” because of “differences between the terms of the two protective orders”. (Opp.  
8 at 1). Google further acknowledged that the relevant terms “differ in some respects”. (Opp. at 7).  
9 Inexplicably, although conceding the differences between the two protective orders, Google  
10 justifies its failure to re-review and re-designate the production pursuant the Protective Order in  
11 this case because the “protective orders from *Geico v. Google* and from the current case are so  
12 similar, Google reasonably believed that the vast majority of the documents bore the appropriate  
13 designations...” (Opp. at 7) (emphasis added). No matter how “similar” the provisions or how  
14 “reasonable” Google’s belief that the designations were proper, Google has admitted that the two  
15 protective orders contain different terms.

16 Furthermore, Google could not even reasonably believe that the Attorney’s Eyes Only  
17 designations it made in *Geico v. Google* were appropriate in this case. The negotiation history of  
18 the Protective Order in this case demonstrates this clearly. After rejecting American Blind’s  
19 original proposed protective order, Google sent a wholly new proposal which included an  
20 Attorney’s Eyes Only provision. (Rammelt Decl., ¶ 3.) American Blind, believing the  
21 Attorney’s Eyes Only provision was much too broad, significantly limited the types of documents  
22 which could be designated Attorney’s Eyes Only and specified that the Attorney’s Eyes Only  
23 designation would be used only in “limited circumstances.” (Rammelt Decl., ¶ 4; *see also*  
24 Protective Order.) Google agreed to these limitations on its original draft. (*Id.*) Now that Google  
25 has provided a copy of the *Geico* protective order as part of its Opposition to this motion, it is  
26 clear that the protective order Google sent American Blind — the protective order American  
27 Blind clearly and specifically limited — was the *Geico* protective order. (*Compare* Andelman  
28 Decl., Ex. B, *with* Hamm Decl., Ex. B.) In other words, Google initially proposed the lax

1 Attorney's Eyes Only standards applicable in the *Geico* case to American Blind, and American  
2 Blind rejected them. Google thus clearly understood that, under the Protective Order in this case,  
3 the Attorney's Eyes Only designation could not be used as broadly as it had been in the *Geico*  
4 case, and it could not reasonably believe otherwise.

5 Google's willingness to "dedesignate any documents that it designated incorrectly" (Opp.  
6 at 7) or "treat [American Blind's] requests for de-designation in a reasonable and expeditious  
7 manner" (Opp. at 8) are not at issue and do not absolve Google for failing to comply with the  
8 Protective Order in the first place. American Blind brought this motion so that it would not have  
9 to scrutinize the designation of every document and then meet and confer with Google,  
10 challenging the accuracy of the designations. Because of the vast number of documents produced  
11 - and potentially improperly designated - American Blind identified a small fraction of the  
12 documents in its motion as a representative sample of Google's failure to comply with the  
13 Protective Order. Tellingly, Google has conceded to dedesignate (or undesignate) every single  
14 document that American Blind has identified in this motion. (Opp. at 5). However, that leaves  
15 untold thousands (or tens of thousands) of pages of documents overdesignated by Google, which  
16 Google does not dispute. All of these overdesignated documents should be de-designated by the  
17 Court to Confidential, as requested in American Blind's motion.

18 Essentially, Google's position is that it is too heavy of a burden to expect it to comply  
19 with the Protective Order in this case and, therefore, it should be allowed to produce documents  
20 without reviewing them or designating them pursuant to the Protective Order. But the Protective  
21 Order squarely places the burden on Google to designate documents "in limited circumstances" as  
22 "Confidential – Attorneys' Eyes Only" only if the party "believe[s] in good faith" that the  
23 information contained therein falls into one of four narrow categories of documents. (Protective  
24 Order, ¶ 1(b).) Google admits that it did not do this when it produced the documents to American  
25 Blind in this case because it believes it was too burdensome. (Opp. at 6 ("When Google produced  
26 the documents in this case it did not repeat this burdensome exercise [of re-reviewing the  
27 documents].") (emphasis added); Opp. at 8 ("American Blind wants to impose a heavy burden on  
28 Google by requesting that it review for confidentiality designations approximately 100,000

1 documents that American Blind already possesses...”) (emphasis added)). Yet Google, the  
2 plaintiff in this case and a company with a market capitalization of close to \$140 billion, has the  
3 temerity to suggest that the appropriate burden is for American Blind to review over 110,000  
4 pages of Google documents and determine whether the designations that Google applied in *Geico*  
5 *v. Google* translate to this case, and then, if they do not, submit all inappropriately designated  
6 documents pursuant to the challenge process outlined in Section 7 of the Protective Order.  
7 Google cannot shift its burden to review and properly designate documents under the Protective  
8 Order to American Blind. Google’s position essentially rewrites the Protective Order to allow the  
9 producing party to designate any document as Attorney’s Eyes Only when originally produced.  
10 This is not what the parties intended when they negotiated the Protective Order. (See Protective  
11 Order, ¶7 (“[a]t all times, the burden shall remain on the Designating Party to sustain a claim of  
12 confidentiality). Google’s actions and arguments demonstrate its lack of good faith and should  
13 not be allowed.

## 14 **II. GOOGLE’S DEFENSES OF ITS ACTIONS ARE UNAVAILING.**

15 The purpose of this motion is merely to obtain Google’s compliance with the terms of the  
16 Protective Order. Google has attempted to divert the Court’s attention from its abject failure to  
17 comply by insinuating that American Blind is seeking to share competitive information with the  
18 business persons at American Blind. Not only is this incorrect and unsupported, but it is  
19 irrelevant. Google’s improper behavior in this matter speaks for itself and requires redress for no  
20 other reason than it violates the Protective Order.

21 Furthermore, Google’s reliance on *Intel Corp. v. VIA Techs., Inc.*, 198 F.R.D. 525 (N.D.  
22 Cal. 2000), in support of this argument is entirely misplaced. In *Intel*, the plaintiff was seeking to  
23 modify the protective order so that one of its in-house counsel could have access to confidential  
24 materials beyond the conditions addressed in the protective order. *See id.* at 528. Intel argued  
25 that this individual needed access to this information so that she could advise Intel on all  
26 important decisions. The court rejected this argument as a valid basis for modifying the terms of  
27 the protective order. In refusing to modify the protective order, the *Intel* court also found  
28 persuasive the fact that the plaintiff and defendant were direct competitors and defendant’s

1 argument that disclosing its trade secrets to its competitor would cause it irreparable harm. *See*  
2 *id.* at 527.

3 Here, in contrast, American Blind seeks to enforce – not modify - the Protective Order.  
4 Specifically, American Blind does not seek to grant any non-attorneys or in-house counsel access  
5 to “Confidential – Attorney’s Eyes Only” material, as did the movant in *Intel*. Moreover, Google  
6 and American Blind are not direct competitors and no trade secrets are sought to be divulged.

7 Finally, this motion was brought to enforce the very explicit terms of the Protective Order  
8 negotiated by the parties, not to enforce Rule 26 or the general discovery procedures. Thus,  
9 Google’s reliance on the language of Rule 26(b)(2) is misplaced. Even assuming the Court  
10 conducts a burden versus benefit analysis, the burden to Google is minimal and the benefit to  
11 American Blind is great. It can hardly be considered a burden for Google to comply with the  
12 terms of the Protective Order that it freely negotiated. On the other hand, without the Court’s  
13 intervention, American Blind will be forced to carry Google’s burden and expend significant time  
14 and resources doing Google’s work.

15 **III. CONCLUSION**

16 Google has admitted that it failed to comply with the terms of the Protective Order in  
17 producing Google’s documents to American Blind. American Blind does not want Google to  
18 conduct a “re-review” of its production, as Google suggests. (Opp. at 2). Rather, it wants Google  
19 to review its documents for the first time in this case under the terms of the parties’ Protective  
20 Order and properly designate its documents. Had Google simply carried its burden at the outset,  
21 the parties would not be before this Court with this dispute. Only if Google is ordered to comply  
22 with the Protective Order will American Blind be able to determine which materials are actually  
23 Confidential and were simply improperly marked “Confidential – Attorney’s Eyes Only” and, as  
24 a result, can be shown to individuals outside the “Attorney’s Eyes Only” group. American Blind  
25 respectfully requests that the Court grant its motion and order Google to comply with the terms of

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1 the Protective Order, and additionally de-designate all documents currently labeled as Attorney's  
2 Eyes Only to the Confidential designation.

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4 Dated: January 20, 2006

HOWREY LLP

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