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 8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA
 10 SAN JOSE DIVISION

11	DIGITAL ENVOY, INC.,)	CASE NO.: C 04 01497 RS
12)	
13	Plaintiff/Counterdefendant,)	GOOGLE INC.'S OBJECTION AND
14	v.)	MOTION TO STRIKE
15	GOOGLE INC.,)	"SUPPLEMENTAL" BRIEF
16)	SUBMITTED IN OPPOSITION TO
17	Defendant/Counterclaimant.)	MOTIONS FOR SUMMARY
18)	JUDGMENT
19)	Date: May 4, 2005
20)	Time: 9:30 a.m.
21)	Courtroom: 4, 5th Floor
22)	Judge: Hon. Richard Seeborg

INTRODUCTION

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2 The day before and then shortly after the May 4, 2005 hearing on Google's Motions for
3 Summary Judgment, Digital Envoy supplied the Court with an untimely and substantively
4 inadequate motion under Rule 56(f), asking the Court to continue the hearing. Google opposed
5 the 56(f) request at the hearing. Digital Envoy then indicated that it was withdrawing or at least
6 did not care about its 56(f) request. Google's motions were then submitted for decision.¹

7 Now, ten days later, as if to compound the impropriety of its untimely 56(f) request,
8 Digital Envoy has filed what it calls a "Supplemental Brief" ostensibly in support of the 56(f)
9 request it abandoned. The new brief is even more untimely than the first and should be stricken on
10 that basis alone. Moreover, the new brief consists almost entirely of re-argument on the submitted
11 motions, and does not cure any of the deficiencies in the original 56(f) request. In short, the new
12 filing is the sort of submission for which Rule 56(g) contemplates the imposition of sanctions.
13 Google respectfully requests that the Court strike the "Supplemental Brief" and instruct Digital
14 Envoy not to file further papers concerning the submitted motions except with leave of Court in
15 accordance with Local Rule 7-3.

ARGUMENT**I. THE SUPPLEMENTAL BRIEF IS UNTIMELY**

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18 Digital Envoy is correct that a 56(f) request must be filed in advance of the hearing on a
19 motion for summary judgment. Fed. R. Civ. Proc. 56(c); *Ashton-Tate Corp. v. Ross*, 916 F.2d
20 516, 520 (9th Cir. 1990) ("[T]he process of evaluating a summary judgment motion would be
21 flouted if requests for more time, discovery, or the introduction of supplemental affidavits had to
22 be considered even if requested well after the deadline set for the introduction of all information
23 needed to make a ruling has passed."). For that reason alone, its brief filed ten days *after* the
24 hearing, and after the motions were submitted, must be rejected.

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27 ¹ Google does not yet have a copy of the transcript from the May 4, 2005 hearing. Its
28 representations concerning the conduct of the hearing are made based on the recollection of its
counsel.

1 Digital Envoy is badly mistaken, however, in suggesting its original 56(f) request should
2 be considered because it was filed (albeit in an incomplete and unintelligible form) the day
3 before the hearing. While a party must file papers opposing a summary judgment motion prior
4 to the hearing, that does not give a party the right to file those papers at any time it chooses, right
5 up to the moment the hearing begins. See Local Rule 7-3. As Wright and Miller explain, the
6 deadline for filing papers in opposition to a summary judgment motion is set by local rule. 10
7 Wright, Miller & Kane, *Federal Practice and Procedure: Civil* § 2719 ("If the opposing party
8 decides to file counter-affidavits, the second sentence of subdivision (c) provides that they must
9 be served on the moving party prior to the day of the hearing. But local rules may vary this time
10 period....The purpose of these local court rules is to provide a specific time within which the
11 opposing party must respond to the motion and to make certain that the issues on the motion are
12 properly framed.")

13 In this Court, pursuant to Local Rule 7-3, "[a]ny opposition to a motion must be served
14 and filed not less than 21 days before the hearing date. The opposition may *include* ... affidavits
15 or declarations" Civil L.R. 7-3(a) (emphasis added). An opposition based upon Rule 56(f)
16 obviously cannot be filed on the day before the hearing if it must be *included* with the opposition
17 21 days before the hearing. More importantly, Local Rule 7-3 contains a section concerning
18 "Supplementary Material." That section allows the parties only to alert the court to recent
19 judicial opinions published after the date the opposition or reply was served. Civil L.R. 7-3(d).
20 "Otherwise, once a reply is filed, *no additional memoranda, papers or letters may be filed*
21 *without prior Court approval.*" *Id.* (emphasis added).

22 Here, the hearing on Google's motions was twice continued.² Digital Envoy did not file
23 its 56(f) request with its original opposition papers, or even 21 days prior to the hearing date that

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25 ² Google's initial motion for partial summary judgment was noticed for hearing on March
26 16, 2005. Digital Envoy filed its opposition to that motion in February 2005. That motion was
27 then continued to be heard together with Google's motion for summary judgment on March 30,
28 2005. Digital Envoy filed its opposition to Google's second motion on March 9, 2005. The
hearing on both motions was then continued until May 4, 2005. Digital Envoy did not file its
56(f) request until May 3, 2005, roughly two months after it completed the submission of its
opposition papers.

1 was ultimately set. It waited until the day before the hearing, apparently seeking to deprive
2 Google of an opportunity to respond.³ Moreover, ignoring Local Rule 7-3, Digital Envoy did
3 not request or obtain leave of Court to file its original 56(f) request, much less the supplemental
4 brief at issue here.

5 Digital Envoy's new submission and its original 56(f) request were untimely and
6 improperly filed with the Court. Google thus requests that they both be stricken.

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8 **II. THE SUPPLEMENTAL BRIEF DOES NOT CURE THE SUBSTANTIVE**
9 **DEFECTS IN DIGITAL ENVOY'S 56(F) REQUEST**

10 Despite taking for itself far more time than the rules allow, Digital Envoy still has not put
11 together a proper 56(f) request.

12 To begin with, Rule 56(f) requires that a party opposing a summary judgment on Rule
13 56(f) grounds show through *affidavits* that it cannot present facts essential to justify the party's
14 opposition. Digital Envoy's original 56(f) request contained argument, but no affidavits and thus
15 no evidence. Its new submission suffers from the same flaw. Because Digital Envoy has never
16 submitted the affidavit required by Rule 56(f), its request must be denied for that reason alone.

17 The lack of affidavit points up a second fatal deficiency in Digital Envoy's 56(f) request
18 – nowhere has Digital Envoy explained why, after a year of discovery, it is unable to present
19 supposedly important information to the Court. Indeed, nowhere has Digital Envoy even
20 attempted to show diligence in the discovery process. Again, by itself, this warrants denial of its
21 56(f) request. *See Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1005 (9th Cir. 2002) (“The
22 failure to conduct discovery diligently is grounds for the denial of a Rule 56(f) motion.”); *Bryson*
23 *v. Royal Business Group*, 763 F.2d 491, 494-95 (1st Cir. 1985) (denying plaintiff's request to
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26 ³ As much of Digital Envoy's 56(f) filing was submitted manually, Google could not retrieve
27 it through the Court's electronic case filing system. Digital Envoy then chose to serve Google
28 with its manually filed papers by mail, ensuring that Google could not possibly have a complete
set of the papers before the hearing.

