

May 23, 2005

VIA E-FILING

The Honorable Richard Seeborg
United States Magistrate Judge
United States District Court
280 South 1st Street
San Jose, CA 95113

Case 5:04-cv-01497-RS Document 166 Filed 05/23/2005 Page 1 of 1

Re: *Digital Envoy v. Google*
USDC, Northern District of California, Case No.: C-04-01497 RS

Your Honor:

We are in receipt of the Court's Order concerning Google's motion for summary judgment dated May 20, 2005. Based upon our review of the Order, it appears that the Court did not discuss or pass upon Google's alternative ground for seeking summary judgment on Digital Envoy's trade secret claim. Specifically, Google argued that Digital Envoy could not carry its burden of establishing the *mens rea* required for the intentional tort of trade secret misappropriation because Google's interpretation of the party's License Agreement was reasonable, even if it ultimately proves erroneous. *See* Google's Motion for Summary Judgment at p. 19 – 22; Google's Reply Brf. at 12 -15.

The Court's Order finds that Google's interpretation of the License Agreement was reasonable. Order, May 20, 2005 at 9-10. This was a legal determination. *See Brinderson-Newberg*, 971 F.2d 272, 277, 283 (9th Cir. 1992) (reasonableness of contract interpretation is matter of law for Court, and bars liability for bad faith). In light of the Court's finding, Google respectfully requests that the Court issue a further ruling addressing Google's argument that Digital Envoy did not carry its burden of establishing the *mens rea* required for trade secret misappropriation. If the Court would prefer that Google re-brief the issue in light of the Order, Google would be happy to do so.

Respectfully submitted,

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/s/ David H. Kramer

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