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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,)	REPLY IN SUPPORT OF GOOGLE
14	v.)	INC.'S MOTION TO PRECLUDE
15)	AND/OR TO COMPEL
16	GOOGLE INC.,)	Judge: Hon. Richard Seeborg
17)	Courtroom: 4, 5th Floor
18	Defendant/Counterclaimant.)	Date: June 22, 2005
19)	Time: 9:30 a.m.
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INTRODUCTION

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2 Digital Envoy, Inc.'s ("Digital Envoy") opposition to Google Inc.'s ("Google") motion to
3 preclude and/or compel leaves little doubt that after a year of discovery, Digital Envoy does not
4 have evidence to support its contentions. And for that deficiency, Digital Envoy has no one to
5 blame but itself.

6 Digital Envoy's argument that Google's contention interrogatories were poorly drafted
7 and didn't really call for detailed responses is breathtaking and specious. Google's
8 interrogatories called for Digital Envoy to "state all facts and IDENTIFY all evidence" in
9 support of its specific contentions. Moreover, Google specifically defined the term
10 "IDENTIFY" in the interrogatories with a full page of instructions detailing the specific
11 information required to adequately IDENTIFY documents, people, or evidentiary support. At
12 this late stage of the case, Google asked for and was entitled to the specific evidentiary details
13 underlying Digital Envoy's contentions. The responses it received were frivolous.

14 Further, conceding the inadequacy of its original responses, Digital Envoy served
15 supplemental responses together with its opposition to Google's motion. But the supplemental
16 responses fail to cure the original defects Google identified. Once again, Digital Envoy
17 identifies only general categories of documents that allegedly support its contentions. Moreover,
18 Digital Envoy uses catch-all categories such as "Other deposition testimony"; "Language from
19 other sections of the Agreement"; or "Other email messages by Other Google employees
20 referring to the Agreement" to virtually include every document produced in this litigation as
21 potentially supporting its claims. As before, these responses remain so general as to be
22 meaningless.

23 Finally, Digital Envoy blames its failure of proof on Google's purported refusal to
24 produce relevant evidence. While Google disputes that it has improperly withheld any evidence,
25 the extent of Google's production is irrelevant. It certainly does not excuse Digital Envoy's
26 failure to identify the evidence it *does have* that allegedly supports its contentions. As Digital
27 Envoy concedes, the parties have produced over 70,000 pages of documents and have taken
28 numerous depositions. If Digital Envoy believes that any of this evidence supports its

1 contentions, it was required to identify that evidence. As it has no evidence, Digital Envoy
 2 should simply have made that clear, thereby fulfilling its obligation to respond to the
 3 interrogatories.

4 Digital Envoy has already had two chances to identify whatever evidentiary support it has
 5 for its contentions. It has twice failed to do so. It should now be quite clear that it cannot do so.
 6 Digital Envoy is not entitled to try a third time. Accordingly, the preclusion order Google has
 7 requested is appropriate.

8 ARGUMENT

9 **I. DIGITAL ENVOY'S INTERROGATORY RESPONSES ARE INADEQUATE**

10 Digital Envoy's responses to Google's requests for detailed information are beyond
 11 inadequate -- they are obstructionist. Digital Envoy concedes that such general responses are
 12 insufficient where the contention interrogatories call for detailed responses. Yet it remarkably
 13 attempts to distinguish the controlling authority cited in Google's moving papers by claiming
 14 that the interrogatories at issue here "neither request particularity, nor do they request details, nor
 15 do they request specifics." Resp. at 4-5.¹ Digital Envoy's position is nonsense, especially in
 16 light of the fact that the term "IDENTIFY" used in each of Google's interrogatories was
 17 expressly defined and called for significant detail.

18 Each interrogatory asked Digital Envoy to "state all facts and IDENTIFY all evidence"
 19 that supports [the relevant] contention. Resp. at 5-8. The interrogatories defined "'IDENTIFY'
 20 when used with reference to evidence of any fact [to] mean IDENTIFY all PERSONS and
 21 summarize their expected testimony, knowledge and/or understanding regarding the fact to
 22 which the evidence relates, and IDENTIFY all DOCUMENTS that DIGITAL ENVOY contends
 23 have any tendency to make the existence of the fact more probable or less probable than it would
 24 be without the evidence." Supplemental Declaration of David H. Kramer ("Supp. Decl."), Ex. A

25
 26 ¹ Indeed, in its discussion of each interrogatory, Digital Envoy contends that the
 27 interrogatory "does not request that Digital Envoy 'state with particularity' or 'identify with
 28 specificity.'" It merely requests Digital Envoy to state all facts and identify all evidence." *Id.* at
 5-8 (emphasis in original).

1 (Google's Third Set of Interrogatories) at 3. The definitions further elaborated that "when used
 2 with reference to a PERSON, entity or advertiser [IDENTIFY] shall mean to state the PERSON,
 3 entity or advertiser's name, last known address, and telephone number." *Id.* at 2. Additionally,
 4 "when used with reference to a DOCUMENT [IDENTIFY] shall mean to state, to the extent
 5 known:

- 6 1. the type of DOCUMENT (for example, a letter or photograph);
- 7 2. the DOCUMENT's author or originator, including, but not limited to, the
 8 names of each and every PERSON who wrote, signed, initialed or
 otherwise participated in the creation of the document;
- 9 3. the DOCUMENT's addressee, recipient, and any other PERSON to whom
 10 it was directed;
- 11 4. any other PERSON who may have seen the DOCUMENT;
- 12 5. the date the DOCUMENT was created;
- 13 6. the DOCUMENT's language, text or substance (to the best that it can be
 recalled);
- 14 7. the DOCUMENT's present location and the identity of the PERSON
 15 having possession, custody, or control of the DOCUMENT;
- 16 8. the DOCUMENT's Bates number, if it has been produced on discovery by
 any party or third party in this action; and
- 17 9. if the DOCUMENT is no longer in existence or in YOUR control, the
 18 disposition that was made of it and the DOCUMENT's present location or
 the location of any copies known to the party."

19 *Id.* Accordingly, Digital Envoy's position that its did not have to provide specific, detailed
 20 responses to Google's interrogatories because Google "merely requests Digital Envoy to state all
 21 facts and identify all evidence" is preposterous. It is unclear how Digital Envoy can even make
 22 such an argument with a straight face.

23 As detailed in Google's opening papers, Digital Envoy's boilerplate responses (such as
 24 that support for its contentions could be found in "the Agreement itself" or "the communications
 25 between Digital Envoy and Google") were so general as to be non-responsive. Digital Envoy's
 26 supplemental responses, served on the same day as its opposition to Google's motion, do not
 27 remedy these defects. For example, the supplemental responses are replete with vague
 28 references to depositions, indicating that facts supporting particular contentions can be found in

1 “Admissions made by Matt Cutts during his deposition; Statements made during Matt Cutts’
2 deposition, regarding Matt Cutts’ understanding of the Agreement” and so forth. *See* Supp.
3 Decl. Ex. B (Digital Envoy’s Supplemental and Amended Responses to Google’s Third Set of
4 Interrogatories) at 3-17. Not *once* does Digital Envoy provide a page and line reference to the
5 portions of the deposition transcripts that supposedly support its contentions. Digital Envoy also
6 claims to find support for its positions in “[l]anguage from [identified pages or sections] of the
7 AGREEMENT.” *Id.* at 4, 7, 11, 14. Yet Digital Envoy does not identify *any* of the language.
8 Digital Envoy’s reference to Google’s purported activities and communications fare no better.
9 *Id.* at 3-17. Nowhere does Digital Envoy provide *any* specificity or detail – just generic
10 categories.

11 To make matters worse, Digital Envoy’s generic categories are coupled with even
12 broader catch-all categories (*e.g.* “Other deposition testimony”; “Language from other sections
13 of the AGREEMENT”; or “Other email messages by other GOOGLE employees referring to the
14 AGREEMENT”). Ex. B at 3-17. These responses are *per se* improper. They are tantamount to
15 a claim that its contentions are supported by nearly every document and piece of testimony in the
16 case. At least two courts of appeals have affirmed dismissal sanctions in the face of such
17 interrogatory answers. *Profile Gear Corp. v. Foundry Allied Indus., Inc.*, 937 F.2d 351, 352 (7th
18 Cir. 1991) (affirming sanction of default judgment where, *inter alia*, plaintiff answered
19 interrogatories by responding “See Complaint” and “See Documents Produced”); *Truck Treads,*
20 *Inc. v. Armstrong Rubber Co.*, 818 F.2d 427, 429 (5th Cir. 1987) (affirming dismissal sanction
21 for failure to comply with discovery where in response to contention interrogatory plaintiff made
22 “a general assertion that they would rely on all documents agreed to be produced by
23 defendants.”)² *See* Fed. R. Civ. Proc. 37 (detailing appropriate sanctions). The lesser sanction
24 of evidentiary preclusion is certainly appropriate under the same circumstances.

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26
27 ² *See also Derson Group, Ltd. v. Right Management Consultants, Inc.*, 119 F.R.D. 396, 396
28 (N.D. Ill. 1988) (response to interrogatory “simply by general reference to the 33,000 documents
previously produced” was insufficient).

1 Digital Envoy's claim that it cannot do any better because Google has purportedly
 2 withheld documents is badly misguided. Google is not withholding relevant documents, but the
 3 charge is beside the point. Google is not asking Digital Envoy to identify evidence it does not
 4 have. Digital Envoy is, however, obligated to identify the evidence it *does have*, if any. It has
 5 completely failed to meet that obligation.³

6 **II. DIGITAL ENVOY'S RESPONSES TO GOOGLE'S REQUESTS FOR**
 7 **ADMISSION**

8 In light of Digital Envoy's supplemental responses to Google's Requests for Admission,
 9 Google withdraws its motion as it relates to those requests.

10 **CONCLUSION**

11 Contention interrogatories are an important tool by which a defendant can learn the
 12 grounds upon which a plaintiff is basing its claims. Digital Envoy has twice scorned its
 13 obligation to respond to these interrogatories by relying on generic categorizations and
 14 identifying no specific facts. In short, it is refusing to disclose its case, if any exists.

15 Courts have repeatedly rejected the tactic Digital Envoy has adopted here, litigation by
 16 ambush. This is the antithesis of discovery, the purpose of which is "to remove surprise from
 17 trial preparation so the parties can obtain evidence necessary to evaluate and resolve their
 18 dispute." *Cable & Computer Technology, Inc. v. Lockheed Saunders, Inc.*, 175 F.R.D. 646, 650
 19 (C.D. Cal. 1997) (granting motion to compel responses to contention interrogatories). As the
 20 Fifth Circuit noted in affirming a dismissal for failure to respond to contention interrogatories,
 21 "[t]he district court correctly observed that appellants' evasive response left the defendants in
 22 complete ignorance of the substance of [plaintiff's] contentions almost one year after the case
 23 was filed." *Truck Treads*, 818 F.2d at 429-30.

24 _____
 25 ³ As noted above, Digital Envoy claims that its contentions are supported by deposition
 26 testimony yet fails to identify the pages and line numbers of the testimony. Digital Envoy has
 27 the transcripts. If the alleged support is there, Digital Envoy was required to specifically identify
 28 it. Likewise, Digital Envoy claims that, between its production and Google's, over 70,000 pages
 of materials have been produced and somewhere within those documents one might find
 evidence to support its claims. Resp. at 2. If Digital Envoy believes that any of these documents
 support its claims, it was required to provide the details requested by the Interrogatories.

1 For the foregoing reasons, Google respectfully requests that the Court grant its motion
2 and ban Digital Envoy from offering any evidence not specifically set forth in the interrogatory
3 responses at issue.

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5 Dated: June 8, 2005

Respectfully submitted,

6
7 /s/ David H. Kramer

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