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11 UNITED STATES DISTRICT COURT  
 12 NORTHERN DISTRICT OF CALIFORNIA  
 13 SAN JOSE DIVISION

14 DIGITAL ENVOY, INC.,  
 15 Plaintiff/Counterdefendant,  
 16 v.  
 17 GOOGLE, INC.,  
 18 Defendant/Counterclaimant.

Case No. C 04 01497 RS

**DIGITAL ENVOY'S MOTION UNDER  
 CIVIL L.R. 7-2 FOR LEAVE TO FILE ITS  
 MOTION PURSUANT TO FEDERAL  
 RULE OF CIVIL PROCEDURE 56(F)**

Date: No Hearing Set  
 Courtroom: 4, 5th Floor

The Honorable Richard Seeborg

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1 Pursuant to Local Rule 7-2, Digital Envoy, Inc. (“Digital Envoy”) seeks leave of the Court  
2 to file a Motion pursuant to Federal Rule of Civil Procedure 56(f). In support of this Motion,  
3 Digital Envoy shows the Court as follows:

4 1. Digital Envoy filed its Opposition to Google Inc.’s Motion for Partial Summary  
5 Judgment on September 1, 2005.

6 2. On September 2, 2005, counsel for Google Inc. stated that it did not intend to  
7 produce additional documents or information, which Digital Envoy contends the Court required  
8 Google to produce in its July 15, 2005 Order Granting in Part and Denying in Part Digital’s  
9 Motions to Compel and Denying Motion for Sanctions or a corporate witness to testify on key  
10 issues. *See* Exhibit B to Declaration of Robert J. Waddell, Jr. in support of Rule 56(f) Motion.

11 3. On September 8, 2005, Google filed its Reply in Support of Motion for Partial  
12 Summary Judgment Regarding Digital Envoy, Inc.’s Damages Claims asserting that the record  
13 was insufficient to support a finding that Google was unjustly enriched due to its use of Digital  
14 Envoy’s proprietary technology. *See* Reply at 12-13.

15 4. Notwithstanding the sufficiency of the record to establish Google’s unjust  
16 enrichment due to its misappropriation of Digital Envoy’s trade secrets, Google in its Reply  
17 flaunts the alleged absence of evidence as justification of its entitlement to partial summary  
18 judgment. *See, e.g.*, Google’s Reply at 11-12. However, the very evidence that Google contends  
19 is absent *resides in the hands of Google*, which Google has refused to produce. Digital Envoy will  
20 be forced once again to seek relief from the Court to obtain the discovery to which it is entitled.

21 5. Under the circumstances, it would be unjust indeed for Google to use its own  
22 refusal to provide meaningful discovery responses as the very basis justifying its entitlement to  
23 partial summary judgment.

24 6. Therefore, to the extent the Court were to accept Google’s contention that the  
25 record does not establish its unjust enrichment, Digital Envoy respectfully requests that the Court  
26 continue Google’s motion for partial summary judgment until such time as Digital Envoy can  
27 bring Google’s non-compliance with its discovery obligations before the Court.

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1 DATED: September 16, 2005

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By \_\_\_\_\_ /s/ Brian Blackman  
P. CRAIG CARDON  
BRIAN R. BLACKMAN

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