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

12	DIGITAL ENVOY, INC.,	)	CASE NO.: C 04 01497 RS
		)	
13	Plaintiff/Counterdefendant,	)	<b>GOOGLE INC.'S OBJECTION AND</b>
		)	<b>MOTION TO STRIKE DIGITAL</b>
14	v.	)	<b>ENVOY'S RULE 56(F)</b>
		)	<b>SUBMISSIONS IN OPPOSITION TO</b>
15	GOOGLE INC.,	)	<b>GOOGLE'S MOTION FOR</b>
		)	<b>PARTIAL SUMMARY JUDGMENT</b>
16	Defendant/Counterclaimant.	)	
		)	
17		)	Date: September 21, 2005
		)	Time: 9:30 a.m.
18		)	Courtroom: 4, 5th Floor
		)	Judge: Hon. Richard Seeborg

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1 **INTRODUCTION**

2 Digital Envoy’s continuing disregard for the Rules of Civil Procedure defies  
 3 understanding. When Google filed a motion for summary judgment on liability issues, Digital  
 4 Envoy filed a frivolous 56(f) request the night before the scheduling hearing. The Court,  
 5 following 9th Circuit precedent and the applicable rules of the Court, scolded Digital Envoy for its  
 6 tactics and made clear that any such request was to have been filed with its opposition papers.  
 7 Despite that experience and admonition (and without any explanation) Digital Envoy has  
 8 incredibly employed the same tactic again – this time filing a substanceless “56(f) motion” two  
 9 court days before the hearing on Google’s motion regarding damages. The conduct almost seems  
 10 designed to draw an award of sanctions. The submission should be rejected out of hand.

11 In any event, the submission is a farce. The information Digital Envoy proposes to submit  
 12 would change nothing, even accepting its scurrilous explanation for failing to present it  
 13 previously. As Digital Envoy itself concedes, the discovery it prays for is directed to “the value,  
 14 rather than the existence, of Google’s unjust enrichment[.]” Digital Envoy’s Motion Pursuant to  
 15 Federal Rule of Civil Procedure 56(f) (“56(f) Motion”) at 5:3-4. Digital Envoy thus misses the  
 16 point. In relevant part, Google’s motion challenges Digital Envoy’s ability to prove the *existence*  
 17 of any supposed unjust enrichment given the lack of causal nexus between Google’s use of Digital  
 18 Envoy’s data and the revenues earned from its AdSense program. *See, e.g.*, Reply at 14-15. The  
 19 information that Digital Envoy now desperately claims to need has nothing to do with that inquiry.  
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21 **ARGUMENT**

22 **I. DIGITAL ENVOY’S SUBMISSIONS ARE UNTIMELY**

23 While a party must file papers opposing a summary judgment motion prior to the hearing,  
 24 that does not give a party the right to file those papers at any time it chooses, right up to the  
 25 moment the hearing begins.<sup>1</sup> *See* Local Rule 7-3.

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 27 <sup>1</sup> As Wright and Miller explain, the deadline for filing papers in opposition to a summary  
 28 judgment motion is set by local rule. 10A Charles Alan Wright, Arthur R. Miller & Mary Kay  
 Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2719 (3d ed. 1998) (“If the opposing party  
 (continued...)”)

1 This Court specifically told Digital Envoy precisely that in rejecting its last Rule 56(f)  
 2 submission, filed on the eve of oral argument, as “neither timely nor properly filed.” May 20,  
 3 2005 Order at 2 n.1. Indeed, the Court left no ambiguity, stating at the hearing that “if 56(f) was  
 4 going to be even an alternative basis to oppose the motion for summary judgment, **it should**  
 5 **have been included in your opposition papers.**” Transcript of May 4, 2005 hearing  
 6 (Document No. 168) (“May 4 Transcript”) at 4:5-9 (emphasis added); *see also* FED. R. CIV. P.  
 7 56(c); *Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 520 (9th Cir. 1990) (“[T]he process of  
 8 evaluating a summary judgment motion would be flouted if requests for more time, discovery, or  
 9 the introduction of supplemental affidavits had to be considered even if requested well after the  
 10 deadline set for the introduction of all information needed to make a ruling has passed.”)

11 Any Rule 56(f) request must be filed with a party’s opposition papers. Pursuant to Local  
 12 Rule 7-3, “[a]ny opposition to a motion must be served and filed not less than 21 days before the  
 13 hearing date. The opposition may *include* ... affidavits or declarations . . . .” Civil L.R. 7-3(a)  
 14 (emphasis added). Per Wright and Miller:

15 Since the purpose of an affidavit under subdivision (f) is to prevent summary  
 16 judgment from being entered, at least temporarily, it should be considered as  
 17 “opposing” the motion. Furthermore, there is an affirmative reason for requiring  
 18 service of a Rule 56(f) affidavit prior to the hearing. The movant may want to  
 19 contest the allegation that the opponent is unable to present counter-affidavits on  
 the ground that it is made in bad faith or is a result of a lack of diligence and  
 therefore insufficient to justify denying the entry of summary judgment. In this  
 situation it would be important for the movant to know in advance that Rule 56(f)  
 will be invoked to defend against the motion.

20 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND  
 21 PROCEDURE: CIVIL § 2719 (3d ed. 1998).

22 Obviously, a Rule 56(f) request cannot be filed two court days before the hearing if it must  
 23 be *included* with the opposition 21 days before the hearing. More importantly, Local Rule 7-3  
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 (...continued from previous page)  
 26 decides to file counter-affidavits, the second sentence of subdivision (c) provides that they must  
 27 be served on the moving party prior to the day of the hearing. But local rules may vary this time  
 28 period....The purpose of these local court rules is to provide a specific time within which the  
 opposing party must respond to the motion and to make certain that the issues on the motion are  
 properly framed.”)

1 contains a section concerning “Supplementary Material.” That section allows parties to alert the  
 2 court to recent judicial opinions published after the date the opposition or reply was served. Civil  
 3 L.R. 7-3(d). “Otherwise, once a reply is filed, *no additional memoranda, papers or letters may be*  
 4 *filed without prior Court approval.*” *Id.* (Emphasis added).

5 Despite its prior experience, Digital Envoy did not file its 56(f) submission with its  
 6 opposition papers 21 days prior to the hearing date. It waited until two court days before the  
 7 hearing.<sup>2</sup> Incredibly, Digital Envoy claims its submission is timely by virtue of the *very*  
 8 *authority the Court considered and rejected the last time around.* See May 4 Transcript at 86:19  
 9 – 87:7 (rejecting argument that *Ashton-Tate* and *Kitsap Physician Services* (cited by *Mason*)  
 10 authorize Rule 56(f) submissions the day before a hearing; “Neither of those cases stand for that  
 11 proposition.”).<sup>3</sup>

12 Digital Envoy’s invocation of Local Rule 7-2 changes nothing. It mandates that motions  
 13 be filed 35 days before a hearing “[e]xcept as otherwise ordered or permitted[.]” Civil L.R. 7-  
 14 2(a). There is no reason to permit Digital Envoy’s last-minute submission given that it could  
 15 easily have been timely filed. Indeed, in Digital Envoy’s Opposition (“Opp.”), it actually argued  
 16 that Google’s motion was premature in light of alleged discovery disputes. Opp. at 1:8-17. For  
 17 whatever reason, Digital Envoy elected not to make a timely 56(f) request. Accordingly, Digital  
 18 Envoy’s submissions are untimely and should be rejected without any further consideration. See  
 19 May 4 Transcript at 88:9-14 (casting doubt on Court’s willingness to hold subsequent hearing “if  
 20 there’s a case you could have brought that before and you just didn’t do it in your opposition and  
 21 now you want another hearing depending upon how I’m inclined to rule...” ).<sup>4</sup>

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23 <sup>2</sup> Digital Envoy e-filed its “motion” after the close of business on Friday. It did not in any  
 24 way apprise Google that it would be making such a filing. Notably, the filing came fifteen days  
 after it filed its opposition to Google’s motion, and eight days after Google filed its reply.

25 <sup>3</sup> See Digital Envoy’s May 13, 2005 submission (Document No. 155) at 2:4-9 (citing *Mason*  
 26 *v. United States*, 120 Fed. Appx. 40, 43 (9th Cir. 2005)) and 56(f) Motion at 2 n.1 (citing *Ashton-*  
*Tate Corp. v. Ross*, 916 F.2d 516, 520 (9th Cir. 1990) and *Mason* at 43).

27 <sup>4</sup> The timing of Digital Envoy’s submission is only the most glaring of its procedural defects.  
 There is no such thing as a “56(f) motion.” Rather, the rule calls upon a party to file a detailed  
 affidavit from counsel that describes the party’s diligent efforts to obtain necessary information,  
 28 explains why that information had not been obtained, discusses how the information will be  
 (continued...)

1 **II. DIGITAL ENVOY’S RULE 56(F) SUBMISSION IS SUBSTANTIVELY**  
 2 **WITHOUT MERIT**

3 Digital Envoy’s untimely submission is made all the more mystifying by its complete  
 4 lack of merit. According to Digital Envoy, “all of the information identified [in its Rule 56(f)  
 5 motion] goes to the issue of the *value*, rather than the *existence*, of Google’s unjust  
 6 enrichment[.]” Rule 56(f) Motion at 5:3-4 (emphasis added). But as Google explained in its  
 7 moving papers, calculation of the *amount* of damages is not at issue in Google’s motion.  
 8 Instead, the question is whether Digital Envoy has established the *existence* of any unjust  
 9 enrichment given its inability to show any causal link between Google’s use of Digital Envoy’s  
 10 data in its AdSense program and the profits Google earned from that program. Reply at 14-15.  
 11 If the discovery Digital Envoy claims to need goes only to the amount of damages, it simply has  
 12 no bearing here. *See* Cal. Civ. Code § 3426.3(a) (plaintiff may recover for “unjust enrichment  
 13 *caused by misappropriation*”) (emphasis added). It certainly would not create a triable issue of  
 14 fact on the antecedent question of causation. Accordingly, should the Court be inclined to  
 15 consider Digital Envoy’s Rule 56(f) motion, the motion should be denied.<sup>5</sup> *See State of*  
 16 *California v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998); *Reiffin v. Microsoft Corp.*, 270 F.  
 17 *Supp. 2d* 1132, 1146 (N.D. Cal. 2003) (Rule 56(f) requires a moving party to show: (1) the  
 18 specific facts that it hopes to elicit from further discovery; (2) that those facts exist; and (3) that  
 19 *those facts are essential to resist summary judgment*) (emphasis added).

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 24 obtained, and demonstrates how that information could create a triable issue of fact on a pending  
 25 motion. FED. R. CIV. P. 56(f). The declaration that Digital Envoy submitted in connection with  
 26 its “motion” falls far short of what is required.

27 <sup>5</sup> Digital Envoy’s habit of blaming Google for its own shortcomings remains specious and  
 28 has become galling. The charge that Google has failed to comply with the Court’s prior  
 discovery Order is nonsense – the problem lies in Digital Envoy’s attempt to rewrite that Order  
 to grant itself discovery that the Court plainly denied. Further, Google spent weeks searching for  
 that documents that the Court actually directed it to produce, and timely provided all such  
 documents.

