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

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 12 DIGITAL ENVOY, INC.,)
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 13 Plaintiff/Counterdefendant,)
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 14 v.)
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 15 GOOGLE INC.,)
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 16 Defendant/Counterclaimant.)
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CASE NO.: C 04 01497 RS

**GOOGLE INC.'S OPPOSITION
 TO DIGITAL ENVOY, INC.'S
 MOTION FOR LEAVE**

 Judge: Hon. Richard Seeborg
 Courtroom: 4, 5th Floor
 Date: September 21, 2005
 Time: 9:30 a.m.

1 Digital Envoy, Inc. (“Digital Envoy”) is out of control. In what can only be seen as
2 desperation, Digital Envoy has abandoned even the pretense of complying with the Federal Rules
3 of Civil Procedure and the applicable Rules of this Court. This motion is merely its latest folly.

4 After the close of business last night, one court day before the scheduled hearing on
5 Google Inc.’s (“Google”) Motion for Partial Summary Judgment, Digital Envoy has asked for
6 leave to submit a new evidentiary declaration. It offers no explanation for why it failed to offer
7 the supposed evidence in its opposition papers. In truth, there could be no justification, as it seeks
8 to submit deposition testimony of its own witness obtained in November 2004. For this reason
9 alone, its motion for leave should be denied. *See* Local Rule 7-3(a) (requiring submission of all
10 papers opposing a motion 21 days before the scheduled date for a hearing).¹

11 In any event, the evidence Digital Envoy purports to offer is inadmissible as a matter of
12 law. Digital Envoy seeks leave to offer the deposition testimony of its current principal, Mr.
13 Friedman, on his understanding of one of the limitation of liability provisions at issue in Google’s
14 motion. But Digital Envoy has offered no evidence that Mr. Friedman ever communicated his
15 supposed understanding of that provision to anyone at Google. His subjective understanding of
16 the provision, whether held at the time or developed for purposes of this litigation, is simply
17 irrelevant to interpretation of the contract. *See Founding Members of the Newport Beach Country*
18 *Club v. Newport Beach Country Club Inc.*, 109 Cal. App. 4th 944, 956, 960 (1999). As the
19 *Newport Beach* court explained “California recognizes the objective theory of contracts [citation],
20 under which it is the objective intent as evidenced by the words of the contract, rather than
21 subjective intent of one of the parties that controls interpretation [citation]. *The parties’*
22 *undisclosed intent or understanding is irrelevant to contract interpretation.” Id.* (emphasis
23

24 ¹ The motion, not surprisingly, is also procedurally improper. Digital Envoy does not
25 identify the Court rule authorizing the submission of its request for leave and it does not appear
26 to meet the criteria for any of the motions authorized by Local Rule 7-1. *See* Civ. L.R. 7-1
27 (“Any written request to the Court for an order must be presented by one of the following
28 means....”). The request is certainly not a duly noticed motion pursuant to Local Rule 7-2, nor is
it a motion to shorten time under Local Rule 6-1 or an authorized ex parte under Local Rule 7-
10. Presumably then, it is a Motion for Administrative Relief under Local Rule 7-11. But under
that Rule, Digital Envoy was obligated to seek a stipulation from Google or explain in its papers
why a stipulation could not be obtained. Digital Envoy did neither.

1 supplied); *see also In re Marriage of Simundza*, 121 Cal. App. 4th 1513, 1518 (2004) (same;
2 party's self-serving declaration on meaning of contract irrelevant where party's understanding was
3 "undisclosed").²

4 For the foregoing reasons Google Inc. respectfully requests that the Court deny Digital
5 Envoy's request for leave. Should the Court grant such leave, however, it should reject the
6 proffered evidence as irrelevant and thus inadmissible.

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Dated: September 20, 2005

Respectfully Submitted,
WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: /s/ David H. Kramer
David H. Kramer

Attorneys for Defendant/Counterclaimant
Google Inc.

27 ² Digital Envoy has also previously claimed in an interrogatory response that the provisions
28 of the parties' License Agreement are unambiguous, making its submission of parol evidence
here particularly dubious.