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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.
 19

Case No. C 04 01497 RS

**DIGITAL ENVOY, INC.'S SURREPLY RE
 GOOGLE, INC.'S MOTION TO STAGE
 DISCOVERY**

20 Digital Envoy submits this further memorandum in opposition to Google's Motion for
 21 Protective Order Staging Discovery in order to address the following limited issues pertinent
 22 thereto, which were raised by Google subsequent to Digital Envoy's Opposition being submitted.
 23

24 As described in Digital Envoy's prior brief, Google submitted extensive discovery to
 25 Digital Envoy timed such that Digital Envoy's responses were served before Google filed this
 26 motion. Portions of the discovery requests whose scope were far beyond the contemplated first
 27 stage of discovery were quoted in Digital Envoy's memorandum. Digital Envoy has expended the
 28 effort to respond to those requests as required by rule.

1 Evidently emboldened by the prospect of successfully leveraging an imbalance of
2 discovery expenses against Digital Envoy, Google has set upon further discovery efforts outside
3 the scope of its own proposed first stage of discovery. After Digital Envoy submitted its
4 Opposition to the motion, on August 20, 2004, counsel for Google requested that Digital Envoy
5 identify its alleged trade secrets pursuant to a California state procedural rule, and repeated this
6 request on August 23, 2004, in response to Digital Envoy calling into question the applicability of
7 the rule to federal court proceedings. See Declaration of P. Craig Cardon in Support of Surreply,
8 Exhs. A and B. Digital Envoy intends to set aside the technical question of the rule's applicability
9 and voluntarily submit such information as a good faith effort to support the aims of the discovery
10 process in civil matters.

12 Digital Envoy submits that Google's conduct is a microcosm of its contradictory approach
13 to this discovery issue. Despite claiming in its reply brief that Digital Envoy has identified no
14 flaw in the "bright line" test proposed by this motion, Google itself cannot maintain a constant
15 position as to whether they intend to present parole evidence in its proposed dispositive motion.
16 Digital Envoy understands that Google will, since the plain language of the document supports
17 Digital Envoy's position and since Google has already referred extensively to their version of the
18 parole evidence. Therein lies the flaw, as in fact noted in Digital Envoy's initial brief. The scope
19 of discoverable potential parole evidence swallows the limitations proposed for the first stage of
20 discovery.
21

23 The Court, through inevitable additional discovery disputes and Rule 56(f) issues arising
24 from an allegedly dispositive motion to be filed on incomplete discovery, and Digital Envoy, who
25 will be compelled to engage in such additional disputes or suffer prejudice from being
26 economically leveraged against protecting its rights and will need to re-take at least two
27 depositions, gain nothing from staging discovery.
28

1 Google, since the motion will not be well taken and it will also have increased its own
2 expenses, gains only economic leverage by causing equal increased expenses to be incurred by a
3 significantly less financially capable foe and the strategic advantage of making Digital Envoy go
4 through hoops to obtain legitimate discovery (i.e. requiring Digital Envoy to justify its purpose in
5 asking any particular question, invading Digital Envoy's work product). Google is thus the only
6 person who benefits from its proposal, improper and imbalanced benefits, just like its request for
7 further discovery of Digital Envoy's trade secrets claim.
8

9 For this reason, and those set forth in its prior briefing, Digital Envoy requests that
10 Google's motion be DENIED.
11

12 DATED: August 23, 2004

13 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
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15 By

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