Exhibit I

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GOOGLE INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

GOOGLE INC., a Delaware corporation,

Plaintiff,

v.

AMERICAN BLIND & WALLPAPER FACTORY, INC., a Delaware corporation d/b/a decoratetoday.com, Inc., and DOES 1-100, inclusive,

Defendants.

AMERICAN BLIND & WALLPAPER FACTORY, INC., a Delaware corporation d/b/a decoratetoday.com, Inc.,

Counter Plaintiff,

v.

GOOGLE INC., AMERICA ONLINE, INC., NETSCAPE COMMUNICATIONS CORPORATION, COMPUSERVE INTERACTIVE SERVICES, INC., ASK JEEVES, INC. and EARTHLINK, INC.,

Counter Defendant/
Third-Party Defendants.

Case No. C 03-5340-JF (RS)

GOOGLE INC.'S OPPOSITION TO AMERICAN BLIND AND WALLPAPER FACTORY, INC.'S MOTION TO COMPEL GOOGLE TO RESPOND TO DISCOVERY TIMELY SERVED GIVEN THE CURRENT CUTOFF DATE OF AUGUST 26, 2006

Date: September 6, 2006
Time: 9:30 am
Dept: 4
Judge: Hon. Richard Seeborg

Date Comp. Filed: November 26, 2003

Trial Date: May 15, 2007

REDACTED VERSION

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I. INTRODUCTION

Two months ago, on the eve of an already extended fact discovery cutoff, American Blind & Wallpaper Factory, Inc. ("American Blind") came before Judge Fogel to request yet another extension in this three year old case. The reason, American Blind averred, was that a management change at the company prevented it from being able to timely *respond* to discovery Google had served more than a year earlier. American Blind—which at the time had noticed only a single Rule 30(b)(6) deposition in the entire life of the case—made no claim that the recent management changes had interfered in its outside counsel's ability to *take* discovery, only to *respond* to pending discovery.

Google responded that it recognized that American Blind's failure to respond to pending discovery or produce any deposition witnesses made an extension for that long-pending discovery a *fait accompli*. Google opposed, however, a general extension in which American Blind could propound new discovery—discovery that it could and should have conducted long ago. Judge Fogel ruled in Google's favor, in the most unambiguous terms:

> Mr. Page: We don't object to extending the time to handle the discovery that has been held up by the ownership change. Our concern is that the schedule should not be reopened for new discovery. . . . .
>
> The Court: **The point is to allow the parties to complete discovery, not to do new discovery.**

That hearing occurred on Friday, June 23. Notwithstanding Judge Fogel's clear directive, however, American Blind on Monday, June 26—with no effort to either meet and confer or seek leave of Court—served purported deposition notices for Google's two founders, Larry Page and Sergey Brin. Putting aside the obvious harassment value of choosing two of the busiest and most prominent executives in America as their *first* individual deponents, those notices clearly violate both the June 27 discovery cut-off and Judge Fogel's express order. In the ensuing weeks, American Blind proceeded to notice seven additional depositions, all in violation of those orders.

The fact discovery cut-off in this case was June 27, and American Blind can show no good cause for relief from that cut-off for discovery it could have taken any time in the past 16

months. Since Civil Local Rule 26-2 states that "[d]iscovery requests that call for responses or depositions after the applicable cut-off are not enforceable, except by order of the Court for good cause shown," this discovery was not timely served, and the Court should deny this motion.

II. BACKGROUND

A. Except for a limited extension to complete discovery "already in the pipeline," the fact discovery cut-off was June 27, 2006.

This case is nearly three years old. Google filed its complaint seeking declaratory relief on November 26, 2003.[1] On June 21, 2004, the Court stayed discovery.[2] The stay lifted on April 20, 2005. At a May 13, 2005 case management conference, the Court set a February 27, 2006 fact discovery cut-off.[3] On February 3, 2006, over Google's objection, American Blind requested a six-month extension of all case deadlines and the Court extended the schedule by four months.[4] That extension pushed the close of fact discovery to June 27, 2006.

On June 9, 2006, with fact discovery set to close in "a mere two weeks," American Blind filed a motion seeking to extend the case deadlines an additional 90 days.[5] Google opposed the request. After full briefing and a June 23, 2006 hearing, Judge Fogel extended the schedule for 60 days so the parties could complete discovery already served. At the hearing he stated: "*The point is to allow the parties to complete discovery, not to do new discovery.* . . . So the blanket order is simply the *time to complete discovery that's already underway*, 30(b)(6) depositions, other depositions[,] document discovery. If you need another two months, I understand."[6] The Court's written order that issued the same day likewise stated that "the extension of case management dates is intended *only to allow the parties to complete discovery that is within the*

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[1] Complaint For Declaratory Judgment of Non-Infringement.

[2] Stipulation and Order Setting Hearing on Motion to Dismiss and Extending Time for Case Management Conference.

[3] Amended Civil Minute Order re May 13, 2005 Further Case Management Conference.

[4] Civil Minutes re February 3, 2006 Further Case Management Conference.

[5] American Blind & Wallpaper [sic], Inc.'s Motion To Amend And Extend Case Management Order Dates at 3.

[6] Declaration of Klaus H. Hamm, filed herewith ("Hamm Decl."), Ex. A (June 23 Tr.) at 3 (emphasis added).

previously established scope of discovery."[7]

Consistent with the Civil Local Rules' requirement regarding discovery after the cut-off, Judge Fogel stated that "if there is something that comes up in completing the pending discovery that leads either party to think that there's something further they need to do, then you should go to Magistrate Seeborg . . . *If you want to initiate something that's not already in the pipeline, then you need to go to the magistrate judge and show good cause.*"[8] The written order similarly stated that if "a party believes that additional discovery is necessary, the parties should attempt to resolve the matter between themselves. However, if an agreement cannot be reached, permission to conduct additional discovery shall be sought from Magistrate Judge Seeborg."[9]

B. American Blind's attempts to seek discovery after the discovery cut-off.

The next day business after the Court prohibited American Blind from serving additional discovery, American Blind served two deposition notices. The "Notice of Deposition of Larry Page" set an August 8, 2006 deposition date and the "Notice of Deposition for Sergey Brin" set an August 10, 2006 deposition date.[10] Two days later, American Blind served by fax "American Blind and Wallpaper Factory Inc.'s First Set of Requests For Admission To Google Inc." ("RFAs").[11] Under Federal Rules of Civil Procedure 6(e) and 36(a), Google's deadline for responding to the RFAs was July 31, 2006.

When Google pointed out that the deposition notices and RFAs violated Judge Fogel's June 23, 2006 Order, American Blind took the following two positions: (1) that "Judge Fogel's June 23rd order merely extended all deadlines for an additional 60 days and does not provide any explicit limitations on depositions or other discovery"; and (2) that "the deposition notices and Requests for Admission are related to the initial scope of discovery in that they were generated in response to issues presented by Google in its responses to American Blind's discovery, which

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[7] Order Granting in Part Defendant's Motion to Extend Case Management Deadlines ("June 23 Order") at 2 (emphasis added).

[8] Hamm Decl. Ex A (June 23 Tr.) at 3 (emphasis added).

[9] June 23 Order at 2.

[10] Hamm Decl. Exs. B (Page Dep. Notice), C (Brin Dep. Notice).

were received prior to the original close of fact discovery."[12] On July 31, 2006, Google served objections to the deposition notices and RFAs, objecting on the ground the discovery was untimely and reserving Google's right to make additional objections.[13]

In correspondence faxed on June 30, 2006, American Blind stated that it would serve deposition notices for individuals listed on Google's initial disclosures "early" in the week of July 2, 2006.[14] Instead, American Blind waited another month to send out further deposition notices. When it finally did, it served deposition notices that purported to cram seven depositions into the final week of the extended fact discovery period. On August 7-8, 2006, American Blind served notices for the August 21, 2006 deposition of Britton Mauchline Picciolini;[15] the August 22, 2006 deposition of Jessica Bluett;[16] the August 23, 2006 deposition of Jane Butler;[17] the August 23, 2006 deposition of Rick Steele;[18] the August 24, 2006 deposition of Bismark Lepe;[19] the August 25, 2006 deposition of Leshika Samarasinghe;[20] and the August 25, 2006 deposition of Salar Kamangar.[21]

III. ARGUMENT

American Blind does not cite any statutes, rules or case law in support of its motion. The applicable authority is the Northern District's Civil Local Rules. They define the "discovery cut-off" as "the date by which all responses to written discovery are due and by which all depositions

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[11] Hamm Decl. Ex. D (RFAs).

[12] Hamm Decl. Ex. E (June 30, 2006 letter from Rammelt).

[13] Hamm Decl. Exs. F (Objections to Page Dep. Notice), G (Objections to Brin Dep. Notice), H (Objections to RFAs).

[14] Hamm Decl. Ex. E (June 30, 2006 letter from Rammelt).

[15] Hamm Decl. Ex. I (Picciolini Dep. Notice).

[16] Hamm Decl. Ex. J (Bluett Dep. Notice).

[17] Hamm Decl. Ex. K (Butler Dep. Notice).

[18] Hamm Decl. Ex. L (Steele Dep. Notice).

[19] Hamm Decl. Ex. M (Lepe Dep. Notice).

[20] Hamm Decl. Ex. N (Samarasinghe Dep. Notice).

[21] Hamm Decl. Ex. O (Kamangar Dep. Notice).

must be concluded."[22] As a result, "[d]iscovery requests that call for responses or depositions after the applicable discovery cut-off are not enforceable, except by order of the Court for good cause shown."[23] The Commentary to Civil Local Rule 26-2 provides the further, blunt reminder that "[c]ounsel should initiate discovery requests and notice depositions sufficiently in advance of the cut-off date to comply with this local rule."

Even though this Rule is clear, parties occasionally test it. In *Miller v. International Business Machines*, 2006 WL 1141090 (N.D. Cal. May 1, 2006), the plaintiff mailed a document request on November 7, 2005, when the discovery cut-off date was November 18, 2005. Citing Rule 26-2, the Court noted that to be timely the "request would have to be mailed no later than October 14, 2005."[24] It then held that because the plaintiff "did not seek leave of the District Court to propound discovery that called for responses after the cut-off date, [defendant] has no obligation to respond to this untimely request." *Id.* Similarly, in *Padgett v. City of Monte Sereno*, 2006 WL 1141265, *1 (N.D. Cal. May 1, 2006) (Seeborg, M.J.), when the plaintiff mailed discovery requests before the discovery cut-off but without providing time for responses, the Court denied plaintiff's motion to compel "[i]n view of the fact that the responses to the written discovery were not due until after the discovery cutoff."

A. American Blind has not complied with the Court's order requiring it to meet and confer and seek leave from the Court before serving discovery.

Judge Fogel's June 23, 2006 order was clear: to serve additional discovery, a party must meet and confer with the other side and, if that fails, seek "permission to conduct additional discovery . . . from Magistrate Judge Seeborg."[25] American Blind has defied this ruling. It did not meet and confer or seek the Court's permission before serving additional discovery. Instead, the next business day after the Court's order it, without any warning, served notices for the

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[22] Civil L.R. 26-2.

[23] *Id.*

[24] *Miller*, 2006 WL 1141090, at *4.

[25] June 23 Order at 2; *see also* Hamm Decl. Ex. A (June 23 Tr.) at 3 ("If you want to initiate something that's not already in the pipeline, then you need to go to the magistrate judge and show good cause.").

depositions of Google's two founders. Two days later, again without meeting and conferring or seeking leave from the Court, American Blind served RFAs on Google. Then, two days after that, American Blind declared that the Court's "June 23rd order . . . does not provide any explicit limitations on depositions or other discovery."[26]

Even now, American Blind is not seeking leave to file additional discovery; it instead moves to compel discovery based on the erroneous premise that it was timely served (its Motion is titled "Motion To Compel Google To Respond To Discovery Timely Served Given The Current Cutoff Date of August 26, 2006"). American Blind should have sought leave from the Court *before* serving the discovery. In *Miller*, when a party served discovery that called for responses after the cutoff and then moved to compel, the Court simply ruled that the responding party "has no obligation to respond to this untimely request" and denied the motion to compel.[27] The Court should reach the same conclusion here. Since American Blind has failed to follow the Civil Local Rules or the Court's June 23 Order, the Court should deny its motion to compel.

B. American Blind has not shown good cause for its late-served discovery.

Although American Blind moves to compel discovery, rather than to serve additional discovery, even if it had presented the latter motion, it would fail. American Blind has not shown good cause for serving late discovery, as required by the Court's June 23 order and the Civil Local Rules. Judge Fogel ordered that any late discovery must focus on matters "that come[] up in completing the pending discovery that leads either party to think that there's something further they need to do."[28] Further, before serving this discovery a party must show "good cause."[29] As Judge Seeborg recently ruled, good cause "requires not only that there be good reason for the questions in the abstract, but *good reasons that they could not have been*

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[26] Hamm Decl. Ex. E (June 30 letter from Rammelt).

[27] *Miller*, 2006 WL 1141090, at *4; *see also Milt's Flying Service, Inc. v. AV Finance, Inc.*, 2002 WL 31975066, at *3 (D. Or. Dec. 2, 2002) (the "Court did not even have to require Defendants to respond to the Motion [to Compel]" made after close of discovery).

[28] Hamm Decl. Ex. A (June 23 Tr.) at 3.

[29] *Id.*; *see also* Civil L.R. 26-2.

propounded within the normal time requirements."[30]

1. American Blind has not shown good cause for noticing the depositions of Google's presidents after the discovery cut-off.

American Blind cannot show good cause for why it did not serve the notices for the depositions of Mr. Page and Mr. Brin "within the normal time requirements." American Blind primarily argues that it should be allowed to take the depositions of Mr. Page and Mr. Brin now because it was too busy to conduct discovery this spring due to the ownership and management change at American Blind. The Court already has considered and rejected this excuse when American Blind moved to extend fact discovery.[31] After considering American Blind's detailed recitation of its supposed inability to conduct discovery, the Court extended fact discovery only "to allow the parties to complete discovery, not to do new discovery."[32] American Blind has not requested leave to file a motion for reconsideration and thus should not be permitted to make this argument anew.[33] As a result, American Blind must show good cause—apart from any

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[30] *Padgett*, 2006 WL 1141265, *1 (emphasis added).

[31] In any case, American Blind's oft-repeated argument is based on the false claim that "during the two months leading up to the original close of discovery [sic], American Blind's sole focus" was on its management change. Mot. 2. The truth is that during this time American Blind engaged in all manner of discovery, including scheduling depositions, taking a deposition, appearing at Google's deposition of one its former employees, serving written discovery, and responding to written discovery. For example, on April 18, American Blind requested that Google identify its remaining 30(b)(6) witnesses (Hamm Decl. ¶ 2); on April 26, American Blind served an amended deposition notice and an amended version of its third set of document requests (Hamm Decl. Ex. P); on May 1, American Blind suggested that Google depose American Blind's 30(b)(6) witness on June 6 (Hamm Decl. ¶ 3); on May 9, American Blind asked whether Google had produced certain documents (Hamm Decl. ¶ 4); on May 11, American Blind inquired about scheduling the deposition of Rose Hagan on June 13 (Hamm Decl. ¶ 5); on May 17, American Blind complained that Google's timely objections to American Blind's third set of document requests were untimely (Hamm Decl. ¶ 6); on May 18, American Blind deposed Google Rule 30(b)(6) designee Prashant Fuloria (Hamm Decl. ¶ 7); on May 26,

(Hamm Decl. Ex.Q); on June 9, American Blind served its responses and objections to Google's second set of requests for admissions (Hamm Decl. Ex. R); on June 19, American Blind served its responses and objections to Google's second set of requests for production and second set of interrogatories (Hamm Decl. Exs. S and T); and on June 22, American Blind attended Google's deposition of William Smith (Declaration of Ajay S. Krishnan, filed herewith, ¶ 2).

[32] Hamm Decl. Ex. A (June 23 Tr.) at 3.

[33] In fact, the Civil Local Rule regarding motions for reconsideration requires the sanctioning of

distractions caused by its management change—for its failure to take these depositions during the more than one-year period in which discovery was open.

Neither can American Blind claim that it did not know about Mr. Page or Mr. Brin until after it was too late to notice their depositions for dates within the discovery period. Both Google co-founders are celebrities in the business world, and American Blind itself acknowledges that it listed both as people who "may have information that American Blind may use to support its case" in its initial disclosures served more than a year ago, on April 27, 2005.[34] Instead, American Blind claims that it delayed for more than a year out of respect for the rule that it first confirm that Mr. Page and Mr. Brin have knowledge relevant to this lawsuit. American Blind claims that a deposition on April 12, 2006 and another on May 18, 2006 first revealed this knowledge. And then—still needing to explain its more than one month of inaction between May 18 and June 26—American Blind claims it took another five weeks from the *second* deposition for American Blind to process the information and to conclude that it should depose Mr. Page and Mr. Brin.[35] This story has three huge flaws.

First, if the April and May depositions truly were the "eureka" moments that caused American Blind to believe that Mr. Page and Mr. Brin have relevant knowledge, American Blind could have made this determination during the April and May depositions. American Blind's lead trial counsel took the April and May depositions and even if American Blind's management was busy with an ownership change, American Blind has offered no explanation about why its lead trial counsel or other litigation counsel was so overwhelmed that it could not conduct this analysis.[36]

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a party who violates the prohibition against the repetition of "any oral or written argument made . . . in support of or in opposition to the interlocutory order which the party now seeks to have reconsidered." Civil L.R. 7.9(c).

[34] Hamm Decl. Ex. U at 5. These disclosures stated that Page and Brin have "knowledge regarding Google's advertising policies, Google's corporate philosophy, pending litigation, advertising revenues, and profits[.]" *Id.*

[35] Mot. 3.

[36] American Blind states that it took another month after the second deposition to "review the information in the April and May depositions and determine that Messrs. Brin and Page have information that was necessary for American Blind's defense." Mot. 3. If this statement means

Second, emails produced by Google in October 2005, show that Mr. Page was copied on emails, along with dozens of other people at Google, regarding the change to Google's trademark policy.[37] Indeed, American Blind itself has acknowledged that "Mr. Page's name is identified on numerous documents that Google has produced."[38] Thus, by American Blind's own admission, it knew about (or should have known about) Mr. Page's limited involvement in the trademark policy change before the close of discovery. As a result, American Blind has not presented "good reasons that the" notice for Mr. Page's deposition "could not have been propounded within the normal time requirements."[39]

Third, American Blind has not shown that either Mr. Page or Mr. Brin "have some unique knowledge pertinent to the issues" in this case, as it must do before gaining the right to depose Google's co-presidents.[40] The emails on which Mr. Page are copied include 47 other recipients; American Blind cannot point to any pertinent emails listing Mr. Brin as a recipient. Moreover, American Blind has made no showing that it has recently discovered information that Mr. Brin possesses information relevant to this lawsuit. To support its argument that it should depose Mr. Brin, American Blind cites the following deposition testimony:

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that American Blind's attorneys reviewed the transcript with American Blind's management, then American Blind has violated the Protective Order since Google has designated the sections of transcript at issue "Attorneys' Eyes Only." If, on the other hand, only American Blind's outside counsel conducted this review, there is no reason why outside counsel delayed for more than a month before conducting the review.

[37] *See, e.g.*, Hamm Decl. Exs. V (GOOGLE 005127-GOOGLE 005128.), W (GOOGLE 004761-GOOGLE 004762).

[38] Hamm Decl. Ex. E (June 30, 2006 letter from Rammelt).

[39] *Padgett*, 2006 WL 1141265, *1.

[40] *Consolidated Rail Corp. v. Primary Indus. Corp.*, 1993 WL 364471, *1 (S.D.N.Y. Sept. 10, 1993).

If anything, this testimony reveals Mr. Brin's *lack* of knowledge about relevant events.

Nor can American Blind demonstrate that it has made an effort to exhaust other sources for the information it seeks. In fact, American Blind thus far has taken only one three-part Rule 30(b)(6) deposition of Google's corporate representatives. Until August 7, 2006, it had not noticed the individual deposition of *any* Google employees except for Mr. Page or Mr. Brin.[42] Since American Blind has not made a showing that Mr. Page or Mr. Brin possess unique knowledge unavailable from other sources, it cannot take their depositions.[43]

2. American Blind has not shown good cause for why it could not have served its RFAs earlier.

American Blind does not attempt to show that it has good cause for serving its RFAs more than a month too late. Instead, it argues that responding to these RFAs will not prejudice Google, even though it must show "good reasons" why it could not have served the RFAs "within the normal time requirements."[44] American Blind makes the vague allegation that "Google has failed to respond to American Blind's correspondence regarding matters contained

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[41] Mot. 3 (citing Declaration of Caroline C. Plater In Support of American Blind And Wallpaper Factory Inc.'s Motion To Compel Google To Respond To Discovery Timely Served Given The Current Cutoff Date of August 26, 2006, Ex. M at 98:5-99:13). Moreover, American Blind fails to complete its argument: even if one or both gentlemen had unique information concerning Google's decision to change its trademark policy, there is no showing that the reasons for that change have any bearing on this case. Google's policy does, or does not, violate trademark law, regardless of the process by which it was promulgated.

[42] In addition, once Google had identified Prashant Fuloria as a Rule 30(b)(6) deponent, American Blind served an individual deposition notice for him at the same date and time, under the mistaken impression that doing so would double the federal 7-hour limitation.

[43] *Id; see also Mulvey v. Chrysler Corp.*, 106 F.R.D. 364, 366 (D.R.I. 1985); *Baine v. General Motors Corp.*, 141 F.R.D. 332, 334 (M.D. Al. 1991); *Folwell v. Hernandez*, 210 F.R.D. 169, 174 (M.D.N.C. 2002); *Lewelling v. Farmers Ins. of Columbus, Inc.*, 879 F.2d 212, 218 (6th Cir. 1989). Moreover, American Blind acknowledges Google's right to "later seek a protective order on the grounds that Messrs. Brin and Page are not subject to deposition in this case" and Google hereby reserves its right to do so. Mot. 3 n. 1.

[44] *Padgett*, 2006 WL 1141265, *1.

in the requests for admission[.]"[45] But this contention is not true, and American Blind provides no support for it. As a result, the Court should deny American Blind's motion to compel responses to its late-served RFAs.

3. American Blind's additional deposition notices are improper.

Since filing this motion, American Blind has attempted to cram seven more depositions into the last week of the extended fact discovery period. American Blind has not shown good cause for why it did not serve these deposition notices "within the normal time requirements."[46] Nor can it, since each of the seven individuals were listed on either American Blind's or Google's initial disclosures, which the parties exchanged exactly 14 months before the June 27, 2006 close of discovery.[47]

IV. CONCLUSION

For the foregoing reasons, the Court should deny American Blind's motion to compel.

Dated: August 16, 2006

KEKER & VAN NEST, LLP

By: /s/ Klaus H. Hamm
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Attorneys for Plaintiff and Counter Defendant
GOOGLE INC.

[45] Mot. 4.

[46] *Padgett*, 2006 WL 1141265, *1.

[47] Hamm Decl. Exs. U (American Blind's Initial Disclosures), X (Google's Initial Disclosures).