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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA

12 PERFECT 10, INC., a California
13 corporation,

14 Plaintiff,

15 v.

16 GOOGLE INC., a corporation,

17 Defendants.

Case No.: CV 04-9484 AHM (SHx)

Before Judge A. Howard Matz

**PLAINTIFF PERFECT 10, INC.'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
DEFENDANT GOOGLE INC.'S
MOTION FOR REVIEW OF AND
OBJECTIONS TO MAGISTRATE
JUDGE HILLMAN'S AUGUST 10, 2010
ORDER DENYING GOOGLE'S
MOTION TO QUASH SUBPOENAS
DIRECTED TO SHANTAL RANDS
POOVALA**

[DECLARATION OF DR. NORMAN
ZADA FILED CONCURRENTLY
HEREWITH]

Date: November 14, 2011

Time: 10:00 a.m.

Place: Courtroom 14, Courtroom of Judge
A. Howard Matz

Discovery Cut-Off Date: None Set

Pretrial Conference Date: None Set

Trial Date: None Set

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- I. INTRODUCTION AND SUMMARY OF ARGUMENT 1
 - A. Magistrate Judge Hillman’s Order Is Not Clearly Erroneous Or Contrary To Law 1
 - B. Material Facts Occurring After Magistrate Judge Hillman’s Order Provide A Further Basis To Depose Ms. Poovala 6
 - 1. Google’s August 2011 Non-Prosecution Agreement 6
 - 2. Google’s “Search By Image” Capability 7
- II. RELEVANT FACTUAL BACKGROUND 10
 - A. Perfect 10’s 30(b)(6) Deposition 10
 - B. Google Relies Upon The Poovala Declaration And The Poovala Rebuttal Declaration In Support of Its Partial Summary Judgment Motions 10
 - C. As Magistrate Judge Hillman Found, The Poovala Declarations Conflict With Ms. Poovala’s Testimony At The Rule 30(b) Deposition 11
 - D. Perfect 10 Seeks To Depose Ms. Poovala 12
- III. THE STANDARD OF REVIEW PREVIOUSLY ADVOCATED BY GOOGLE SUPPORTS AN AFFIRMANCE OF MAGISTRATE JUDGE HILLMAN’S ORDER 12
- IV. GOOGLE FAILS TO ESTABLISH, AND CANNOT ESTABLISH, THAT MAGISTRATE JUDGE HILLMAN’S ORDER IS CLEARLY ERRONEOUS OR CONTRARY TO LAW 13
 - A. Google’s Mistaken Assertions Provide No Basis To Reverse Magistrate Judge Hillman’s Order..... 13
 - 1. Perfect 10 Properly May Depose Ms. Poovala About Numerous Issues Remaining In The Case 13
 - 2. Google Ignores Settled Law That The SJ Order May Be Revised At Any Time Before Final Judgment 15
 - 3. New Material Facts Provide A Separate Basis To Depose Ms. Poovala..... 16
 - B. Ms. Poovala’s Deposition Would Not Be Unreasonably Cumulative..... 18
 - C. Google’s Assertions Regarding Magistrate Judge Hillman’s Order Concerning The Deposition of Former Google CEO Eric Schmidt Are False And Misleading..... 20
- V. MAGISTRATE JUDGE HILLMAN’S ORDER REQUIRING MS. POOVALA TO PRODUCE DOCUMENTS AT HER DEPOSITION IS NEITHER CLEARLY ERRONEOUS NOR CONTRARY TO LAW 21
- VI. CONCLUSION 23

TABLE OF AUTHORITIES

Cases

American Canoe Assoc. v. Murphy Farms, Inc., 326 F.3d 505 (4th Cir.2003)..... 15

Bhan v. NME Hospitals, Inc., 929 F.2d 1404 (9th Cir. 1991) 12

Blankenship v. Hearst Corp., 519 F.2d 418 (9th Cir. 1975)..... 1, 13

Dreith v. Nu Image, Inc. 648 F.3d 779 (9th Cir. 2011) 15

Google v. American Blind & Wallpaper Factory, Inc., 2006 WL 25782377
(N.D. Cal., Sept. 6, 2006) 1

Grimes v. City and County of San Francisco, 951 F.2d 236 (9th Cir. 1991)3, 12

L.W. ex rel. Whitson v. Knox County Bd. of Educ., 2008 WL 820007
(E.D. Tenn. 2008) 20

M2 Software, Inc. v. Madacy Entertainment, 421 F.3d 1073 (9th Cir. 2005)..... 15

Perfect 10, Inc. v. Google Inc., 2011 WL 3320297
(9th Cir., August 4, 2011).....2

Salter v. Upjohn Co., 593 F.2d 649 (5th Cir.1979) 1

Westefer v. Snyder, 472 F.Supp.2d 1034, 1047 (S.D. Ill. 2006).....3, 12

Wiwa v. Royal Dutch Petroleum Co., 392 F.3d 812 (5th Cir. 2004)..... 22

Statutes

17 U.S.C. §512 2

28 U.S.C. §636 12

Treatises

J. Moore & J. Lucas, *Moore’s Federal Practice* (3d. ed. 2007)..... 20

Rules

Fed. R. Civ. P. 30passim

Fed. R. Civ. P. 45 22

Fed. R. Civ. P. 54 5

Fed. R. Civ. P. 56 13, 16

Fed. R. Civ. P. 72 12

1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 **A. Magistrate Judge Hillman’s Order Is Not Clearly Erroneous Or**
3 **Contrary To Law**

4 On August 10, 2010, Magistrate Judge Hillman issued a well-reasoned order
5 correctly denying Defendant Google Inc.’s (“Google”) Motion to Quash the Subpoenas
6 Directed to Shantal Rands Poovala (“Ms. Poovala”) and for a Protective Order (the
7 “Order”) (Docket No. 964). Google’s motion for review of the Order (the “Motion”)
8 rehashes contentions properly rejected by Magistrate Judge Hillman in issuing the
9 Order. The Motion mistakenly asks this Court to rule that the Order is contrary to law
10 and clearly erroneous, even though the Order includes the following correct rulings:

11 1) “A party seeking to prevent a deposition carries a heavy burden to
12 show why discovery should be denied.” Order at 1, *quoting Google v. American*
13 *Blind & Wallpaper Factory, Inc.*, 2006 WL 25782377, at *3, n.3 (N.D. Cal., Sept.
14 6, 2006) (granting motion to compel the deposition of Larry Page, Google's co-
15 founder and president).

16 2) “It is very unusual for a court to prohibit the taking of a deposition
17 altogether and absent extraordinary circumstances, such an order would likely be in
18 error.” Order at 1, *quoting Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir.1979).

19 3) A court “may issue a protective order only after the moving party proves
20 the order is necessary ‘to protect a party or person from annoyance, embarrassment,
21 oppression, or unique burden or expense.’” Order at 2, *quoting Blankenship v.*
22 *Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975).

23 4) Google failed to meet its burden to quash the subpoenas served on Ms.
24 Poovala and for a protective order to be issued. Order at 2.

25 5) That Ms. Poovala was deposed for less than three hours on November
26 19, 2008, only in her capacity as one of several individuals designated by Google
27 in response to a Rule 30(b)(6) deposition notice served by Perfect 10, “does not
28 preclude a deposition of her in her individual capacity.” Order at 2.

1 6) There “appears to be some conflict” between Ms. Poovala’s Rule
2 30(b)(6) deposition testimony and her declarations. Order at 2. Ms. Poovala’s July
3 2, 2009 declaration and her September 9, 2009 rebuttal declaration form the basis
4 for Google’s three motions for partial summary judgment (the “Partial Summary
5 Judgment Motions”), which contended that Google was entitled to a safe harbor
6 under Section 512 of the Digital Millennium Copyright Act (the “DMCA”). This
7 Court relied upon Ms. Poovala’s declarations in its July 26, 2010 Order Granting In
8 Part and Denying In Part Google’s Motions for Partial Summary Judgment (the “SJ
9 Order”) and its July 30 Order Denying Perfect 10’s Motion for Preliminary
10 Injunction (the “PI Order”).¹

11 7) Perfect 10 is entitled to depose Ms. Poovala notwithstanding this
12 Court’s issuance of the SJ Order and the PI Order, because Perfect 10 “is permitted
13 to prepare its case as it sees fit.” Order at 2.

14 8) The documents sought by Perfect 10 “in connection with Ms.
15 Poovala’s deposition appear to be relevant to the subject matter of this action and

16 ¹ Google misleadingly asserts that “the Ninth Circuit declined to disturb” the SJ Order
17 or the PI Order on Perfect 10’s appeal. Google’s Memorandum of Points and
18 Authorities in Support of the Motion (“Memo”) at 1. In fact, the Ninth Circuit
19 specifically chose not to address the SJ Order, or the merits of any of Perfect 10’s
20 claims addressed in the PI Order, instead holding only that “Perfect 10 has failed to
21 show irreparable harm.” *Perfect 10, Inc. v. Google Inc.*, 2011 WL 3320297, *5 n.3
22 (9th Cir., August 3, 2011). Moreover, during oral argument on Perfect 10’s appeal, the
23 Ninth Circuit questioned several aspects of the SJ Order and the PI Order. *See*
24 Declaration of Norman Zada, submitted concurrently herewith (“Zada Decl.”), Exh.12
25 (Transcript of Oral Argument on April 11, 2011 [“Transcript”]), at 7:14-18; 13:20-21;
26 20:19-21; 21:20-23; 22:17-20; 25:11-16; 26:14-27:4; 29:3-11; 31: 31:15-22; 32:23-
27 33;1; 34:3-6; 34:23-24; 34:9-13; 36:2-3. Finally, Google incorrectly contends that the
28 parties “asked this Court to stay discovery and all other proceedings” during Perfect
10’s appeal because “further DMCA-related discovery would be unnecessary if the
Ninth Circuit affirmed this Court’s rulings.” Memo at 5. This assertion is simply
false. Perfect 10 agreed to a stay during the pendency of its appeal to conserve its
limited resources and so that this case would not be proceeding simultaneously before
two different courts. Indeed, this Court’s August 25, 2010 Order staying proceedings
before this Court (Docket No. 978) specifically states that “it is in the best interests of
judicial economy to stay discovery, motion practice, and all other proceedings in the
District Court . . . until the Ninth Circuit rules on Perfect 10’s appeal . . .”

1 reasonably calculated to lead to the discovery of admissible evidence.” Order at 2.

2 As Google has previously argued before this Court, when this Court reviews
3 Magistrate Judge Hillman’s Order, “[t]he reviewing court may not simply
4 substitute its judgment for that of the deciding court.” Google Inc.’s Opposition to
5 Perfect 10, Inc.’s Motion for Review of, and Objections to, Magistrate Judge
6 Hillman’s June 16, 2010 Order Denying Perfect 10, Inc.’s Motion for Evidentiary
7 Sanctions (“Google’s Opposition”) (Docket No. 944) at 8-9, *quoting Grimes v. City*
8 *and County of San Francisco*, 951 F.2d 236, 241 (9th Cir. 1991). Moreover,
9 “[w]hen ruling on discovery matters, a magistrate judge ‘is operating in a zone of
10 very broad discretion’ and any permissible view of the evidence must be accepted.”
11 *Id.* at 9, *quoting Westefer v. Snyder*, 472 F.Supp.2d 1034, 1047 (S.D. Ill. 2006).

12 Here, it was certainly permissible for Magistrate Judge Hillman to conclude
13 that: (i) Perfect 10 was entitled to depose Ms. Poovala; (ii) Google had failed to
14 meet its heavy burden of showing that extraordinary circumstances exist which
15 compel the entry of a protective order prohibiting Ms. Poovala’s deposition; and
16 (iii) the documents that Perfect 10 seeks in connection with Ms. Poovala’s
17 deposition are relevant to the subject matter of this action or reasonably calculated
18 to lead to the discovery of admissible evidence. Moreover, Judge Hillman’s Order
19 cannot possibly be clearly erroneous or contrary to law, because Google failed to
20 set forth any facts establishing that Ms. Poovala’s deposition will cause her
21 annoyance, embarrassment, oppression, or unique burden or expense.

22 Google’s key assertions in support of the Motion – that the Order should be
23 reversed because it allows discovery on established matters and permits Perfect 10
24 to relitigate the SJ Order – are fatally flawed, for at least three reasons. First, Ms.
25 Poovala’s testimony is relevant to numerous issues regarding Perfect 10’s
26 copyright claims that remain to be tried. These include, without limitation:
27 (i) which of the 8,000 URLs in Perfect 10’s spreadsheet-style “Group B” notices
28 are compliant; (ii) whether Google expeditiously processed any of Perfect 10’s

1 Group B notices; (iii) what constitutes a compliant DMCA notice when there are
2 many infringing P10 Images on the same web page; (iv) whether Google’s
3 treatment of notices that it forwarded to chillingeffects.org constitutes direct or
4 contributory infringement; (v) programs such as AdWords, for which Google has a
5 policy of essentially not responding to any DMCA notices; (vi) Google’s infringing
6 activity after June 2009, the period covered by Google’s Partial Summary
7 Judgment Motions; (vii) what knowledge Google had regarding that infringing
8 activity; and (viii) any DMCA notices sent by Perfect 10 to Google after June
9 2009, which were not addressed in the SJ Order. These notices include: (i) the 95
10 Group C notices that were not at issue in connection with the SJ Order, but were
11 raised by Perfect 10 in connection with its motion for preliminary injunction (the
12 “PI Notices”). As Justice Ikuta correctly noted during oral argument on Perfect
13 10’s recent appeal and as Google’s attorney confirmed, this Court has yet to
14 address these notices. Zada Decl., Exh. 12 (Transcript, 25:11-16); and
15 (ii) numerous DMCA notices sent by Perfect 10 to Google after this Court issued
16 the SJ Order, many of which comply with the standards for DMCA notices set forth
17 in that order. Zada Decl. ¶3, Exh. 2. These are just some of the many issues about
18 which Perfect 10 may properly depose Ms. Poovala.

19 Second, Google’s assertion that Perfect 10 may not depose Ms. Poovala
20 because the SJ Order established certain facts as no longer in dispute is simply
21 wrong. Rather, it is well established that the SJ Order is an interlocutory, non-final
22 order and that this Court retains the power to reconsider and modify partial
23 summary judgments such as the SJ Order at any time prior to final judgment when
24 such is warranted. *See, e.g.*, Fed. R. Civ. P. 54(b).² Therefore, Perfect 10 is

25 _____
26 ² Google misleadingly quotes only a portion of Perfect 10’s argument in order to
27 mistakenly contend that Perfect 10’s position defies this Court’s rulings and the
28 Federal Rules of Civil Procedure. Memo at 9-10. In fact, as counsel for Perfect 10
stated at the hearing before Magistrate Judge Hillman on Google’s Motion to Quash (in
language Google fails to quote), Fed. R. Civ. P. 54(b) supports Perfect 10’s position:

1 entitled to depose Ms. Poovala, the key witness supporting Google's Partial
2 Summary Judgment Motions, to probe the veracity of the assertions found in her
3 declarations in support of those motions. This is particularly true here, where
4 Magistrate Judge Hillman has determined that "there appears to be some conflict"
5 between these declarations and Ms. Poovala's Rule 30(b)(6) deposition testimony.
6 Order at 2. For this reason as well, Magistrate Judge Hillman's Order is neither
7 clearly erroneous nor contrary to law.

8 Third, the Local Rules specifically provide that a party may move for
9 reconsideration of a decision where new material facts emerge following the
10 decision. As discussed in Section 1.B, below, at least two such material facts have
11 emerged since this Court issued the SJ Order and Magistrate Judge Hillman issued
12 the Order: (1) Google has admitted to criminal wrongdoing by entering into a \$500
13 million Non-Prosecution Agreement with the Department of Justice. In this
14 agreement, Google admitted that, from 2003 to 2009, Google knowingly aided and
15 abetted criminal activity in its advertising programs, which are at issue in this case
16 and upon which this Court has not yet ruled. At the same time, Google provided
17 Congress with false or misleading testimony regarding these advertising programs,
18 its knowledge of the illegal activity, and its efforts to stop illegal conduct; and
19 (2) Google has made available to the public a powerful "search-by-image" capability.
20 This capability, which Google likely has had available for its own internal use for
21

22 The ruling on the summary judgment motion is hardly a final ruling. In
23 fact, **Federal Rule of Civil Procedure 54(b) specifically says that any**
24 **order or decision that adjudicates fewer than all the claims may be**
25 **revised at any time before the entry of a judgment adjudicating all the**
26 **claims and all the parties' rights and liabilities.** [¶] Ms. Poovala is the
27 key deponent -- is the key witness apparently from Google's perspective
relating to issues as to how they dealt with notices that were submitted by
Perfect 10. She submitted two declarations and we're entitled to depose
her regarding those matters regardless of Judge Matz's ruling.

28 *See Declaration of Bradley R. Love in support of the Motion (Docket No. 1009-2),
Exhibit 2, at 6:20-7:7 (Transcript of August 9, 2010 hearing) (emphasis added).*

1 years, allows Google to easily remove from its system all copies of P10 Images
2 identified in Perfect 10's notices, including those found in Google's Image Search and
3 Web Search results. Zada Decl. ¶¶2-4, Exhs. 1-3. These new material facts provide an
4 independent basis for Perfect 10 to fully depose Ms. Poovala.

5 **B. Material Facts Occurring After Magistrate Judge Hillman's Order**
6 **Provide A Further Basis To Depose Ms. Poovala**

7 **1. Google's August 2011 Non-Prosecution Agreement**

8 In August 2011, Google entered into a criminal Non-Prosecution Agreement
9 with the Department of Justice and the United States Attorneys' Office for the District
10 of Rhode Island (the "Non-Prosecution Agreement"). Under the terms of the Non-
11 Prosecution Agreement, Google admitted to knowingly and repeatedly violating
12 Federal criminal laws against the "unsafe and unlawful importation of prescription
13 drugs" for years, by allowing Canadian online pharmacies to advertise prescription
14 drugs for sale to Google users in the United States through Google's AdWords
15 advertising program. As a result, Google paid a \$500 million penalty, one of the
16 largest penalties ever levied against a United States corporation. Zada Decl. ¶¶6-8,
17 Exhs. 5-7.

18 A Wall Street Journal article discussing the Non-Prosecution Agreement stated
19 that, "[i]n the years leading up to the [Justice Department] investigation, **Google**
20 **executives testified repeatedly in Congress that the company had 'rigorous'**
21 **controls to stop unlawful advertisements.** Those included retaining a series of third-
22 party services to screen out sites that didn't comply with U.S. law." Zada Decl. ¶6,
23 Exh. 5, pp. 3-4 (emphasis added). The article added that Peter Neronha, the Rhode
24 Island United States Attorney who led the probe, said that **"those efforts amounted to**
25 **'window dressing,' allowing Google to continue earning revenues from the**
26 **allegedly illicit ad sales even as it professed to be taking action against them."** *Id.*
27 (emphasis added). Mr. Neronha stated that Larry Page, Google's co-founder, "knew
28 what was going on," and added: "Suffice it to say that this is not two or three rogue

1 employees at the customer service level doing this on their own. . . . **This was a**
2 **corporate decision to engage in this conduct.**” *Id.* (emphasis added).

3 The above discussion demonstrates that Google’s testimony before Congress
4 was at least misleading, if not untruthful, and that Google’s **six years** of unlawful
5 conduct was known and approved at the highest corporate level. **The illegal activity**
6 **which Google admittedly aided and abetted involved trademark infringement,**
7 **copyright infringement, patent infringement, and the sale of counterfeit goods.**
8 Zada Decl. ¶¶6-12, Exhs. 5-11.

9 This situation is eerily similar to Google’s conduct in this case. Here, as well,
10 Google has relied upon Ms. Poovala to contend that Google is a responsible and
11 innocent Internet Service Provider that “went beyond what the law requires” to process
12 Perfect 10’s DMCA notices, and “regularly blocks links to content (including
13 thumbnails) from search results for policy and legal reasons . . .” Google Partial
14 Summary Judgment Motion for Web and Image Search (Docket No. 428) at 1:19-20,
15 2:25-27. In her declarations, Ms. Poovala made assertions that Google complied with
16 copyright laws and the requirements of the DMCA. In light of the new material facts
17 concerning the Non-Prosecution Agreement, and Google’s false and misleading
18 testimony to Congress, Perfect 10 at the very least should be able to fully depose Ms.
19 Poovala, to determine whether any of the testimony set forth in the declarations upon
20 which this Court so heavily relied in the SJ Order was untruthful as well. *See, e.g.,*
21 Ninth Circuit Model Civil Jury Instruction No. 2.8 (evidence that a witness lied under
22 oath on a prior occasion may be considered, along with all other evidence, in deciding
23 whether or not to believe the witness and how much weight to give to the testimony of
24 the witness).

25 2. Google’s “Search By Image” Capability

26 Google and Ms. Poovala have repeatedly and incorrectly claimed that Perfect
27 10’s “Group C” DMCA notices, which included copies of the allegedly infringing P10
28 Images, were unreasonably burdensome to process. *See, e.g.,* Google Partial Summary

1 Judgment Motion for Web Search and Image Search (Docket No. 428) at 1:14-16;
2 9:17-11:19; 22:13-16; Declaration of Shantal Rands Poovala (Docket Nos. 467-469
3 [under seal]), ¶¶86-90. In response, Perfect 10 has argued that its Group C notices that
4 were created using Adobe Acrobat Professional were the only type of notices that
5 could efficiently identify tens of thousands of infringements. Moreover, these notices
6 were easier to process because Google could immediately see the infringing webpages
7 and identified infringing images and could use Adobe’s advanced features to remove
8 infringing links. Zada Decl. ¶3, Exh. 2.³

9 In June 2011, Google made available to its users a powerful “search by
10 image” capability. Zada Decl. ¶¶2-4, Exhs. 1-3. Google has likely had this
11 capability for its own internal use for years. Google’s “search-by-image”
12 capability now allows Google users to search on an actual image and find the exact
13 locations of hundreds of identical copies of that image in Google’s Image Search
14 and Web Search results. Zada Decl. ¶¶2-4, Exhs. 1-3.

15 The consequences of this new evidence of Google’s capabilities are profound.
16 First, the existence of Google’s “search-by-image” capability contradicts Google’s
17 assertion that the inclusion of images in DMCA notices makes those notices more
18 difficult to process. Google could have simply taken any Perfect 10 DMCA notice
19 which contained identified Perfect 10 infringing images and removed all such images
20 from its system, almost automatically, using its search-by-image capability.

21 Second, Google’s search-by-image feature reveals the massive amount of
22 infringement that exists on Google’s system – hundreds of thousands of infringing P10
23 Images and links. Zada Decl. ¶¶2-4, Exhs. 1-3. In fact, Google offers 13,900 direct
24 links to one infringing P10 Image alone. Zada Decl. ¶4, Exh. 3. When there is this

25 _____
26 ³ Perfect 10 began sending its Group C notices using Adobe to archive the infringing
27 web pages and identify which images on those webpages were infringing, in part
28 because Google claimed that Perfect 10’s Group B spreadsheet notices (which
followed Google’s instructions), did not provide such information and therefore were
deficient.

1 level of infringement, Google’s current policy of requiring copyright holders to cut and
2 paste tens of thousands of URLs, one by one, is simply unworkable. To put this new
3 evidence into perspective, **it took Perfect 10 at least three full months to cut and**
4 **paste roughly 8,000 URLs** into 48 Group B notices. It would take Perfect 10 years to
5 cut and paste the URLs for the **hundreds of thousands** of direct links that Google now
6 provides to repeatedly identified infringing P10 Images. Zada Decl. ¶4, Exh. 3. By
7 contrast, Google can rapidly locate and remove **all copies** of identified P10 Images
8 from its system, using its search-by-image capability.

9 Finally, the fact that Google can use this “search-by-image” capability to locate
10 all copies of a particular P10 Image on its system means that Google knows (or should
11 know) of that infringement. Zada Decl. ¶¶2-4, Exhs. 1-3.

12 This new evidence regarding Google’s “search-by-image” capability is
13 particularly relevant in light of comments made by Judge Ikuta, during the recent oral
14 argument, that Google possessed image recognition technology, but this Court failed to
15 address the evidence submitted by Perfect 10 regarding this issue. Zada Decl., Exh. 12
16 (Transcript), 26:15-27:4; 29:3-11.⁴ At the very least, such new evidence provides a
17 basis to question Ms. Poovala regarding Google’s image recognition capability,
18 whether Google could use such capability to remove infringing Perfect 10 images
19 identified in DMCA notices, when Google developed such capability, and whether the
20 existence of such capability contradicts any statements in Ms. Poovala’s declarations.

21
22
23 ⁴ During oral argument, Judge Ikuta questioned why this Court had stated in the PI
24 Order that the only evidence submitted by Perfect 10 in support of its assertion that
Google possessed image recognition technology was “speculation” by Dr. Zada:

25 I know that Google does have that capability. And they have the
26 pages there that were sent to the District Court. And there was the
27 McPhatter Declaration, and there was the Tin Eye material. So, they had
28 more than the Zada Declaration. I'm wondering whether that was not
shown to the District Court or why the District Court said that all that was
presented was the Zada Declaration. Zada Decl. ¶13, Exh. 12, 29:3-11.

1 **II. RELEVANT FACTUAL BACKGROUND**

2 **A. Perfect 10's 30(b)(6) Deposition**

3 On or about June 30, 2008, Perfect 10 served a Rule 30(b)(6) deposition notice
4 upon Google. Declaration of Andrea Pallios Roberts in support of Google's Motion to
5 Quash (Docket No. 913) ("Roberts Decl."), Exh. C. In response, Google designated
6 Ms. Poovala as one of Google's witnesses to testify regarding three of the topics set
7 forth in the Rule 30(b)(6) notice. *Id.*, Exh. D. Unlike with Alexander McGillivray and
8 Bill Brougher, two other Rule 30(b)(6) witnesses previously designated by Google,
9 Perfect 10 specifically chose not to notice Ms. Poovala's individual deposition for the
10 same day as the Rule 30(b)(6) deposition. *Id.*, Exhs. J, K; Declaration of Jeffrey N.
11 Mausner in opposition to Google's Motion to Quash (Docket No. 914) ("Mausner
12 Decl."), ¶2. Accordingly, as Magistrate Judge Hillman correctly held in the Order [*see*
13 Order at 2], Perfect 10 has never before taken Ms. Poovala's deposition.

14 The Rule 30(b)(6) deposition took place on November 19, 2008. It was
15 unilaterally ended by counsel for Google, despite protests by counsel for Perfect 10
16 that "[w]e are not finished." Mausner Decl., ¶2 and Exh. A [Transcript of Rule
17 30(b)(6) deposition ("Rule 30(b)(6) Depo.")] at 115:10-13, 115:20-21, 115:25-116:2,
18 116:24-117:1. As a result, Perfect 10 actually questioned Google through Ms. Poovala
19 for less than three hours. *Id.*, ¶3 and Exh. A, at 3:4, 117:3-6.

20 **B. Google Relies Upon The Poovala Declaration And The Poovala**
21 **Rebuttal Declaration In Support of Its Partial Summary Judgment**
22 **Motions**

23 On July 2, 2009, Google filed its Partial Summary Judgment Motions. That
24 same day, Google filed the Declaration of Shantal Rands Poovala in support of the
25 Partial Summary Judgment Motions (Docket Nos. 467-469 [under seal]) (the
26 "Poovala Decl." or "Poovala Declaration"). The Poovala Declaration is 27 pages
27 and consists of 100 separate paragraphs and 32 separate exhibits. It is replete with
28 such blanket statements as: (i) "Google processes all DMCA notices expeditiously"

1 [Poovala Decl. ¶17]; (ii) “Google has established and diligently implemented repeat
2 infringer policies ...” [*id.*, ¶36]; and (iii) “The Group C Notices also failed to identify
3 the location of any allegedly infringing material” [*id.*, ¶51]. *See* Mausner Decl.
4 (Docket No. 914), Exh. B [the Poovala Declaration, without the exhibits thereto].

5 Thereafter, on or about September 9, 2009, Google filed the Rebuttal
6 Declaration of Shantal Rands Poovala in support of the Partial Summary Judgment
7 Motions (Docket No. 534 [under seal]) (the “Poovala Rebuttal Decl.”). The Poovala
8 Rebuttal Declaration goes so far as to state that Google had a policy for processing
9 DMCA-compliant notices of infringement before March 2002, even though Ms.
10 Poovala did not begin working for Google until November 2002. Poovala Decl. ¶1,
11 Poovala Rebuttal Decl. ¶8. *See* Mausner Decl., Exh. C [the Poovala Rebuttal
12 Declaration, without the exhibits thereto]. Of course, neither the Poovala Declaration
13 nor the Poovala Rebuttal Declaration existed when Perfect 10 conducted its Rule
14 30(b)(6) deposition on November 19, 2008.

15 **C. As Magistrate Judge Hillman Found, The Poovala Declarations**
16 **Conflict With Ms. Poovala’s Testimony At The Rule 30(b) Deposition**

17 In its portion of the Joint Stipulation submitted in connection with Google’s
18 Motion to Quash, Perfect 10 provided Magistrate Judge Hillman with a long list of
19 disparities between the Poovala Declarations and Ms. Poovala’s testimony at the Rule
20 30(b)(6) deposition. *See* Joint Stipulation in connection with Google’s Motion to
21 Quash (Docket No. 912) at 21-24.

22 After examining these contradictions, Magistrate Judge Hillman ruled that “there
23 appears to be some conflict between the pleadings defendant has submitted and Ms.
24 Poovala’s testimony at the Rule 30(b)(6) deposition.” Order at 2. This ruling is based
25 upon Magistrate Judge Hillman’s review of the evidence and is not clearly erroneous.
26 Accordingly, Perfect 10 at the very least is entitled to depose Ms. Poovala regarding
27 the apparent contradictions between the Poovala Declaration and the Poovala Rebuttal
28 Declaration, on the one hand, and Ms. Poovala’s testimony at the Rule 30(b)(6)

1 deposition, on the other.

2 **D. Perfect 10 Seeks To Depose Ms. Poovala**

3 Following its receipt of the Poovala Declaration and the Poovala Rebuttal
4 Declaration, Perfect 10 sought to depose Ms. Poovala in her individual capacity for the
5 first time, only to learn that Ms. Poovala could not be deposed until she returned from
6 maternity leave sometime in 2010. Mausner Decl. ¶¶6-7 and Exh. D. Although
7 Perfect 10 sought to depose Ms. Poovala since October 2009, Google did not contend
8 until April 23, 2010 that Perfect 10 was not entitled to depose Ms. Poovala. *Id.*, ¶7 and
9 Exh. E (April 23, 2010 letter from Andrea P. Roberts to Jeffrey N. Mausner).

10 **III. THE STANDARD OF REVIEW PREVIOUSLY ADVOCATED BY**
11 **GOOGLE SUPPORTS AN AFFIRMANCE OF MAGISTRATE JUDGE**
12 **HILLMAN’S ORDER**⁵

13 A magistrate judge’s ruling on a non-dispositive motion may be set aside only if
14 it is “clearly erroneous or contrary to law.” 28 U.S.C. §636(b)(1)(A); Fed. R. Civ. P.
15 72(a); *Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404, 1414 (9th Cir. 1991). “The
16 reviewing court may not simply substitute its judgment for that of the deciding court.”
17 *Grimes*, 951 F.2d at 241 (reversing district court’s order altering the terms of a
18 magistrate’s discovery order). Moreover, when ruling on discovery matters, a
19 magistrate judge “is operating in a zone of very broad discretion” and any permissible
20 view of the evidence must be accepted.” *Westefer*, 472 F.Supp.2d at 1047
21 (“Ordinarily, under clearly erroneous review, if there are two possible views, the
22 reviewing court should not overturn the decision solely because it would have chosen
23 the other view.”) (internal citations omitted).

24
25
26
27 ⁵ This section is taken directly from pages 8-9 of Google’s Opposition to Perfect 10’s
28 Motion for Review of Magistrate Judge Hillman’s June 16, 2010 Order (Docket No. 944).

1 **IV. GOOGLE FAILS TO ESTABLISH, AND CANNOT ESTABLISH,**
2 **THAT MAGISTRATE JUDGE HILLMAN’S ORDER IS CLEARLY**
3 **ERRONEOUS OR CONTRARY TO LAW**

4 As the above discussion demonstrates, application of the standards set forth in
5 Section III, above, to the evidence before this Court compels the conclusion that this
6 Court should deny the Motion, because Magistrate Judge Hillman’s Order is neither
7 clearly erroneous nor contrary to law. Magistrate Judge Hillman certainly had
8 discretion to deny Google’s Motion to Quash and permit Perfect 10 to fully depose Ms.
9 Poovala, even after this Court issued its SJ Order and PI Order, for all of the reasons
10 set forth in the Order. Moreover, Google has never even attempted to show that
11 deposing Ms. Poovala would subject her to “annoyance, embarrassment, oppression, or
12 unique burden or expense” – the standard necessary for Magistrate Judge Hillman to
13 have issued a protective order. *See* Order at 2, *quoting Blankenship*, 519 F.2d at 429.
14 As explained below, Google’s contrary contentions lack merit and fails to provide any
15 grounds for this Court to rule that the Order is clearly erroneous or contrary to law.

16 **A. Google’s Mistaken Assertions Provide No Basis To Reverse**
17 **Magistrate Judge Hillman’s Order**

18 Google asserts that the Order is clearly erroneous and contrary to law because it
19 allows Perfect 10 “to pursue irrelevant discovery from Ms. Poovala related to issues
20 already decided” by this Court’s SJ Order. Memo at 7. According to Google, Fed. R.
21 Civ. P. 56(d)(1) prevents Perfect 10 from conducting discovery regarding these facts.
22 *Id.* at 8. Google is wrong, for at least three separate reasons.

23 **1. Perfect 10 Properly May Depose Ms. Poovala About Numerous**
24 **Issues Remaining In The Case**

25 Google’s assertion ignores the fact that there are numerous issues remaining in
26 the case about which Perfect 10 properly may depose Ms. Poovala. These include:

27 1) Which of the 8,000 URLs in Perfect 10’s spreadsheet-style “Group B”
28 notices is compliant and whether Google expeditiously processed any of these “Group

1 B” notices. Google itself concedes that these matters remain at issue. *See* Memo at 14.

2 2) Whether Google’s treatment of notices that it forwarded to
3 chillingeffects.org constitutes direct infringement, and whether Google’s linking to
4 full-size images and live links in those notices constitutes contributory infringement.
5 During the Ninth Circuit’s oral argument, Chief Judge Kozinski was particularly
6 concerned about Google sending Perfect 10 notices with live links to Chilling Effects.
7 Zada Decl. Exh. 12, at 36:2-3. The fact that this Court addressed this issue in the PI
8 Order in no way prevents Perfect 10 from proving at trial that Google is liable for such
9 conduct. This is particularly true because Perfect 10 has uncovered new evidence that
10 the DMCA notices it has sent to Google are now being substantially altered before
11 being published on chillingeffects.org. Zada Decl. ¶5, Exh. 4.

12 3) Which of Perfect 10’s 95 PI Notices complied with the DMCA and
13 whether Google processed these notices expeditiously. Google concedes that this
14 Court has not yet addressed those notices. Zada Decl. Exh. 12, 25:11-16.

15 4) What constitutes a compliant DMCA notice when an infringing webpage
16 contains many infringing images, or when there is no authorized location of the
17 copyrighted work?

18 5) DMCA notices sent by Perfect 10 to Google after June 2009, the period
19 covered by Google’s Partial Summary Judgment Motions. Google concedes that
20 Perfect 10 submitted additional notices after it filed the Partial Summary Judgment
21 Motions. Memo at 12 n.2. Google’s assertion that these notices are not compliant [*id.*]
22 does not change the fact that this Court has never addressed these notices, and Perfect
23 10 properly may depose Ms. Poovala regarding them.

24 The Court’s SJ Order granted a DMCA safe harbor to Google only for the 18
25 Group C notices sent by Perfect 10 between June 2007 and May 2009. Since Google
26 filed the Partial Summary Judgment Motions, Perfect 10 has sent Google numerous
27 additional notices, many of which followed the guidelines set out by this Court in the
28 SJ Order and thus comply with the DMCA. Zada Decl. ¶¶3, 5, Exh. 2 pp. 9-15, Exh. 4,

1 pp. 4-7. Nevertheless, the infringement on Google’s system has skyrocketed. Google
2 is currently offering direct links to **hundreds of thousands of P10 Images** in its Image
3 Search and Web Search results. Many of the P10 Images currently being infringed by
4 Google were identified to Google as far back as 2004, in compliant Group B notices
5 sent by Perfect 10. Zada Decl. ¶¶2-4, Exhs. 1-3. Under these circumstances,
6 Magistrate Judge Hillman’s Order that Perfect 10 may fully depose Ms. Poovala about
7 these and other issues is neither clearly erroneous nor contrary to law.

8 **2. Google Ignores Settled Law That The SJ Order May Be**
9 **Revised At Any Time Before Final Judgment**

10 Google’s contention that the SJ Order should bar Perfect 10 from deposing Ms.
11 Poovala is contrary to applicable case law and the Federal Rules of Civil Procedure.
12 Because the SJ Order did not resolve all of the claims in this action, it is interlocutory
13 and thus subject to revision at any time. As Fed.R.Civ.P. 54(b) specifically states, “any
14 order or other decision, however designated, that adjudicates fewer than all the claims
15 or the rights and liabilities of fewer than all the parties does not end the action as to any
16 of the claims or parties and may be revised at any time before the entry of a judgment
17 adjudicating all the claims and all the parties' rights and liabilities.” It is well settled
18 that “a district court retains the power to reconsider and modify its interlocutory
19 judgments, including partial summary judgments, at any time prior to final judgment
20 when such is warranted.” *American Canoe Assoc. v. Murphy Farms, Inc.*, 326 F.3d
21 505, 514–15 (4th Cir.2003). *See also Dreith v. Nu Image, Inc.* 648 F.3d 779, 787 (9th
22 Cir. 2011) (“a district court has the inherent power to revisit its non-final orders”). In
23 fact, this Court has ruled on motions for reconsideration of partial summary judgment
24 orders. *See, e.g., M2 Software, Inc. v. Madacy Entertainment*, 421 F.3d 1073, 1078-79
25 (9th Cir. 2005).

1 Under these circumstances, Magistrate Judge Hillman was well within his rights
2 in permitting Perfect 10 to fully depose Ms. Poovala notwithstanding the SJ Order.
3 Accordingly, the Order is neither clearly erroneous nor contrary to law.⁶
4 Fed. R. Civ. P. 56(d)(1), upon which Google purports to rely, does not compel a
5 different conclusion. First, Rule 56 was significantly amended in 2010. Accordingly,
6 Fed. R. Civ. P. 56(d)(1) as cited by Google is no longer applicable. In any event,
7 former Fed. R. Civ. P. 56(d)(1)'s provision that certain facts be treated as established
8 applies only to orders specifying what facts are not genuinely at issue.

9 **3. New Material Facts Provide A Separate Basis To Depose Ms.**
10 **Poovala**

11 Local Rule 7-18 provides that a motion for reconsideration of a decision may be
12 based on the emergence of new material facts occurring after the time of the decision.
13 Here, as explained in Section I.B, above, both Google's entry into the Non-Prosecution
14 Agreement in August 2011 and Google's making its "search-by-image" capability
15 available to its users in June 2011 constitute new material facts which provide a
16 separate basis for Perfect 10 to depose Ms. Poovala.

17 At the very least, the facts surrounding the Non-Prosecution Agreement
18 described above provide a basis for Perfect 10 to probe the truthfulness of Ms.
19 Poovala's declarations in support of Google's Partial Summary Judgment Motions.
20 This is particularly true here, because Perfect 10 has discovered that, notwithstanding
21 the terms of the Non-Prosecution Agreement, Google is continuing to host thousands
22 of blogspot.com websites which promote illegal pharmacies and simultaneously
23 infringe trademarks, patents, and copyrights, and display Google ads. Zada Decl. ¶¶6-
24 12, Exhs. 5-11.⁷

25 _____
26 ⁶ For this same reason, Google's assertion that the Order is clearly erroneous and
27 contrary to law because it allows Perfect 10 to relitigate the SJ Order [Memo at 14-16]
is incorrect and provides no basis to grant the Motion.

28 ⁷ Perfect 10 has long contended that Google has been obstructing discovery and has
been providing false or misleading statements to this Court. The circumstances

1 Similarly, the facts surrounding Google’s “search-by-image” capability, at the
2 very least, provide a basis to depose Ms. Poovala regarding Google’s image
3 recognition capability. This is particularly true in light of comments by Judge Ikuta, at
4 the recent oral argument before the Ninth Circuit, that Google already possessed image
5 recognition technology:

6 Perfect 10 says, well, look, you have this similar images search.
7 You could go through and get all of the images that they've indicated are
8 infringing, that only they have the right to display, and you could block all
9 those URLs. That argument has some appeal given Google's current
10 existing technology that it's using. . . .Does [Google] know of the
11 infringement? Yes. And could it take steps to block these sites. And they

13 surrounding the Non-Prosecution Agreement, and other recent conduct by Google,
14 support Perfect 10’s contentions. Indeed, a recent article in Forbes Magazine, entitled
15 “Google 21st Century Robber Baron,” describes many illegal activities engaged in by
16 Google, including the conduct that led to the Non-Prosecution Agreement, and
17 concludes that, “[o]ver the last decade, **Google has become the western world’s most**
18 **pervasive serial property infringer....**” Zada Decl. ¶7, Exh. 6, pp. 1-4 (emphasis
19 added). The article adds that “Google has been investigated, sanctioned or fined for
20 illegal Street View wiretapping of WiFi communications in thirteen countries: U.S.,
21 Canada, Germany, France, Switzerland, Netherlands, Spain, Belgium, Czech Republic,
22 South Korea, Japan, Australia, and Hong Kong” and includes a quotation from a
23 Google attorney stating that “**Google’s leadership does not care terribly much about**
24 **precedent or law.**” *Id.* (emphasis added). Another article regarding the Non-
25 Prosecution Agreement states that the “**DOJ’s pharmacy investigation undermines**
26 **Google’s credibility on questions of compliance with the law and good faith in**
27 **enforcing its supposed policies. Previously, when Google argued that it was**
28 **difficult to find bad ads, trademark-infringing domains, or copyrighted content,**
the world could only wonder what made these tasks so difficult for Google. Now
we know: at least sometimes, Google’s difficulties were a farce; behind the scenes,
Google employees were encouraging and supporting the very unlawful conduct
they claimed to oppose.” Zada Decl., ¶8, Exh. 7 (emphasis added).

25 In light of Google’s pervasive illegal conduct, lies, and misrepresentations,
26 Perfect 10 should be able to depose Ms. Poovala regarding Google’s claimed efforts to
27 stop copyright infringement, which Perfect 10 has claimed all along are a farce. *See*
28 Zada Decl. Exh. 5, pp. 3-4 (statement of United States Attorney that Google’s claimed
efforts to stop illegal conduct “**amounted to ‘window dressing,’ allowing Google to**
continue earning revenues from the allegedly illicit ad sales even as it professed to
be taking action against them.”) (emphasis added).

1 argue, yes, they have the technology already. Why doesn't that meet the
2 contributory infringement standard or test?

3 Zada Decl., Exh. 12, 26:17-27:4. Judge Ikuta made the above statements at a time
4 when she was not even aware of Google's recently released "search- by-image"
5 capability. Under these circumstances, Perfect 10 has the right to fully depose Ms.
6 Poovala about issues relating to Google's possession of image recognition capability.

7 **B. Ms. Poovala's Deposition Would Not Be Unreasonably Cumulative**

8 Google also contends that Magistrate Judge Hillman's Order is contrary to law,
9 and that it demonstrated the exceptional circumstances necessary for this Court to issue
10 a protective order barring Perfect 10 from deposing Ms. Poovala, because such a
11 deposition would be highly cumulative and unduly burdensome. Memo at 16-17.
12 Google is wrong, for at least four reasons.

13 First, Perfect 10 has never before taken Ms. Poovala's deposition in her
14 individual capacity. The deposition on November 19, 2008 was a Rule 30(b)(6)
15 deposition of Google, for which Google chose to designate Ms. Poovala. Because
16 Google designated another witness on other subjects on the same day, the Rule
17 30(b)(6) deposition of Ms. Poovala lasted less than 3 hours. Perfect 10 now seeks to
18 depose Ms. Poovala in her individual capacity, after Google's filing of the Poovala
19 Declaration and the Poovala Rebuttal Declaration. As Magistrate Judge Hillman
20 correctly noted, the Federal Rules of Civil Procedure specifically provide that Perfect
21 10 is entitled to depose Ms. Poovala in her individual capacity, notwithstanding the
22 fact that she was designated by Google as a Rule 30(b)(6) deponent. *See* Order at 2;
23 Fed. R. Civ. P. 30(b)(6) (deposition of a corporation such as Google under this section
24 "does not preclude a deposition by any other procedure allowed by these rules").
25 Indeed, Google does not argue, and cannot properly argue, that Perfect 10 needs to
26 obtain leave of Court in order to take Ms. Poovala's deposition.

27 Second, any deposition of Ms. Poovala could not possibly be unreasonably
28 cumulative, because Perfect 10 seeks to depose Ms. Poovala about the issues raised in

1 the Poovala Declaration and the Poovala Rebuttal Declaration, among other things.
2 These declarations, which total 37 pages, 125 paragraphs and 38 accompanying
3 exhibits [*see* Mausner Decl., Exhs. B, C], were not even in existence at the time of the
4 Rule 30(b)(6) deposition on November 19, 2008. Perfect 10 is entitled to question Ms.
5 Poovala about the assertions she makes for the first time in her declarations, including
6 the blanket claims that “Google processes all DMCA notices expeditiously” and that
7 “Google has established and diligently implemented repeat infringer policies ...”
8 [Poovala Decl. ¶¶17, 36].

9 Third, as discussed in Section II.C, above, and as Magistrate Judge Hillman
10 correctly found [*see* Order at 2], various assertions in the Poovala Declaration and the
11 Poovala Rebuttal Declaration are contradicted by Ms. Poovala’s earlier testimony
12 during the Rule 30(b)(6) deposition. Accordingly, Perfect 10 is entitled to depose Ms.
13 Poovala regarding these apparent contradictions. Google’s assertion that this Court
14 “determined as a matter of law that the alleged inconsistencies between Ms. Poovala’s
15 declarations and her prior deposition testimony [Perfect 10] identified were immaterial
16 to Google’s safe harbor” [Memo at 13] is simply wrong. On the contrary, in issuing
17 the SJ Order, this Court specifically failed to address, let alone rule upon, Perfect 10’s
18 evidentiary objections to Ms. Poovala’s declarations. *See* SJ Order; Perfect 10’s
19 Evidentiary Objections (Docket No. 587).

20 Fourth, as Magistrate Judge Hillman noted [*see* Order at 2], the Federal Rules of
21 Civil Procedure specifically provide that a party may conduct up to 10 depositions,
22 lasting seven hours each, without leave of court. *See* Fed. R. Civ. P. 30(a)(2)(A)(i),
23 30(d)(1). Here, the 30(b)(6) deposition of Ms. Poovala on November 19, 2008 lasted
24 less than three hours. Mausner Decl. ¶3 and Exh. A. Accordingly, a deposition of Ms.
25 Poovala in her individual capacity cannot be unreasonably cumulative. Indeed, if
26 Google were correct that a Rule 30(b)(6) deposition could subsequently bar a party
27 from taking an individual deposition of a Rule 30(b)(6) designee, parties would have
28 the incentive to designate all of their key witnesses as separate designees in response to

1 a Rule 30(b)(6) notice, in an attempt to limit the time each witness could be deposed to
2 less than seven hours. As explained above, the language of the Federal Rules of Civil
3 Procedure is directly contrary.⁸

4 Accordingly, for each of the four above reasons, Google has not established, and
5 cannot establish, either that Magistrate Judge Hillman's Order is clearly erroneous or
6 contrary to law, or that the extraordinary or exceptional circumstances necessary for
7 this Court to reverse the Order and issue a protective order prohibiting Perfect 10 from
8 deposing Ms. Poovala exist. *See, e.g.,* J. Moore & J. Lucas, *Moore's Federal Practice*
9 (3d. ed. 2007), § 26.105[2][a], at 26-520.

10 **C. Google's Assertions Regarding Magistrate Judge Hillman's Order**
11 **Concerning The Deposition of Former Google CEO Eric Schmidt Are**
12 **False And Misleading**

13 In the Order denying Google's Motion to Quash, Magistrate Judge Hillman held
14 that his recent Order denying Perfect 10 the opportunity to depose Eric Schmidt,
15 Google's former CEO, "weighs in favor of permitting the individual deposition of Ms.
16 Poovala." Order at 2. Google's assertion that Perfect 10's raising of this argument
17 was "untimely and irrelevant" [Memo at 14] is false and misleading.

18 The parties' Joint Stipulation with respect to Google's Motion to Quash Ms.
19 Poovala's deposition (Docket No. 912) was filed on June 24, 2010. At that time,
20 Magistrate Judge Hillman had not yet ruled on Google's Motion for a Protective Order
21 with respect to the deposition of Eric Schmidt. On July 20, 2010, Magistrate Judge
22 Hillman issued an Order granting Google's Motion for a Protective Order regarding
23 the Schmidt deposition (the "Schmidt Order") (Docket No. 930). One of the grounds
24 advanced by Magistrate Judge Hillman in support of his ruling was that Perfect 10
25 should first depose other lower-level employees rather than "leap-frogging to the

26
27 ⁸ The cases cited by Google [Memo at 17], including *L.W. ex rel. Whitson v. Knox*
28 *County Bd. of Educ.*, 2008 WL 820007 (E.D. Tenn. 2008), are inapposite because they
involved a second individual deposition.

1 pinnacle of [Google’s] corporate pyramid.” As Magistrate Judge Hillman stated,
2 Perfect 10 “still has several more opportunities to depose employees of [Google] who
3 are the most knowledgeable on matters relevant to this lawsuit.” Schmidt Order at 3.

4 Accordingly, in its Supplemental Memorandum in connection with Google’s
5 Motion to Quash Ms. Poovala’s deposition, filed July 26, 2010 (Docket No. 938),
6 Perfect 10 appropriately and timely argued that the Schmidt Order provided an
7 additional basis for it to depose Ms. Poovala, because she was just such “a lower level
8 Google employee with knowledge of matters relevant to this lawsuit.” *Id.* at 2.
9 Magistrate Judge Hillman’s acceptance of this argument was neither clearly erroneous
10 nor contrary to law, and provides a further basis to deny Google’s Motion.

11 **V. MAGISTRATE JUDGE HILLMAN’S ORDER REQUIRING MS.**
12 **POOVALA TO PRODUCE DOCUMENTS AT HER DEPOSITION IS**
13 **NEITHER CLEARLY ERRONEOUS NOR CONTRARY TO LAW**

14 In addition to seeking to depose Ms. Poovala for the first time in her individual
15 capacity, Perfect 10 also requested that Ms. Poovala produce eight categories of
16 documents in connection with her deposition. Roberts Decl., Exh. A. Perfect 10
17 sought such critical documents as (i) communications between Ms. Poovala and other
18 Google employees relating to the processing of notices received from copyright
19 holders; (ii) communications sent or received by Ms. Poovala relating to whether a
20 DMCA notice was deficient or could not or would not be processed; and
21 (iii) communications relating to DMCA notices that Ms. Poovala processed. *Id.* In
22 denying Google’s Motion to Quash, Magistrate Judge Hillman ordered Ms. Poovala to
23 produce the documents sought by Perfect 10, holding that these documents “appear to
24 be relevant to the subject matter of this action and reasonably calculated to lead to the
25 discovery of admissible evidence.” Order at 2. This holding is neither clearly
26 erroneous nor contrary to law.

27 First, Rule 45 of the Federal Rules of Civil Procedure permits a party such as
28 Perfect 10 to request the production of documents in connection with a deposition

1 subpoena. *See* Fed. R. Civ. P. 45(a)(1). The deposition subpoena served upon Ms.
2 Poovala clearly asks her to bring the documents requested to her deposition in San
3 Francisco. Roberts Decl., Exh. A. Accordingly, the subpoena is valid. *See* Fed. R.
4 Civ. P. 45(a)(2).

5 Second, as the Fifth Circuit held in *Wiwa v. Royal Dutch Petroleum Co.*, 392
6 F.3d 812 (5th Cir. 2004), a case cited by Google and Magistrate Judge Hillman [*see*
7 Order at 1-2; Joint Stipulation at 31:6-9], a document request in a subpoena properly
8 may seek documents in the subpoenaed party's "possession, custody, or control." *Id.*
9 at 821. Accordingly, pursuant to Perfect 10's deposition subpoena, Ms. Poovala must
10 produce all responsive documents in her possession, custody, or control. That these
11 documents may be considered "corporate records" in no way changes this conclusion.
12 Indeed, none of the cases upon which Google seeks to rely [*see* Memo at 17-19] stands
13 for the proposition that a party may not obtain documents from a subpoenaed employee
14 because those documents are labeled as "corporate records."

15 Third, Google's claim that the documents sought by Perfect 10 are unreasonably
16 cumulative is unsupported. On the contrary, Perfect 10 was forced to seek these
17 documents from Ms. Poovala because Google refused to produce any documents
18 whatsoever in response to the Eleventh and Thirteenth Requests for Production
19 propounded to Google by Perfect 10, which contain similar requests. *See* Roberts
20 Decl., Exhs. G, H. These documents are not cumulative, because in most cases Google
21 has not produced them. In the few cases where Google has produced such documents,
22 it does not need to re-produce them.

23 Fourth, although Fed. R. Civ. P. 45(c)(3)(a)(iv) permits a court to quash or
24 modify a subpoena that "subjects a person to undue burden," Google has failed to
25 satisfy its burden of proving that compliance with Perfect 10's subpoena would be
26 "unreasonable and oppressive." *See Wiwa*, 392 F.3d at 818. Moreover, as explained
27 above, Perfect 10 certainly needs these documents, because it has been unable to obtain
28

1 them from Google because of Google's obstructionist responses to Perfect 10's
2 discovery requests.

3 Accordingly, for all of these reasons, Magistrate Judge Hillman's Order
4 requiring Ms. Poovala to produce the documents sought by Perfect 10 is not clearly
5 erroneous or contrary to law.

6 **VI. CONCLUSION**

7 Google has failed to demonstrate that Magistrate Judge Hillman's Order is
8 clearly erroneous or contrary to law. It has failed to meet its heavy burden of showing
9 that extraordinary circumstances exist which would allow this Court to enter a
10 protective order prohibiting Perfect 10 from deposing Ms. Poovala. On the contrary,
11 Magistrate Judge Hillman certainly had the discretion to deny Google's Motion to
12 Quash and permit Perfect 10's deposition of Ms. Poovala to go forward, based on all of
13 the evidence before him. Moreover, Perfect 10's deposition subpoena seeks
14 documents that are clearly relevant to critical issues in this action and does not impose
15 an undue burden. Finally, new evidence since Judge Hillman's Order, including
16 Google's entry into the Non-Prosecution Agreement and Google's release of its search-
17 by-Image capability, provides additional basis for Perfect 10 to depose Ms. Poovala.
18 Accordingly, for all of the foregoing reasons, this Court should overrule Google's
19 objections to Magistrate Judge Hillman's Order.

20 Dated: October 24, 2011

Respectfully submitted,

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