

No. 10-56316

IN THE
United States Court of Appeals

FOR THE NINTH CIRCUIT

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PERFECT 10, INC.,

Plaintiff-Appellant,

v.

GOOGLE INC.,

Defendant-Appellee.

*On Appeal from the United States District Court
For the Central District of California
Hon. A. Howard Matz, District Judge*

**DEFENDANT-APPELLEE'S REPLY IN SUPPORT OF ITS MOTION TO
STRIKE**

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GOOGLE INC.

Perfect 10, Inc.’s (“P10”) opposition to Google’s motion to strike fails to justify P10’s inappropriate inclusion of two tentative court orders (one of which Google has never even seen) and an order issued by a magistrate judge after the order on appeal as part of the Excerpts of Record. Rather, P10’s Opposition largely argues the purported merits of P10’s appeal—adding an additional 13 pages to the 84 pages (and 16,733 words) of its Opening Brief—and rests on erroneous legal arguments to justify its conduct.

Because Google addressed the merits of the issues on appeal in its Response Brief, it will not rehash those arguments in this Reply. The nature of Google’s motion to strike is procedural. It is brought not to prevent this Court’s review of relevant material, but to enforce the Federal and Local Rules’ prohibitions against P10’s inclusion of tentative orders that were not even docketed by the district court and a discovery ruling issued by the magistrate that is not appealable and post-dates the district court’s rulings at issue here.

The Amazon Tentative Order. P10 claims that ER10097-98 is a portion of an unpublished, and undocketed, tentative order in the *Amazon* litigation. P10 Opp. at 10. At P10’s own request, it was never issued as a final order following settlement by the parties who briefed the motion leading to the tentative order. *Id.*, n.8; Declaration of Bradley R. Love (“Love Decl.”), filed concurrently, Ex. 1 (2/22/2010 Hearing Transcript in *Amazon* litigation at 3:12-4:12). Although P10 is

correct that the *Amazon* litigation was consolidated with the case below, Google was not a party to the motion that led to the tentative order, did not participate in the briefing or the hearing for that motion, and never received a copy of the tentative order. *Id.* at 2, 5:19-21. Further, P10 did not include the entirety of that single-spaced, 34-page tentative order in its Excerpts of Record. *Id.* at 3:13-18. As such, Google has still never seen the whole of that order and, neither it, nor this Court, has the ability to assess the two pages P10 selected in the context of the whole draft opinion, or even verify that the two pages are accurate copies. This failure alone makes P10's inclusion of these two pages improper.

P10's other arguments for including two pages from a tentative order addressing a motion it brought against a third party also fail. This Court's Rules, which allow the record to include an "opinion, findings of fact or conclusions of law relating to the judgment or order appealed from" (Cir. R. 30-1.4(a)(iv)), do not permit the inclusion of the *Amazon* tentative order. That undocketed, tentative order does not provide opinions, findings, or conclusions referred to or relied upon within the appealed order denying P10's Second PI Motion; it was neither referenced in the district court's orders on appeal nor litigated by the parties to this appeal. P10 cites no authority suggesting the Circuit Rule encompasses tentative orders, but relies instead on an expansive reading of the word "related." P10 Opposition at 1-2. However, P10's proposed interpretation contravenes Circuit

Rule 10-2, which limits the record on appeal to (a) “the official transcript of oral proceedings before the district court” and (b) “the district court clerk’s record of original pleadings, exhibits and other papers filed with the district court.” The tentative rulings do not fit either of these categories. And if P10’s interpretation of Circuit Rule 30-1.4(a)(iv) were correct, any tentative, provisional or otherwise non-final ruling, by any court, at any time, could be interjected into the record for the first time on appeal.

P10’s reliance on *Townsend v. Columbia Operations*, 667 F.2d 844 (9th Cir. 1982), is similarly flawed. P10 Opp. at 2-4. In *Townsend*, the documents at issue “were physically in the courtroom at the argument, were referred to and relied on [as evidence] by both sides in that argument, were the basis of the opinion dictated by the court at the end of the argument,” and were omitted from the original record by “error or accident.” *Id.* at 848-849. They were also the subject of an order by the district court pursuant to Fed. R. App. P. 10(e) directing that the documents be included in the record on appeal. *Id.* In contrast, the *Amazon* tentative order was (1) not the subject of a Rule 10(e) order, (2) not accidentally omitted from the record, (3) not relied upon as evidence by the district court or the parties in briefing the motion at issue, and (4) not discussed at the hearing in this case. Moreover, because the *Amazon* tentative order was not filed or provided to Google, it cannot be properly characterized as being part of “what actually happened,” *id.* at 849,

before the district court on P10's Second PI Motion against Google. *Cf.* P10 Opp. at 10. *Townsend* is consistent with this Court's admonition that "[o]nly the court may supplement the record" and "[l]itigants should proceed by motion or formal request" to include items not actually in the record below. *Lowry v. Barnhart*, 329 F.3d 1019, 1024-25 (9th Cir. 2003) (striking improper "unilateral supplementation of the record"). P10's inclusion of a tentative ruling from a different case is not.¹

As a matter of policy, tentative orders should not be part of the Excerpts of Record. A tentative order is not binding on anyone. *Thomas v. Housing Authority of Los Angeles*, 2005 WL 6133692, *1 (C.D. Cal. June 3, 2005) ("tentative order binds neither the court nor the parties"). Rather, tentative orders allow parties to target their oral argument to the issues of interest to the court, and for the court to test its conclusions knowing that the parties have the opportunity to persuade the

¹ P10's argument that its alleged excerpts from the *Amazon* tentative order have become part of the record because P10 discussed it in its unsolicited, improper "Response" to the tentative summary judgment order also fails. P10 Opposition at 2, 10. P10's "Response" was attached to a declaration filed *after* the appealed order issued. ER100114-100118; ER20016-20064 (August 1, 2010 Declaration of J. Mausner); SER1-26 (July 30, 2010 Order Denying Preliminary Injunction Motion); *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988) ("Papers submitted to the district court after the ruling that is challenged on appeal should be stricken from the record on appeal"). Having been presented to the district court without notice or the opportunity for Google to provide a written reply, P10's "Response" was a legal nullity. *E.g.*, U.S. District Court for the Central District of California, Local Rule 7-10 ("Absent prior written order of the Court, the opposing party shall not file a response to the reply"). P10 cites no authority to the contrary.

court otherwise. Use of tentative orders as an argument for overturning final rulings would likely chill district courts' use of tentative orders.

Further, permitting the record on appeal to include anything referenced in a sur-reply filed *after* an order issues would thwart the Rules of Civil and Appellate Procedure, as well as the principles of notice and fairness those rules were designed to promote. *Kirshner*, 842 F.2d at 1077 (striking contested portions of Excerpts of Record which “were neither filed with the district court, considered by the court, nor even before the court when it entered the order . . . on appeal”); *Lowry*, 329 F.3d at 1024 (striking portion of Excerpts of Record not in the district court’s docket and imposing sanctions because limitations of Fed. R. App. P. 10(a) are “fundamental” and only documents “filed in the district court ... ensure that both opposing counsel and the district court are aware of it at a time when disputes over authenticity can be properly resolved”).

The tentative *Amazon* order should be stricken from the Excerpts of Record.

The Tentative Summary Judgment Order. P10 concedes that the district court explicitly stated ER10063-87 is a draft, tentative summary judgment order and fails to justify its inclusion in the Excerpts of Record. Its assertion that the district court intended to allow the parties to cite to the tentative after it issued a superseding final order is not logical. P10 Opposition at 9-10. The district court’s admonition during the summary judgment argument that the tentative order “is not

to be distributed or used for any purpose until I issue a final order” was plainly intended to bar use of the tentative order to the extent it was not incorporated into the final order. The district court specifically instructed the parties to return the tentative order to the court. SER 61 (5/10/10 Hearing Transcript at 4:19-20) (“At the end of this hearing, make sure that you return that order to Mr. Montes.”). The district court would not have instructed the parties to turn in their copies of the tentative order if it intended the tentative order (in its tentative order format) ever to be used for any purpose.

P10’s other arguments are unavailing for the same reasons discussed above regarding the *Amazon* tentative order. Specifically, it is not “opinion, findings of fact or conclusions of law relating to the judgment or order appealed from” under Circuit Rule 30-1.4(a)(iv) any more than internal drafts of the order; rather, it was superseded by the final, docketed “opinion, findings of fact or conclusions of law relating to the judgment or order appealed from.” *See* Cir. R. 10-2. Like the *Amazon* tentative, it is distinguishable from the evidence at issue in *Townsend* that was properly before the district court but erroneously omitted from the record and later ordered by the district court to be included in the record. *Townsend*, 667 F.2d at 848-849. And, as discussed above (n.1), the “Response” that referenced this tentative order was improperly filed *after* the appealed order issued. *See Kirshner*, 842 F.2d at 1077; *Lowry*, 329 F.3d at 1024. Additionally, that the tentative order is

referenced in the transcript of the summary judgment hearing does not warrant its inclusion in the Excerpts. If it did, tentative orders—which are not final or binding—would always be part of the record. As discussed above, this is inconsistent with practice and sound policy. Accordingly, the tentative summary judgment order should be stricken.

Discovery Order. P10 does not explain how its inclusion of a discovery order issued by a magistrate judge *after* the order on appeal (and after the partial summary judgment ruling) could appropriately be part of the appeal record, particularly given that it is subject to review by the district court and thus not even final. ER100114-100118; Love Decl., Ex. 2 (9/2/2010 Order granting Google leave to re-file objections to ER20001-03 “following the conclusion of Perfect 10’s appeal”). Nor does P10 answer Google’s cited authority precluding the inclusion of such material. *Kirshner*, 842 F.2d at 1077 (record on appeal is limited to “the record before the trial judge when his decision was made”); ER100114-100118; *see also* Circuit Rule 10-2 (setting forth contents of appeal record).

Contrary to P10’s arguments (Opp. at 1-2), this discovery order is not “opinion, findings of fact or conclusions of law relating to the judgment or order appealed from” under Circuit Rule 30-1.4(a)(iv). *Kirshner*, 842 F.2d at 1077; ER100114-100118. Although the order references arguments raised in P10’s summary judgment papers below, it could not have been considered by the district

court in ruling on either P10's Second PI Motion or Google's partial summary judgment motions because the magistrate's order did not *exist* until after those two orders were issued. P10's implication that after-the-fact orders (which do not address the validity of an appealed order) can "relate to" an appealed order for record purposes defies logic.

The discovery ruling denying Google's motion for a protective order should be stricken.

Conclusion

For the foregoing reasons, Google respectfully requests this Court strike ER10063-87, ER10097-98, and ER20001-03 from P10's Excerpts and all references thereto within P10's Opening Brief.

Dated: December 28, 2010

Respectfully submitted,

By /s/ Margret M. Caruso

Margret M. Caruso
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SULLIVAN, LLP
Attorneys for Defendant Google Inc.

No. 10-56316

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

▶◀◀▶

PERFECT 10, INC.,

Plaintiff-Appellant,

v.

GOOGLE INC.,

Defendant-Appellee.

*On Appeal from the United States District Court
For the Central District of California
Hon. A. Howard Matz, District Judge*

**DECLARATION OF BRADLEY R. LOVE IN SUPPORT OF
DEFENDANT-APPELLEE'S MOTION TO STRIKE**

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GOOGLE INC.

I, Bradley R. Love, declare as follows:

1. I am a member of the bar of the State of California and an associate at Quinn Emanuel Urquhart & Sullivan, LLP, counsel for Defendant-Appellee Google Inc. (“Google”) in this action. I make this declaration of my personal and firsthand knowledge.

2. Attached as Exhibit 1 is a true and correct copy of the transcript of the February 22, 2010 hearing in United States District Court for the Central District of California Case No. 05-CV-4753 AHM (SHx).

3. Attached as Exhibit 2 is a true and correct copy of the district court’s order dated September 2, 2010 granting Google leave to re-file a motion for review of Magistrate Judge Hillman’s August 10, 2010 order (ER20001-03).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed December 28, 2010 at Mineral, California.



Bradley R. Love

EXHIBIT 1

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION
HONORABLE A. HOWARD MATZ, U.S. DISTRICT JUDGE

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PERFECT 10, INC., A CALIFORNIA CORPORATION,)	
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PLAINTIFF,)	
)	
vs.)	No. CV05-4753-AHM(SHx)
)	
AMAZON.COM, INC., ET AL.,)	
)	
DEFENDANTS.)	
_____)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
MONDAY, FEBRUARY 22, 2010

CINDY L. NIRENBERG, CSR 5059
U.S. Official Court Reporter
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1 LOS ANGELES, CALIFORNIA; MONDAY, FEBRUARY 22, 2010

2 4:00 P.M.

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4 THE CLERK: Calling Item Number 11, CV05-4753,
5 Perfect 10, Inc. versus Amazon.com, Inc.

6 Counsel, state your appearances, please.

7 MR. MAUSNER: Good afternoon, Your Honor. Jeff
8 Mausner for Perfect 10.

9 THE COURT: Good afternoon.

10 MR. MALUTTA: Good afternoon, Your Honor. Anthony
11 Malutta for amazon.com, Alexa Internet and A9.com.

12 THE COURT: Okay. Please be seated.

13 I thought we were here for argument and final ruling
14 on Perfect 10's motions for the summary adjudication. Let the
15 record reflect that I communicated a draft, a 34-page,
16 single-spaced order. It went out on Friday, and I learned a
17 few minutes ago that the parties apparently reached a
18 settlement.

19 Is that correct, Mr. Mausner?

20 MR. MAUSNER: Yes, Your Honor.

21 THE COURT: Well, why don't you please proceed to the
22 lectern and tell me what's going on.

23 MR. MAUSNER: We have settled the case with Amazon,
24 A9 and Alexa.

25 THE COURT: Okay. Has the settlement been

1 consummated in writing?

2 MR. MAUSNER: There are e-mails. We don't have a
3 written settlement. It was just done today.

4 THE COURT: All right. Well, I congratulate the
5 parties on reaching an agreement. That's very commendable and,
6 of course, reassuring to the Court.

7 I take it you don't want this order filed?

8 MR. MAUSNER: That's correct.

9 THE COURT: Is that a condition of the settlement?

10 MR. MAUSNER: I think it is. It's not -- we
11 discussed the fact that we would ask the Court that the motion
12 not go forward and that it be -- and not be finalized, yes.

13 THE COURT: Okay. Mr. Malutta, do you wish to be
14 heard?

15 MR. MALUTTA: No, Your Honor, other than to agree
16 with Mr. Mausner that there is a settlement in place.

17 THE COURT: Say what? You agree with what?

18 MR. MALUTTA: With Mr. Mausner that there is a
19 settlement in place.

20 THE COURT: All right. Well, so the way I had
21 approached this with the deal on this one, I know, of course,
22 that there was some basically counter-motions for Alexa. I'm
23 going to deny those as moot so that we have a docket sheet that
24 reflects a ruling on that.

25 That's a technicality that has to do with court

1 reporting purposes.

2 And I will deny this motion as moot, but without a --
3 just have minutes reflecting that I won't file this order, and
4 we will see what happens.

5 That just leaves Google, right?

6 MR. MAUSNER: That's correct, Your Honor. Google has
7 not settled.

8 THE COURT: Okay. Now, is there anything that I have
9 under submission in the Google case, me, as opposed to Judge
10 Hillman?

11 MR. MAUSNER: Yes, Your Honor. Google has filed
12 three motions for summary judgment regarding DMCA. There are
13 disputes regarding whether all documents related to that have
14 been produced.

15 We made a motion for sanctions regarding that which
16 was referred to Judge Hillman, and that's pending before Judge
17 Hillman, the documents part of that. The summary judgment
18 motions are before Your Honor, but --

19 THE COURT: Well, let me just ask you this -- it's a
20 little unfair to Google's lawyer, but they can get a copy of
21 the transcript; I am not going to get into any of the merits --
22 but with so much activity before Judge Hillman, the summary
23 judgment motions that Perfect 10 brought, have those been
24 opposed and replies filed as well? They're ready for a ruling?

25 MR. MAUSNER: The motions that Google brought are

1 fully briefed, but there's an issue regarding whether Google
2 had produced all the documents relevant to those motions, so
3 that's what's before Judge Hillman. And then Perfect 10 --

4 THE COURT: It makes sense for me to wait, then,
5 until Judge Hillman rules and whether there is any appeal from
6 whatever he rules.

7 MR. MAUSNER: Correct. Perfect 10 also filed a
8 motion for summary judgment which Your Honor stayed until
9 Google's motions are decided.

10 THE COURT: Okay. I think that takes care of it.

11 Hold on a minute, please.

12 *(The Court and clerk confer off the record.)*

13 THE COURT: We're going to take this case off the
14 active calendar. You can file your notice of dismissal when
15 you file it, but for the purpose of reporting and recording on
16 our extremely burdened calendar, this case is going to be
17 removed from the active calendar.

18 MR. MAUSNER: Okay. It shouldn't take too long for
19 us to get the dismissal.

20 THE COURT: Meaning a week?

21 MR. MAUSNER: I don't know if we can do it that
22 quickly.

23 MR. MALUTTA: Ten days?

24 MR. MAUSNER: Well, yeah.

25 THE COURT: I'll give you two weeks from today.

1 MR. MALUTTA: Thank you, Your Honor.

2 MR. MAUSNER: Thank you.

3 THE COURT: All right. We're adjourned.

4 *(Proceedings concluded.)*

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CERTIFICATE

I hereby certify that pursuant to Section 753,
Title 28, United States Code, the foregoing is a true and
correct transcript of the stenographically reported
proceedings held in the above-entitled matter and that the
transcript page format is in conformance with the
regulations of the Judicial Conference of the United States.

Date: MARCH 8, 2010

Cindy L. Nirenberg, CSR No. 5059

EXHIBIT 2

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PERFECT 10, INC., a California corporation,

Plaintiff,

vs.

GOOGLE INC., a corporation; and DOES 1 through 100, inclusive,

Defendants.

CASE NO. CV 04-9484 AHM (SHx)

ORDER REMOVING THE HEARING ON GOOGLE INC.'S MOTION FOR REVIEW OF MAGISTRATE JUDGE HILLMAN'S AUGUST 10, 2010 ORDER FROM THE COURT'S CALENDAR AND GRANTING GOOGLE LEAVE TO RE-FILE THE MOTION AFTER THE STAY IS LIFTED

AND COUNTERCLAIM

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Order

WHEREAS, Google, on August 24, 2010, filed its Motion for Review of and Objections to Magistrate Hillman's Order of August 10, 2010 on Google's Motion to Quash Subpoenas to Shantal Rands Poovala (Dkt. No. 976) ("Objections");

WHEREAS, this Court, by its August 25, 2010 Order (Dkt. No. 978), stayed all proceedings except those matters directly related to Perfect 10's appeal of the Court's July 30, 2010 Order until the Ninth Circuit issues a decision on that appeal;

WHEREAS, this Court's August 25, 2010 Order also extended the deadline for Google to file a motion for review of Magistrate Hillman's August 10, 2010 Order until fourteen days after the lifting of the stay following the conclusion of Perfect 10's appeal;

WHEREAS the hearing on Google's Objections is currently set for October 4, 2010 at 10:00 a.m. before this Court;

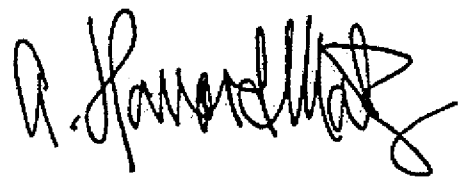
WHEREAS, the parties agree that briefing and argument on Google's Objections should take place after the stay is lifted;

ACCORDINGLY, PURSUANT TO THE PARTIES' STIPULATION, IT IS HEREBY ORDERED AS FOLLOWS:

1. The October 4, 2010 hearing on Google's Objections is taken off the Court's calendar (vacated), and
2. Google is granted leave to re-file a motion for review of Magistrate Hillman's August 10, 2010 Order fourteen (14) days after the lifting of the current stay following the conclusion of Perfect 10's appeal, consistent with this Court's August 25, 2010 Order.

IT IS SO ORDERED.

DATED: September 02, 2010



A. Howard Matz
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 28, 2010.

DEFENDANT-APPELLEE'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE

DECLARATION OF BRADLEY R. LOVE IN SUPPORT OF DEFENDANT-APPELLEE'S MOTION TO STRIKE AND EXHIBITS 1-2 THERETO

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 28, 2010

By /s/ Margret M. Caruso

Margret M. Caruso
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Attorneys for Defendant Google Inc.