

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*

**DEFENDANT-APPELLEE'S MOTION TO STRIKE
FURTHER EXCERPTS OF RECORD**

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Pursuant to Federal Rules of Appellate Procedure 10, 30, and 32 and Circuit Rules 10-2, 30-1, 30-2, and 32-2, Defendant-Appellee Google Inc. (“Google”) moves to strike the entirety of the Further Excerpts of the Record submitted by Plaintiff-Appellant Perfect 10, Inc. (“P10”). Pursuant to Circuit Rule 27-1(2) and the Circuit Advisory Committee Note thereto, Google informs the Court that P10 stated it would oppose Google’s motion.

INTRODUCTION

In blatant disregard of the clear procedural rules and guidelines of this Court, P10’s Further Excerpts of the Record (“FER”) consists of almost 300 pages of argument—in addition to the 84 pages of argument in P10’s Opening Brief, 13 pages of argument in its opposition to Google’s first motion to strike, and 47 pages of argument in its Reply Brief. Specifically, the FER is made up of materials not found in the record below in the form filed—*i.e.*, with P10’s argumentative highlighting and annotation. Most of these documents—in their original, un-highlighted and annotated versions—were included in P10’s *initial* excerpts of the record and/or are excerpts of the parties’ briefs and memoranda of law, including their briefs on this very appeal.

By including excess pages of argument, materials not in the record below, duplicative excerpts, and unnecessary briefs and legal memoranda, P10’s FER violate numerous Rules of this Court. Accordingly, Google requests that this

Court strike P10's improper FER and all portions of P10's Reply Brief that rely on or refer to it.

ARGUMENT

I. P10'S FER CONSISTS OF IMPROPER ADDITIONAL REPLY ARGUMENT IN VIOLATION OF THIS COURT'S RULES

P10 has attempted to circumvent this Court's limitations of the length of its Reply Brief by incorrectly labeling almost 300 pages of additional argument as "Further Excerpts of Record." As the argumentative "Table of Contents and Index" for the FER reflects, the FER is not a collection of documents relied on P10's brief for factual support; rather, it is an argumentative presentation of supposedly "Incorrect Statement[s]" from Google's Response Brief, "followed by Examples of Contrary Evidence submitted by Perfect 10." FER, "Table of Contents and Index," *passim*. Such extended additional argument is not permitted, irrespective of the title on the cover page. *See* Fed. R. App. P. 32(1)(7) (limiting reply briefs to 15 pages or 7,000 words); *G.F. Co. v. Pan Ocean Shipping Co., Ltd.*, 23 F.3d 1498, 1507, n. 6 (9th Cir. 1994) (striking supplemental excerpts of the record that "constitute legal argument rather than evidentiary matter").

If P10 wanted this Court to consider hundreds of pages of additional argument, it should have sought and obtained leave to exceed the page and word limits of Rule 32(a)(7). *See* 9th Cir. R. 32-2 ("The court looks with disfavor on motions to exceed the applicable page or type-volume limitations. Such motions

will be granted only upon a showing of diligence and substantial need. A motion for permission to exceed the page or type-volume limitations set forth at FRAP 32(a)(7) (A) or (B) must be filed on or before the brief's due date and must be accompanied by a declaration stating in detail the reasons for the motion.”). Having failed to do so, P10 cannot circumvent this Court’s rules simply by virtue of the title on its submission. Accordingly, P10’s FER should be stricken.

II. P10’S FER INCLUDES MATERIAL THAT WAS NEVER FILED IN THE DISTRICT COURT IN VIOLATION OF THIS COURT’S RULES

Independently, the FER should be stricken because it consists of materials that are not part of the record below in that P10 has impermissibly marked them up with annotations, comments, and highlighting not found in the district court record. FER 001-264; 266-272. These excerpts violate this Court’s rules because they were not “filed with the district court” in their current form. 9th Cir. R. 10-2; *see also* Fed. R. App. Proc. 10(a) (the “record on appeal” consists solely of “the original papers and exhibits filed in the district court,” “the transcript of proceedings,” and “a certified copy of the docket entries prepared by the district clerk.”). Accordingly, these pages of the FER should be stricken, along with all references to them in P10’s Reply Brief. 9th Cir. R. 30-2; *Barcamerica Intern. v. Tyfield Importers, Inc.*, 289 F.3d 589, 595 (9th Cir. 2002) (striking excerpts not filed in the district court and portions of brief “which rely upon them”).

In addition, P10's FER includes a markup of a document that was never filed in the district court in any form—an excerpt of this Court's opinion in P10's 2007 appeal of the *CCBill* case. FER 266-267. If P10 wishes to draw this Court's attention to legal precedent from another action, the proper means for doing so is to discuss that authority in briefing—not attach pages of the opinion as “excerpts of record” and highlight and annotate them. In any event, highlighted or not, these pages were never filed with the district court, and cannot be part of the “record on appeal.” Fed. R. App. Proc. 10(a); 9th Cir. R. 10-2. P10's “unilateral supplementation of the record” with unfiled materials should be rejected. *Lowry v. Barnhart*, 329 F.3d 1019, 1024-25 (9th Cir. 2003) (striking improper supplemental materials and awarding monetary sanctions because “merely striking appellees' supplemental excerpts seems insufficient to deter abuse”).

III. MUCH OF P10'S FER DUPLICATES P10'S INITIAL EXCERPTS IN VIOLATION OF THIS COURT'S RULES

Confirming its true argumentative purpose, much of P10's FER consists of annotated and marked up copies of documents already included in the excerpts of record. FER 003-005, 007-009, 012-015, 018-021, 023-033, 035-077, 079-113, 115-121, 123, 139-140, 143-149, 155-159, 161, 169, 173-174, 178-180, 182-193, 197-206, 208-210, 212-218, 221-222, 226-233, 236, 240-241, 244-253, 260, 263-265, and 268-272 (indicating original location in P10's Excerpts where the same documents can be found); FER 002, 011, 017 (indicating original location in

Google’s Supplemental Excerpts where the same documents can be found). As the Court’s rules make clear, further excerpts of record should only include “portions of the reporter’s transcript or documents *not included in previously filed excerpts.*” 9th Cir. R. 30-1.8(a) (emphasis added). Thus, to the extent that the underlying documents could properly be considered outside of the argumentative context P10 presents them, they are nonetheless improper and should be stricken because they needlessly duplicate existing excerpts of record.

IV. P10’S FER CONTAINS EXCERPTS OF BRIEFS AND LEGAL MEMORANDA IN VIOLATION OF THIS COURT’S RULES

The FER should also be stricken to the extent it contain briefs or other memoranda of law, which this Court’s rules prohibit “unless necessary to the resolution of an issue on appeal.” 9th Cir. R. 30-1.5. Numerous pages of the FER are improper excerpts of legal memoranda filed in the district court and the parties’ briefs on *this* appeal. FER 001, 006, 010, 016, 022, 034, 078, 114, 122, 124-138, 141, 150-152, 154, 160, 162-168, 170-172, 175-177, 181, 194-196, 207, 211, 219-220, 234-235, 237, 243, 254, and 256-262. Far from being “necessary” on appeal—for example to prove that a certain argument was not waived—the challenged pages serve only as excess and improper argument. Accordingly, all pages of the FER consisting of improper excerpts of briefs and legal memorandum should be stricken as violating Local Circuit Rule 30-1.5. *See G.F. Co.*, 23 F.3d at

1507, n. 6 (striking supplemental excerpts of the record that “constitute legal argument rather than evidentiary matter”).

CONCLUSION

For the foregoing reasons, Google respectfully moves this Court to strike the entirety of P10’s FER and all references thereto within P10’s Reply Brief.

Dated: February 16, 2011

Respectfully submitted,



By _____

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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 February 16, 2011.

DEFENDANT-APPELLEE'S MOTION TO STRIKE

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: February 16, 2010



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