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 REPLY IN SUPPORT OF ITS MOTION TO STRIKE FURTHER EXCERPTS OF RECORD

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Introduction

P10's 19-page "Opposition" to Google's procedural motion offers no legitimate explanation for P10's improper "Further Excerpts of Record" ("FER"), which explicitly present arguments about allegedly "incorrect statement[s]" from "Google's Response Brief." Instead, P10 concedes the argumentative nature of the FER and uses its Opposition to Google's procedural motion to further argue the substance of its appeal.[1] P10's excuses for its argumentative excerpts are based on illogical and erroneous interpretations of this Court's rules. Those excuses should be rejected and the FER stricken.

I. P10'S IMPERMISSIBLE ADDITIONAL ARGUMENT INCREASES THE COURT'S BURDEN

P10 admits that the purpose of its FER was to submit additional argument. *See* Opp. at 1 (FER "demonstrat[es] that … statements [in Google's Response Brief] are incorrect"); at 2 (FER "addresses … significant errors Google makes in its Response Brief"); at 5 (FER "refut[es] … particular statement[s] made by Google"); at 6-10 (detailing specific arguments allegedly made in the FER). Because the FER improperly supplements P10's argument in its Reply Brief with documents not properly in the record, it should be stricken. *See* Fed. R. App. P.

[1] Because Google already addressed many of P10's substantive arguments in its Response Brief, and if necessary, it can rebut P10's other incorrect statements at oral argument, this Reply only addresses P10's arguments concerning Google's Motion to Strike Further Excerpts of Record.

32(1)(7) (limiting reply briefs to 15 pages or 7,000 words); 9th Cir. R. 10-2 (only "the *original* papers and exhibits filed in the district court" and the official transcript and docket "constitute the record on appeal") (emphasis added); *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").

The impropriety of P10's argumentative FER is not diminished by P10's faulty theory that it can disregard the Court's rules as long as *it* believes doing so would "help[] the Court understand the issues." Opp. at 2; *see also* Opp. at 1, 5, 12-13. Unsurprisingly, P10 cites no rule or precedent permitting such a subjective departure from the express limits on the size of briefs and the contents of the record on appeal. *See* Fed. R. App. P. 32(1)(7); 9th Cir. R. 10-2. Lacking relevant authority, P10 selectively quotes from rules concerning which parts of the *record* should be excerpted and the limited exception for deviating from organizing excerpts "in chronological order." Opp. at 2, 12-13 (citing 9th Cir. R. 30-1.1(a), 1.6(a); Advisory Comm. Note to 9th Cir. R. 30-1.6). Those rules are irrelevant to the issue before the Court; Google is not objecting to the selection of documents that are a legitimate part of the record or their organization, but to the FER's argumentative content. Nothing in the rules condones the use of annotated copies of briefs, legal memoranda, documents not filed in the district court, or previously

filed excerpts as additional argument, or suggests any intent to override the rules' limits on the length of briefs and content of excerpts of record. *See* Fed. R. App. P. 32(1)(7); 9th Cir. R. 10-2; *G.F. Co.*, 23 F.3d at 1507, n.6; *see also Davis v. City and County of San Francisco*, 976 F.2d 1536, 1551 (9th Cir. 1992) (rejecting interpretation that violated "the 'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.'" (quoting *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n.22 (1986))).

P10's attempts to distinguish Rule 32(a)(7) and *G.F. Co.*'s prohibitions on additional argument also fail. Opp. at 13 n.4. The length limitations of Rule 32(a)(7) would be meaningless if a party could circumvent them simply by creating "excerpts of record" consisting of additional argument labeled as an index and marked-up previously filed documents. In recognition of this principle, in *G.F. Co*., this Court struck argumentative affidavits improperly included in excerpts of record. *Id.* at 1507, n.6. The attorney argument woven through P10's FER is no less a violation of the Court's rules forbidding excess argument than the affidavits in *G.F. Co*.

As a practical matter, P10's FER embodies the inconvenience that the rules governing the length of appellate briefs and contents of excerpts of record were meant to preclude. Instead of submitting 15 pages (or 7,000 words) of permissible argument, P10 lobbed in, along with its brief, a 276-page, do-it-yourself brief kit.

Apparently, P10 expects the Court to assemble that kit into the arguments that P10 was unable to articulate within its allotted briefing space. This improper effort to circumvent the Court's briefing limits should be rejected.

II. P10'S ATTEMPT TO SUBMIT ADDITIONAL ARGUMENT BY RE-FILING ANNOTATED COPIES OF PREVIOUSLY FILED EXCERPTS VIOLATES THE COURT'S RULES

P10 incorrectly argues that nothing prohibits it from "including in the FER documents already in the ER." Opp. at 12. However, the Court's rules allow only one category of excerpts to be submitted as further excerpts of record with a reply brief: "portions of the reporter's transcript or documents not included in the previously filed excerpts" that are required for the Court's review of the reply brief. 9th Cir. R. 30-1.8(a); *see also* 9th Cir. R. 30-1.1(a) (referencing "those portions of the record necessary to reach a decision"). To the extent P10's FER is deemed a reorganized re-submission of previously filed excerpts, it is, by definition, unnecessary because it is duplicative. Thus, P10's FER contravenes Circuit Rules 30-1.8(a) and 30-1.1(a). Alternatively, if P10's re-ordering, annotating, and highlighting of prior excerpts is deemed to offer any non-duplicative information, that additional information is argument, not evidence, and

therefore improper.[2] *See* Fed. R. App. P. 32(1)(7); 9th Cir. R. 10-2; *G.F. Co.*, 23 F.3d at 1507, n.6.

III. P10'S EXCERPTS OF UNNECESSARY BRIEFS AND LEGAL MEMORANDA AND DOCUMENTS NEVER FILED IN THE DISTRICT COURT ARE IMPROPER

P10's Opposition concedes that excerpts of documents "not filed in the district court" are improper and should be stricken. Opp. at 11 n.3 (characterizing it as an "unremarkable proposition"). P10 does not refute that the FER's excerpts from this Court's opinion in *CCBill* were never filed in the district court and should be stricken. 9th Cir. R. 10-2; *see* FER266-267. Similarly, P10's excerpts of the parties' briefs on this appeal were not filed in the district court and are likewise improper. *See* FER001, 006, 010, 016, 022, 034, 078, 114, 122, 124-130, 141, 150-152, 154, 160, 172, 175-177, 181, 194-196, 207, 219-220, 234-235, 237, 243, 254, 256-259, 262. Further, because they were already filed with this Court, they are unnecessary to the FER and "not to be included in the excerpts of record." 9th Cir. R. 30-1.5. And P10 failed to offer any reason Google's district court briefs (FER211 & 261) and its submission of its own evidentiary objections and notice of motion (FER162-168, 170-171 & 260) were necessary for Court to consider on appeal. *See* Opp. at 15. They should likewise be stricken. 9th Cir. R. 30-1.5.

[2] P10's argument that certain highlighting is permitted in the *district* court misses the point. Opp. at 14. It is the argumentative annotations, comments and highlighting that P10 added to its FER *after* the documents were filed in the district court that are improper. Motion at 3.

Of the all the briefing that Google sought to strike under Circuit Rule 30-1.5, P10 defends only eight challenged pages.[3] Opp. at 15 (addressing FER131-138). However, those pages were not "necessary" as P10 claims. As this Court's rules recognize, the appropriate excerpts of record to show that a party submitted evidence in support of an argument in the district court are excerpts of the actual evidence the party submitted. 9th Cir. R. 30-1.5. What P10 argued in a brief is of little help to the Court in determining what evidence P10 submitted to the district court and is therefore unnecessary.

IV. GOOGLE'S MOTION IS TIMELY

P10's argument that Google's Motion is untimely (Opp. at 4) is unsupported and incorrect. P10's suggestion that the order referring Google's first motion to strike portions of P10's ER to the same panel who will hear the merits and stating that "briefing is completed" precludes Google from filing a separate motion to strike the FER (Opp. at 4 citing Dkt. No. 44) is illogical. The FER were not served until three weeks after Google completed its briefing on the first motion to strike. P10 cites no authority suggesting that Google is obligated to move against P10's violations before they occur.

[3] Although P10 defends its inclusion of some district court briefing with assertions that it was necessary to prove that a certain argument was not waived (Opp. at 15 citing FER142, 153, 185-190, 223-225, 238-239, and 242), Google's Motion did not seek to strike any of those referenced excerpts as unnecessary legal memoranda under Circuit Rule 30-1.5. *See* Motion at 5.

Likewise, P10 cites no rule or precedent to support its claim that Google cannot move to strike P10's improper FER after the appeal has been assigned to a panel and set for oral argument, and Google is not aware of any. Neither Rule 27, which addresses motions generally, nor Circuit Rule 30-2, which addresses remedies for improper excerpts, provides a deadline for a motion to strike improper excerpts of record. Further, the Court has ample time before oral argument to consider the simple issue raised by Google's Motion—*i.e.*, whether an annotated and highlighted compendium of documents (many previously submitted without editorializing) that were reorganized to provide a roadmap to arguments not spelled out in briefing qualifies as an appropriate "further excerpts of record."

P10 did not attempt to argue that it suffered any prejudice from Google filing its Motion four weeks after the FER were served. Nor did it complain about the timing of Google's first motion to strike portions of P10's ER in this appeal, which was filed eight weeks after P10 served its initial excerpts of record. Indeed, P10 itself moved to strike portions of Google's declarations in support of its DMCA Motions more than *three months* after Google served P10 with those declarations. *Compare* ER100046-49 *with* ER100070-71. Thus, P10's timeliness arguments are without merit.

V. P10'S BELATED REQUEST FOR LEAVE TO FILE AN OVERSIZE REPLY BRIEF SHOULD BE DENIED

If granted, P10's request for leave to replace the citations to the FER with the citations to previously filed excerpts would result in its Reply Brief exceeding the page and word limits of Rule 32(a)(7). Opp. at 16-18. This request is both untimely and substantively deficient. A motion to file an oversize brief "must be filed on or before the brief's due date" and "will be granted only upon a showing of diligence and substantial need." 9th Cir. R. 32-2. Not only did P10 fail to file such a motion with its Reply Brief, but its current request includes neither the required "declaration stating in detail the reasons for the motion" nor any other showing of "diligence and substantial need" to submit an oversized brief. *Id.* P10's abuse of this Court's rules should not be rewarded.

Dated: March 4, 2011 Respectfully submitted,

By /s/ Margret M. Caruso

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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 March 4, 2011.

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

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: March 4, 2011

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