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17 UNITED STATES DISTRICT COURT

18 CENTRAL DISTRICT OF CALIFORNIA

19 PERFECT 10, INC., a California
20 corporation,

21 Plaintiff,

22 vs.

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

25 Defendants.

26 AND COUNTERCLAIM

27 PERFECT 10, INC., a California
28 corporation,

Plaintiff,

vs.

AMAZON.COM, INC., a corporation;
A9.COM, INC., a corporation; and
DOES 1 through 100, inclusive,

Defendants.

CASE NO. CV 04-9484 AHM (SHx)
[Consolidated with Case No. CV 05-
4753 AHM (SHx)]

GOOGLE INC.'S OPPOSITION TO
PERFECT 10, INC.'S MOTION FOR
REVIEW AND RECONSIDERATION
OF PORTIONS OF MAGISTRATE
JUDGE HILLMAN'S ORDER OF
FEBRUARY 22, 2008 GRANTING IN
PART AND DENYING IN PART
PERFECT 10'S MOTION TO
COMPEL

Hon. A. Howard Matz

Courtroom: 14
Hearing Date: April 14, 2008
Hearing Time: 10:00 am
Discovery Cutoff: None Set
Pretrial Conference Date: None Set
Trial Date: None Set

1 **II. THE MAGISTRATE JUDGE DID NOT COMMIT CLEAR ERROR**
 2 **BY DECLINING TO REQUIRE GOOGLE TO PROVIDE**
 3 **TESTIMONIAL RESPONSES TO CERTAIN DOCUMENT**
 4 **REQUESTS (NOS. 135, 136 AND 137).**

5 In his ruling on Perfect 10's Motion to Compel, the Magistrate Judge
 6 compelled responses to Perfect 10's Requests for Production Nos. 135-37 (to the
 7 extent they were not so-called "mega-requests"),¹ but rejected certain additional
 8 proposed language from Perfect 10 that would require Google to provide
 9 testimonial responses to these document requests. Perfect 10 now objects to these
 10 rulings to the extent that the Magistrate Judge declined to include the proposed
 11 additional language. Perfect 10's objection should be overruled, because the
 12 Magistrate Judge's rejection of this additional proposed language was entirely
 13 consistent with Rule 34, and thus, was not clearly erroneous nor contrary to law.
 14 *See Fed. R. Civ. P. 72(a) and Local Rule 72-2.1.*

15 The Magistrate Judge's rulings, and the additional language which
 16 Perfect 10 proposed and which the Magistrate Judge rejected, are as follows:

Perfect 10's Request	Magistrate Judge's Order on the Request ²	Perfect 10's Proposed and Rejected Additional Language ³
Order on Request for Production	For each of the nine Perfect 10 model names listed in Exhibit B attached to the Fifth Document	At the time of production, Google must state whether or not it has produced

22
 23 ¹ See Order re. Perfect 10's Motion to Compel Defendant Google Inc. to
 24 Produce Documents, entered February 22, 2008, at pp. 2 and 7 (Further Order No.
 25 3) (attached as Exhibit A to the Declaration of Rachel M. Herrick ("Herrick
 Decl."), executed March 26, 2008, filed concurrently herewith).

26 ² See Herrick Decl., Exh. A (Order at p. 2).

27 ³ See Herrick Decl., Exh. B ((Proposed) Order re. Perfect 10's Motion to
 28 Compel Defendant Google Inc. to Produce Documents, submitted February 20,
 2008, at 3-5).

<p>1 No. 135</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p>	<p>Request, existing logs, data, documents and information from the Google Trends Data Base or elsewhere, sufficient to determine the approximate number of GOOGLE Web Searches which included the name of that model, for each of the years 2001 through 2006 or for any portions of those years if yearly summaries do not exist.</p>	<p>existing logs, data, documents and information sufficient to determine the approximate number of GOOGLE Web Searches which included the name of that model, for each of the years 2001 through 2006 or for any portions of those years if yearly summaries do not exist.</p>
<p>9 Order on</p> <p>10 Request for</p> <p>11 Production</p> <p>12 No. 136</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p>	<p>For each of the terms Perfect 10, Perfect Ten, Perfect10, and perfect10.com, existing logs, data, documents and information from the Google Trends Data Base or elsewhere sufficient to determine the approximate number of GOOGLE Image Searches done which included that term, for each of the years 2001 through 2006, or for any portions of those years if yearly summaries do not exist.</p>	<p>At the time of production, Google must state whether or not it has produced existing logs, data, documents and information sufficient to determine the approximate number of GOOGLE Image Searches done which included that term, for each of the years 2001 through 2006, or for any portions of those years if yearly summaries do not exist.</p>
<p>19 Order on</p> <p>20 Request for</p> <p>21 Production</p> <p>22 No. 137</p> <p>23</p> <p>24</p> <p>25</p> <p>26</p> <p>27</p> <p>28</p>	<p>For each of the nine Perfect 10 model names listed in Exhibit B attached to the Fifth Document Request, existing logs, data, documents and information from the Google Trends Data Base or elsewhere sufficient to determine the approximate number of GOOGLE Image Searches which included that model name, for each of the years 2001 through 2006, or for any portions of those years if yearly summaries do not exist.</p>	<p>At the time of production, Google must state whether or not it has produced existing logs, data, documents and information sufficient to determine the approximate number of GOOGLE Image Searches which included that model name, for each of the years 2001 through 2006, or for any portions of those years if yearly summaries do not exist.</p>

1 The Magistrate Judge did not impose the requirements sought in
2 Perfect 10's proposed order at the hearing on Perfect 10's Motion to Compel.⁴ Nor
3 did he do so in his Order, and rightly so. Rule 34 permits a party to request that
4 certain documents be produced or made available for inspection. Fed. R. Civ. P.
5 34(a)(1) and (2). Generally speaking, the party to whom the request is directed
6 must then either (1) state objections (Rule 34(b)(2)), (2) state that inspection will
7 be allowed (Rule 34(b)(2)(B) and (C)), or (3) produce the requested documents
8 (Rule 34(b)(2)(E)).⁵

9 However, there is *no obligation whatsoever* in Rule 34 to give the
10 kind of narrative and testimonial response Perfect 10 seeks. *See In re G-I Holdings*
11 *Inc.*, 218 F.R.D. 428, 439 (D. N.J. 2003) ("Unlike Rule 33(d), which governs
12 Interrogatories, Rule 34(b) does not require the responding party to make
13 specifications for all document productions."); *Stiller v. Arnold*, 167 F.R.D. 68, 70
14 (N.D. Ind. 1996) (noting that a response to a Rule 34 request "shall state, with
15 respect to each item or category, that inspection and related activities will be
16 permitted as requested, unless the request is objected to, in which event the reasons
17 for the objection shall be stated"); *Cardenas v. Dorel Juvenile Group, Inc.*, 230
18 F.R.D. 611, 619 (D. Kan. 2005) (same).

19 Perfect 10 understood this principle well when it presented its
20 arguments to the Magistrate Judge on the Order at issue here, stating that "Google
21 argues that a federal court does not have the power to order a party to state whether
22

23 ⁴ See Herrick Decl., Exh. C (November 27, 2007 Hearing Transcript at 57:22 -
24 58:6).

25 ⁵ Google has, of course, served written responses and objections to all of
26 Perfect 10's document requests, including Request Nos. 135, 136 and 137. *See*
27 *Herrick Decl.*, Exh. D (Defendant Google Inc.'s Responses and Objections to
28 Plaintiff's Fifth Set of Requests for the Production of Documents, dated February
23, 2007, at 10-11).

1 or not it has complied with a document request by incorrectly limiting to the Court
2 to what is required by the Federal Rules *in the absence of a court order.*" Herrick
3 Decl., Exh. E (Joint Statement Regarding (Proposed) Order on Perfect 10's Motion
4 to Compel Defendant Google Inc. to Produce Documents, submitted February 20,
5 2008, at 6-7) (emphasis in original). Having failed to obtain a court order to the
6 contrary, however, Perfect 10 has now revised its view of the Federal Rules,
7 contending that Rule 34 *does* impose such a requirement. Perfect 10's attempt to
8 stretch Rule 34's provision for a "respon[se] in writing" (*see Fed. R. Civ. P.*
9 34(b)(2)(A)) to include the sort of testimonial commentary regarding the existence
10 or sufficiency of the documents produced, as Perfect 10's proposed language would
11 do, should be rejected out of hand, and the Magistrate Judge was well within his
12 discretion to do so. *See Fed. R. Civ. P. 72(a).*

13 Perfect 10's proposed language should be rejected for the additional
14 reason that it has steadfastly refused to confirm whether it has produced documents
15 in response to particular document requests propounded by Google. Specifically,
16 in Google's prior motion to compel, brought on February 13, 2006, Google asked
17 this Court to order Perfect 10 to modify its manner of production of documents in
18 several respects, including by confirming that no responsive documents existed,
19 where appropriate. *See, e.g.,* Herrick Decl., Exh. F (Joint Stipulation re: Google's
20 Motion to Compel Production of Documents and Responses to Interrogatories,
21 dated February 13, 2006, at pp. 7-12, 24 ("Google requests that this Court compel
22 Plaintiff to supplement its written responses to (1) indicate which documents
23 respond to each of Google's requests for production . . . and (2) indicate that no
24 responsive documents exist to a particular request when this is the case." ...
25 "Google asks that the Court compel Plaintiff to . . . supplement its responses to
26 Document Request Nos. 2 and 35 to clarify that no additional responsive
27 documents exist other than the ones it agreed to produce if that is in fact the case . .
28 . . .)). Google asked the Court to so order because Perfect 10's document

1 production was disorganized and undecipherable in many respects. Perfect 10
2 resisted Google's motion and refused to modify its manner of production, *see id.* at
3 12-13, and the Court deferred ruling on the issue. *See* Herrick Decl., Exh. G
4 (Order Regarding Google, Inc.'s Motion to Compel Production of Documents and
5 Responses to Interrogatories, dated May 22, 2006, at 2-3).

6 Perfect 10 has articulated no plausible basis for imposing this
7 requirement unilaterally, because there isn't one. Perfect 10 cannot have it both
8 ways. The Magistrate Judge was well within his discretion in refusing Perfect 10's
9 request in these circumstances. It was not an error at all, much less a clear one.

10 **III. THE MAGISTRATE JUDGE'S REFUSAL TO IMPOSE THIS SAME**
11 **OBLIGATION REGARDING ALL OF PERFECT 10'S REQUESTS**
12 **WAS NOT CLEARLY ERRONEOUS.**

13 Following the November 27, 2007 hearing, Perfect 10 proposed to the
14 Magistrate Judge that he adopt the following as "Further Order No. 2":

15 On or before _____, 2008, Google shall provide a written
16 response to Perfect 10, stating whether it has produced documents in
17 response to each request. If no responsive documents exist, Google
18 shall so state.

19 *See* Herrick Decl., Exh. B ((Proposed) Order re: Perfect 10's Motion to Compel
20 Defendant Google Inc. to Produce Documents, submitted February 20, 2008, at
21 12). Google pointed out that the Magistrate Judge made no such order, and the
22 Magistrate Judge agreed, declining to include such a ruling in his Order.

23 For the same reasons discussed above regarding Request Nos. 135-37,
24 this decision was entirely proper as applied to all of Perfect 10's Requests. The
25 requested "further order" was not required by the Federal Rules of Civil Procedure,
26 and given Perfect 10's own refusal to provide such a confirmation regarding
27 Google's document requests, the Magistrate Judge was well within his discretion to
28 reject it. *See* Fed. R. Civ. P. 72(a).

1
2 **IV. THE MAGISTRATE JUDGE'S DENIAL OF PERFECT 10'S**
3 **MOTION TO COMPEL A REQUEST FOR IRRELEVANT**
4 **DOCUMENTS FROM AN UNRELATED CASE WAS NOT**
5 **CLEARLY ERRONEOUS (REQUEST NO. 197).**

6 The Magistrate Judge made the following ruling with respect to
7 Perfect 10's Request No. 197:

8 Perfect 10's Motion to Compel production of documents in response
9 to **Request 197** ("Copies of the deposition transcripts of all
10 employees, officers and directors of Google taken in connection with
11 the lawsuit *Columbia Pictures Industries, et.al. v. Drury et.al.*,
12 pending in the U.S. District Court for the Southern District of New
13 York.") is hereby DENIED.

14 *See* Herrick Decl., Exh. A (Order at p. 7).

15 The Court's refusal to require production of these transcripts was
16 proper, and in no way "clearly erroneous," because Perfect 10 articulated no
17 plausible theory of relevance regarding these materials. The *Drury* case involved
18 claims by various movie studios against various websites alleged to be direct
19 infringers of the studios' movies. Neither Google nor Perfect 10 were parties to the
20 case. Perfect 10's only theory of relevance is that "there is at least an inference that
21 Google did the same" thing vis-à-vis Perfect 10 as it may or may not have allegedly
22 done vis-à-vis one or more of the defendants in *Drury*. This tenuous theory was
23 rejected by the Magistrate Judge, and should be rejected again here.

24 As noted, the *Drury* case involved unrelated parties litigating
25 unrelated claims regarding unrelated copyrighted works, and has absolutely no
26 bearing here. Indeed, this request is so far afield from the facts, parties and issues
27 in this case that it can only be described as a fishing expedition. This case is not
28 about "what knowledge Google has about [the] AdSense and Adwords websites"

1 that were at issue in the Drury case, as Perfect 10 claims. This case is about
2 whether Google infringed Perfect 10's alleged copyrights. The parties have more
3 than enough issues to litigate here without holding a series of mini-trials regarding
4 other disputes not presently before the Court. Because it would have been clear
5 error to order the production of such irrelevant materials, *see McCormick v. City of*
6 *Lawrence, Kan.*, 2007 WL 38400, at *3 (D. Kan. Jan. 5, 2007), the Magistrate
7 Judge's refusal to order the production was proper.⁶

8 **Conclusion**

9 For the foregoing reasons, Perfect 10's motion for review of the
10 Magistrate Judge's February 22, 2008 Order regarding Request Nos. 135, 136, 137,
11 197, and (Proposed) Further Order No. 2 should be DENIED.

12
13 DATED: March 26, 2008

QUINN EMANUEL URQUHART OLIVER &
HEDGES, LLP

14
15 By /s/ Michael T. Zeller

16 Michael T. Zeller
17 Attorneys for Defendant Google Inc..
18
19
20
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22
23

24 _____
25 ⁶ In addition, the *Drury* case was litigated subject to a protective order
26 designating various materials in the case as confidential. *See* Herrick Decl., Exh. H
27 (Declaration of Jennifer A. Golinveaux In Support of Google Inc.'s Opposition to
28 Perfect 10, Inc.'s Motion to Compel Google Inc. to Produce Documents, dated
October 4, 2007, at ¶ 11 & Exh. D thereto).