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11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA

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

15 Plaintiff,
16 v.

17 GOOGLE INC., a corporation,
18 Defendants.

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

Before Judge Stephen J. Hillman

**PLAINTIFF PERFECT 10, INC.'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITON TO
DEFENDANT GOOGLE INC.'S *EX
PARTE* APPLICATION TO STAY THIS
COURT'S JUNE 16, 2010 ORDER**

**[DECLARATION OF JEFFREY N.
MAUSNER SUBMITTED
SEPARATELY HEREWITH]**

Discovery Cut-Off Date: None Set
Pretrial Conference Date: None Set
Trial Date: None Set

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

2 Defendant Google Inc. (“Google”) has filed a belated and misleading *Ex*
3 *Parte* Application (the “Application”)¹ seeking to indefinitely stay this Court’s
4 June 16, 2010 Order (Docket No. 896) (the “June 16 Order” or the “Order”). The
5 Application asks this Court to stay Google’s obligation to produce documents by
6 July 6, 2010, as required by the Order, until some unspecified date after Judge
7 Matz rules on Plaintiff Perfect 10, Inc.’s (“Perfect 10”) objections to the Order.
8 *See* Proposed Order (Docket 917-2) at 1. Because the hearing on Perfect 10’s
9 objections to the Order is set for August 16, 2010,² and because Judge Matz may
10 not rule immediately upon Perfect 10’s objections, ***Google may not be required***
11 ***to produce the documents ordered by this Court until September 2010 at the***
12 ***earliest, and perhaps not even until sometime in 2011.*** Google seeks to
13 indefinitely delay the production of documents ordered by the Court even though:

- 14 1) Perfect 10 originally requested production of the documents that are
15 the subject of the June 16 Order more than four years ago;
- 16 2) The categories of documents that Google was ordered to produce in
17 the Order were originally the subject of this Court’s Court’s May 22, 2006 Order
18 or Judge Matz’s May 13, 2008 Order;

19 ¹ Google contends that the “events which triggered Google’s need for a stay . . .
20 occurred within the past three business days.” Application at 1. Google’s assertions
21 elsewhere in the Application conclusively establish that this contention is incorrect.
22 Google asserts that, based upon its prior search for documents responsive to the same
23 categories of documents in 2008, which it claims took more than three months to
24 complete, Google’s production of documents responsive to the Order “will take a
25 minimum of six to eight weeks to complete.” Application at 5:26-27. Google thus
26 knew, or at the very least should have known, as soon as it received the June 16, 2010
27 Order, that it allegedly could not produce the required documents by the July 6, 2010
28 deadline set by the Court. Nevertheless, Google did not raise this issue with Perfect
10 until June 29, 2010, almost two weeks after it received the Order. Nor did Google
raise this issue during the hearing before the Court on June 28, 2010, even though the
parties discussed the June 16 Order at the conclusion of that hearing. *See* Declaration
of Jeffrey N. Mausner, submitted separately herewith (“Mausner Decl.”), ¶¶3, 4.

² The parties stipulated to this hearing date on June 28, 2010 [*see* Docket No. 915],
before Google raised with Perfect 10 the issue of its inability to comply with the July
6, 2010 production date set forth in the June 16 Order. Mausner Decl. ¶¶3, 4.

1 3) Google has not supplemented its prior production of the documents it
2 is required to produce under the terms of the Order since at least September 2008
3 [*see* Supplemental Declaration of Dr. Norman Zada, lodged under seal on June 8,
4 2010 (order for filing entered on June 22, 2010 [Docket No. 903] but not yet on
5 the Docket), ¶12;

6 4) Perfect 10 filed the Motion that resulted in the June 16 Order more
7 than seven months ago, in November 2009;

8 5) Perfect 10 does not plan to object to those portions of the June 16
9 Order compelling Google to produce documents;

10 6) Google apparently does not plan to object to the portions of the Order
11 requiring it to produce documents. Indeed, Google has not met and conferred
12 with Perfect 10 regarding any possible objections it may have to the Order and its
13 deadline for filing such objections is today, July 1, 2010 [*see* Mausner Decl. ¶¶2,
14 5 and Exh. A]; and

15 7) Perfect 10 offered to provide Google with additional time to produce
16 the documents called for by the Order but Google declined the offer [*see* Mausner
17 Decl. ¶3 and Exh. B].

18 The Application is the most recent example of Google's attempt to obstruct
19 discovery and delay its production of documents to which Perfect 10 is clearly
20 entitled. Google apparently hopes that, by engaging in such obstruction and
21 delay, Judge Matz will rule on its pending DMCA Motions without having all of
22 the relevant evidence before him.

23 Perfect 10 has waited long enough to receive the documents that Google
24 has been compelled to produce under the terms of the Order. Google has not
25 demonstrated that good cause exists for Perfect 10 to be forced to wait at least
26 two more months to receive these documents. For all of the reasons explained
27 below, this Court should deny the Application.

1 **II. GOOGLE HAS FAILED TO ESTABLISH THAT GOOD CAUSE**
2 **EXISTS FOR THIS COURT TO STAY THE JUNE 16 ORDER.**

3 Google advances three reasons for this Court to stay the July 6, 2010
4 deadline for producing documents set forth in the Order. Application at 5-6.
5 None of these reasons establishes the good cause necessary for this Court to grant
6 the *ex parte* relief that Google is seeking.

7 Google first asserts that Perfect 10's planned objections create uncertainty
8 regarding the documents that Google ultimately will be required to produce.
9 Google further asserts that discovery orders "are routinely stayed pending appeal
10 for this very reason." Application at 5:13.

11 Here, however, Perfect 10 does not intend to object to those portions of the
12 June 16 Order compelling Google to produce documents by July 6, 2010.
13 Moreover, Google cannot possibly object to those same portions of the Court's
14 Order because the deadline for filing objections is today and Google has not met
15 and conferred with Perfect 10 regarding any objections it may have. *See* Order
16 Approving Stipulation of Extension of Time to File Motion for Review of
17 Nondispositive Ruling of Magistrate Judge Hillman, filed June 29, 2010 (Docket
18 No. 916), attached as Exhibit A to the Mausner Declaration, at 1:22-23; 2:1-7 (the
19 time to file a motion for review of the Order "is no later than July 1, 2010;" only
20 Perfect 10's time to file objections to and a motion for review of the Order is
21 extended until July 12, 2010). *See also* Mausner Decl. ¶¶2, 5.

22 Accordingly, it is certain that Google will be obligated to produce the
23 documents that it is compelled to produce under the terms of the Order, regardless
24 of any ruling by Judge Matz on Perfect 10's objections to other portions of the
25 Order. That Judge Matz may order Google to produce additional documents
26 following the August 16, 2010 hearing on Perfect 10's objections should not
27 provide a basis for Google to delay producing the documents that it is already
28

1 required to produce. The first reason advanced by Google thus fails to establish
2 the good cause necessary for this Court to grant the Application.

3 Google next asserts that it is entitled to *ex parte* relief because it has
4 determined that completing the production by July 6, 2010 “will be impossible.”
5 Application at 5:17. Even if true, this assertion provides no grounds for this
6 Court to indefinitely delay the production required by the Order until after Judge
7 Matz’s ruling on Perfect 10’s objections. First, as explained in footnote 1, above,
8 if Google’s analysis is correct, Google knew (or, at the very least, should have
9 known) that it could not comply with the July 6, 2010 deadline for production *as*
10 *soon as it received the June 16 Order*. Nevertheless, Google waited until June
11 29, 2010, *almost two weeks later*, to even raise this issue with Perfect 10.
12 Mausner Decl. ¶3. Second, even when Google finally raised this issue, it did not
13 initially inform Perfect 10 that it needed “six to eight weeks” to complete the
14 production. Rather, Google informed Perfect 10 only that “it will be impossible
15 to complete this supplementation by the current deadline.” Mausner Decl. ¶3 and
16 Exh. B [email of Rachel Herrick Kassabian, sent on June 29, 2010 at 8:56 a.m.].
17 In response, Perfect 10 agreed to give Google an additional week to produce the
18 documents required by the June 16 Order.³ Google rejected this offer, however.
19 Mausner Decl. ¶3 and Exh. B. Under these circumstances, there is simply no
20 basis for this Court to give Google an indefinite extension of time to produce the
21 documents called for by the June 16 Order.

22 Finally, Google contends that it is entitled to *ex parte* relief because the
23 Court, at a hearing on June 28, 2010, ordered the parties to further meet and
24 confer regarding whether Google will agree to produce DMCA logs in an EXCEL

25 ³ Google conveniently forgets to mention this offer in its Application. In fact,
26 although Paragraph 8 of the Declaration of Andrea Pallios Roberts in support of the
27 Application (Docket No. 917-1) (the “Roberts Declaration”) states that “meet and
28 confer” emails between Rachel Herrick Kassabian, representing Google, and Jeffrey
N. Mausner, representing Perfect 10, are attached as Exhibit A, there is no Exhibit A
attached to the Roberts Declaration.

1 spreadsheet format. *See* June 16 Order (Docket No. 896) at page 2, ¶1. This
2 assertion fails for the same reason that Google's first assertion fails. The mere
3 fact that the parties still need to discuss whether Google will produce its DMCA
4 logs in an EXCEL format does not provide a basis for Google to delay producing
5 other documents that it has already been ordered to produce. This is particularly
6 true here, where Google never even mentioned during the June 28, 2010 hearing
7 either that it would be unable to comply with the July 6, 2010 deadline for
8 production or that the need for the parties to meet and confer regarding the format
9 in which DMCA logs would be produced should provide a basis for this Court to
10 indefinitely delay production of other documents that Google is required to
11 produce under the terms of the Order. *See* Mausner Decl. ¶4. For this reason as
12 well, Google is not entitled to the extraordinary relief sought by the Application.

13 **III. CONCLUSION.**

14 For all of the foregoing reasons, this Court should deny the Application in
15 its entirety. At the very least, if this Court is inclined to grant the Application
16 (and it should not, for all of the reasons discussed above), this Court should order
17 Google to produce all of the documents that it is required to produce under the
18 terms of the Order by a date certain sometime in July 2010, rather than granting
19 Google's request for an indefinite stay of production until sometime after Judge
20 Matz's ruling on Perfect 10's objections to the Order.

21 Dated: July 1, 2010

Respectfully submitted,

LAW OFFICES OF JEFFREY N. MAUSNER

23 By:

David N. Schultz

24 David N. Schultz

25 Attorneys

for Plaintiff Perfect 10, Inc.