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11 Attorneys for Plaintiff Perfect 10, Inc.

12 UNITED STATES DISTRICT COURT
13
14 CENTRAL DISTRICT OF CALIFORNIA

15 PERFECT 10, INC., a California
16 corporation,

17 Plaintiff,

18 v.

19 GOOGLE INC., a corporation,

20 Defendants.

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

Before Judge A. Howard Matz

**NOTICE OF MOTION AND MOTION
OF PLAINTIFF PERFECT 10, INC. FOR
REVIEW OF, AND OBJECTIONS TO,
MAGISTRATE JUDGE HILLMAN'S
JUNE 16, 2010 ORDER ON PERFECT
10'S MOTION FOR EVIDENTIARY
AND OTHER SANCTIONS AGAINST
DEFENDANT GOOGLE INC.**

**[MEMORANDUM OF POINTS AND
AUTHORITIES SUBMITTED
SEPARATELY HEREWITH UNDER
SEAL]**

Date: August 16, 2010

Time: 10:00 a.m.

Place: Courtroom 14, Courtroom of the
Honorable A. Howard Matz

Discovery Cut-Off Date: None Set

Pretrial Conference Date: None Set

Trial Date: None Set

1 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on August 16, 2010 at 10:00 a.m., or as soon
3 thereafter as the matter may be heard, in the Courtroom of the Honorable A.
4 Howard Matz, Courtroom 14 of United States District Court for the Central
5 District of California, located at 312 North Spring Street, Los Angeles,
6 California, Plaintiff Perfect 10, Inc. (“Perfect 10”) will and hereby does move this
7 Court, pursuant to Fed. R. Civ. P. 72(a) and Local Rule 72-2.1, to review and
8 sustain its objections to Magistrate Judge Hillman’s Order concerning Perfect
9 10’s Motion for Evidentiary and Other Sanctions against Defendant Google Inc.,
10 dated June 16, 2010 (Docket No. 896) (the “June 16 Order”). For the
11 convenience of the Court, a copy of the June 16 Order is attached hereto as
12 Exhibit 1.

13 This Motion is made on the grounds that significant portions of the June 16
14 Order are clearly erroneous and/or contrary to law, as explained in greater detail
15 in Perfect 10’s Memorandum of Points and Authorities in support of the Motion,
16 submitted separately under seal.

17 This Motion is based upon this Notice of Motion, the Memorandum of
18 Points and Authorities submitted separately herewith, all matters of which this
19 Court properly may take judicial notice, any additional matters that may be
20 submitted to the Court at or before any hearing on the Motion, including in any
21 reply papers, and the complete files and records in this action, including (without
22 limitation) the following pleadings submitted by Perfect 10 and/or by the Court in
23 connection with Perfect 10’s Motion for Evidentiary and Other Sanctions against
24 Defendant Google Inc.:

25 1) Docket No. 617: Notice of Motion and Motion of Plaintiff
26 Perfect 10, Inc. For Evidentiary and Other Sanctions against Defendant
27 Google, Inc. And/or For The Appointment Of A Special Master, filed on
28 November 29, 2009;

1 2) Docket No. 618: Declaration Of Jeffrey N. Mausner In Support
2 Of Perfect 10's Motion For Evidentiary And Other Sanctions Against
3 Google, And/or For The Appointment Of A Special Master, filed on
4 November 29, 2009;

5 3) Docket No. 619: Declaration Of Sheena Chou In Support Of
6 Perfect 10's Motion For Evidentiary And Other Sanctions Against Google,
7 And/or For The Appointment Of A Special Master, filed on November 29,
8 2009;

9 4) Docket No. 633: Memorandum Of Points And Authorities In
10 Support Of Motion Of Plaintiff Perfect 10, Inc. For Evidentiary and Other
11 Sanctions against Defendant Google Inc. And/or For The Appointment Of A
12 Special Master, Filed Under Seal Pursuant To Protective Order, filed on
13 December 1, 2009;

14 5) Docket No. 635: Declaration Of Dr. Norman Zada In Support
15 Of Perfect 10's Motion For Evidentiary And Other Sanctions Against
16 Google, And/or For The Appointment Of A Special Master, Filed Under
17 Seal Pursuant To Protective Order, filed on December 1, 2009;

18 6) Docket No. 634: Exhibit 9 (A Disk) To The Declaration Of Dr.
19 Norman Zada In Support Of Perfect 10's Motion For Evidentiary And Other
20 Sanctions Against Google, and/or For The Appointment Of A Special
21 Master [Disk Attached], Filed Under Seal Pursuant To Protective Order,
22 filed on December 1, 2009;

23 7) Docket No. 660: Reply Declaration of Jeffrey N. Mausner In
24 Support Of Motion of Plaintiff Perfect 10, Inc. For Evidentiary and Other
25 Sanctions against Defendant Google Inc. and/or For The Appointment Of A
26 Special Master, filed on December 13, 2009;

27 8) Docket No. 681: Reply Declaration Of Dr. Norman Zada In
28 Support Of Motion Of Plaintiff Perfect 10, Inc. For Evidentiary and Other

1 Sanctions against Defendant Google Inc. and/or For The Appointment Of A
2 Special Master, Filed Under Seal Pursuant To Protective Order, filed on
3 December 15, 2009;

4 9) Docket No. 680: Exhibit 35 (A Disk) To The Reply Declaration
5 Of Dr. Norman Zada In Support Of Motion Of Plaintiff Perfect 10, Inc. For
6 Evidentiary and Other Sanctions against Defendant Google Inc. and/or For
7 The Appointment Of A Special Master, Filed Under Seal Pursuant To
8 Protective Order, filed on December 15, 2009;

9 10) Docket No. 682: Declaration Of Mark McDevitt, Filed Under
10 Seal Pursuant To Protective Order, filed on December 15, 2009;

11 11) Docket No. 683: Reply Memorandum Of Points And Authorities
12 In Support Of Motion Of Plaintiff Perfect 10, Inc. For Evidentiary and Other
13 Sanctions against Defendant Google Inc. and/or For The Appointment Of A
14 Special Master, Filed Under Seal Pursuant To Protective Order, filed on
15 December 15, 2009;

16 12) Docket No. 677: Statement of Plaintiff Perfect 10, Inc. In
17 Response To The Court's December 15, 2009 Minute Order Regarding The
18 Effect That Perfect 10's Motion For Evidentiary And Other Sanctions
19 Against Google Inc. and/or For The Appointment Of A Special Master
20 Could Have On Other Pending Motions, filed on December 16, 2009;

21 13) Docket No. 684: Order by Judge A. Howard Matz, filed on
22 December 16, 2009;

23 14) Docket No. 749: Request for Telephonic Conference with
24 Magistrate Judge Hillman, filed on January 26, 2010;

25 15) Docket No. 750: Declaration of Jeffrey N. Mausner in Support
26 Of Perfect 10's Request for Telephonic Conference with Magistrate Judge
27 Hillman, filed on January 26, 2010;

28 16) Docket No. 756: Perfect 10's Reply in Support Of Request for

1 Telephonic Conference with Magistrate Judge Hillman, filed on January 27,
2 2010;

3 17) Docket No. 759: Minute Order Issued By Magistrate Judge
4 Stephen J. Hillman, filed on January 27, 2010;

5 18) Docket No. 764: Status Report Regarding Court-Ordered Meet
6 and Confer Regarding Documents Not Produced by Google, filed on
7 February 8, 2010;

8 19) Docket No. 764-1: Declaration of Jeffrey N. Mausner for Status
9 Report Regarding Court-Ordered Meet and Confer Regarding Documents
10 Not Produced by Google, filed on February 8, 2010;

11 20) Docket No. 787: Statement Of Clarification Of Perfect 10's
12 Position Regarding Applicability Of Rule 56(f) To Pending Motions For
13 Summary Judgment And Motion For Evidentiary And Other Sanctions, filed
14 on March 7, 2010;

15 21) Docket No. 851: Second Status Report Regarding Court-
16 Ordered Meet and Confer; Request for Further Hearing Regarding
17 Documents That Google Has Not Produced, filed on April 7, 2010;

18 22) Docket No. 851-1: Declaration of Jeffrey N. Mausner for
19 Second Status Report Regarding Court-Ordered Meet and Confer; Request
20 for Further Hearing Regarding Documents That Google Has Not Produced,
21 filed on April 7, 2010;

22 23) Docket No. 853: Perfect 10's Reply Re: Second Status Report
23 Regarding Court-Ordered Meet and Confer; Request for Further Hearing
24 Regarding Documents That Google Has Not Produced, filed on April 9,
25 2010;

26 24) Docket No. 854: Plaintiff Perfect 10, Inc.'s Statement
27 Regarding the Status of Its Motion for Evidentiary and Other Sanctions,
28 Submitted in Response to Magistrate Judge Hillman's January 27, 2010

1 Order, filed on April 21, 2010;

2 25) Docket No. 859: Plaintiff Perfect 10, Inc.'s Reply To Defendant
3 Google Inc.'s Response To Perfect 10's Statement Regarding The Status Of
4 Its Motion For Evidentiary And Other Sanctions; Request To Strike
5 Response, filed on April 27, 2010;

6 26) Docket No. 859-1: Declaration Of Jeffrey N. Mausner In
7 Support Of Plaintiff Perfect 10, Inc.'s Reply To Defendant Google Inc.'s
8 Response To Perfect 10's Statement Regarding The Status Of Its Motion For
9 Evidentiary And Other Sanctions, filed on April 27, 2010;

10 27) Docket No. 886: Plaintiff Perfect 10, Inc.'s Request To Strike
11 And Brief Response To Defendant Google Inc.'s Statement Regarding The
12 Status Of DMCA-Related Discovery Issues In Perfect 10's Motion For
13 Evidentiary And Other Sanctions, filed on June 2, 2010;

14 28) Docket No. 887: Minute Order Issued By Magistrate Judge
15 Stephen J. Hillman, filed on June 2, 2010;

16 29) Docket No. 889: Plaintiff Perfect 10, Inc.'s Response To
17 Defendant Google Inc.'s Statement Regarding The Status Of DMCA-
18 Related Discovery Issues In Perfect 10's Motion For Evidentiary And Other
19 Sanctions, filed on June 8, 2010;

20 30) Docket No. 889-1: Declaration Of David N. Schultz In Support
21 Of Plaintiff Perfect 10, Inc.'s Response To Defendant Google Inc.'s
22 Statement Regarding The Status Of DMCA-Related Discovery Issues In
23 Perfect 10's Motion For Evidentiary And Other Sanctions, filed on June 8,
24 2010;

25 31) Supplemental Declaration Of Dr. Norman Zada In Support Of
26 Perfect 10's Response To Google Inc.'s Statement Regarding The Status Of
27 DMCA-Related Discovery Issues In Perfect 10's Motion For Evidentiary
28 And Other Sanctions, lodged under seal on June 8, 2010.

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Statement of Compliance with Local Rule 7-3

This Motion is made following the conference of counsel pursuant to Local Rule 7-3 which took place starting on June 26, 2010 and continuing thereafter, during which time the parties exchanged email correspondence regarding the issues raised by this Motion.

Dated: July 12, 2010

Respectfully submitted,
LAW OFFICES OF JEFFREY N. MAUSNER
By: Jeffrey N. Mausner
Jeffrey N. Mausner
Attorneys for Plaintiff Perfect 10, Inc.

Exhibit 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 04-9484-AHM (SHx) Date June 16, 2010

Title Perfect 10, Inc., v. Google Inc., et al.,

Present: The Honorable Stephen J. Hillman

Sandra Butler

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

N/A

N/A

Proceedings: PLAINTIFF PERFECT 10's MOTION FOR EVIDENTIARY SANCTIONS

After extensive oral argument on January 15, 2010, and supplemental briefing thereafter, Perfect 10's Motion for Evidentiary Sanctions Against Google and/or for a Special Master is DENIED. Alternative relief is partially granted, as set forth herein. All attempts to negotiate a resolution of this Motion have failed, and the parties have requested a ruling on the Motion.

Perfect 10 has not persuaded this Court that any sanctionable violation of a Discovery Order has occurred, nor that there has been resulting prejudice to Perfect 10. Perfect 10 has not persuaded this Court that it is entitled to documents in a different format than that which was produced by Google, nor that Blogger-related documents were embraced within Discovery Orders issued prior to the date that Blogger was formally added to the case in 2008. Nor is the Court persuaded that Google has failed to comply with other aspects of Discovery Orders.

Even if Perfect 10 was correct that Google should have produced Blogger-related documents years ago in compliance with earlier Orders, the circumstances and tardiness by which this contention was brought to Google's attention (including Mr. Mausner's equivocation before Judge Matz as to what Blogger-related discovery would be necessary after Blogger became part of the litigation, followed by absolutely no propounded Blogger-related discovery requests), cannot plausibly justify the severe relief sought by Perfect 10. There is still ample time for Perfect 10 to seek Blogger-related discovery prior to trial.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-9484-AHM (SHx)	Date	June 16, 2010
Title	<u>Perfect 10, Inc., v. Google Inc., et al.,</u>		

Moreover, Perfect 10 has not sought a Rule 56(f) continuance of the Summary Judgment Motions pending before Judge Matz in order to seek Blogger-related discovery, taking the position that such discovery was actually previously ordered. However, this Court finds that such discovery was not ordered, nor necessarily embraced within prior discovery requests.

It is ordered that the Request for Appointment of a Special Master is DENIED..

The Court DENIES Google's request to impose monetary sanctions on Perfect 10 for bringing this Motion.

As to Perfect 10's alternative requested relief (additional document production), the court rules as follows:

1. DMCA logs in an electronic spreadsheet format: Such documents were already produced in TIFF format as to Web Search, Image Search and AdSense. Any supplemental documents shall be produced within 20 days. If plaintiff seeks an EXCEL-formatted production of the same spreadsheets already produced in TIFF format, the court is likely to order such production if parties are unable to reach an agreement in this regard within 5 days. No Request for Blogger DMCA logs was propounded, and they are not ordered produced.
2. DMCA Termination Notices: Such documents were already produced as to Web Search, Image Search and AdSense. Any supplemental documents shall be produced within 20 days. No Request for Blogger DMCA termination notices was propounded, and they are not ordered produced.
3. Third Party DMCA Notices were never requested for Web Search, Image Search, AdSense, nor for Blogger, and therefore are not ordered produced.
4. As for the four additional categories of documents (See Google's Statement Regarding The Status of DMCA-Related Discovery Issues, filed June 1, 2010, pp. 4-6), Google represents that non-privileged documents have been produced. To the extent that production will be supplemented with additional documents, Google shall produce such documents within 20 days.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 04-9484-AHM (SHx) Date June 16, 2010

Title Perfect 10, Inc., v. Google Inc., et al.,

5. AdSense Repeat Infringer Tracking Sheets, updated to the date of production, in an electronic spreadsheet format (TIFF or EXCEL format to be negotiated between the parties) shall be updated to the current date within 20 days, and shall contain URLs. Blogger Repeat Infringer Tracking Sheets were never formally requested, and are not ordered produced.

If counsel for either party believe the court has not ruled on all Document Requests which are the subject of this Motion, they shall promptly advise the court in writing.

cc: **Judge Matz**
Magistrate Judge Hillman
Counsel of Record*
***the term "counsel" as used herein also includes any pro se party.**
See Local Rule 2.9.3.

Initials of Preparer _____ : _____
