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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 04-9484 AHM (SHx) Date August 24, 2010

Title PERFECT 10, INC. v. GOOGLE INC.

Present: The Honorable A. HOWARD MATZ, U.S. DISTRICT JUDGE

Stephen Montes

Not Reported

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys **NOT** Present for Plaintiffs:

Attorneys **NOT** Present for Defendants:

Proceedings: IN CHAMBERS (No Proceedings Held)

Before the Court is Perfect 10, Inc.'s ("Perfect 10") motion for review of, and objections to, Magistrate Judge Hillman's June 16, 2010 order (the "Order") on Perfect 10's motion for evidentiary and other sanctions against defendant Google, Inc. ("Google"). Perfect 10 contends that portions of the Order are clearly erroneous and contrary to law. Perfect 10's Memorandum of Points and Authorities ("MPA") p. 1:6. For the reasons set forth below, the Court DENIES Perfect 10's motion.¹

DISCUSSION

I. Legal Standard

Where a party files an objection to a magistrate judge's nondispositive pretrial matter, such as a discovery dispute, the Court may modify or set aside any part of the magistrate judge's order that is "clearly erroneous or contrary to law." *See* 28 U.S.C. § 636(b)(1)(A); 14 James W. Moore, *Moore's Federal Practice* § 72.11[1][b] (3d ed.).

A magistrate judge's factual determinations in a discovery dispute are clearly erroneous when, "although there is evidence to support [a finding], the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Federal Sav. and Loan Ins. Corp. v. Commonwealth Land Title Ins. Co.*, 130 F.R.D. 507, 508 (D.D.C. 1990) (citing, *inter alia*, *United States v. Gypsum*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948)).

¹Docket No. 923.

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A magistrate judge’s legal conclusions in a discovery-related order “are not subject to *de novo* determination.” *Grimes v. City and County of San Francisco*, 951 F.2d 236, 241 (9th Cir. 1991). Instead, those legal conclusions are subject to the more deferential “contrary to law” standard. *Compare* 28 U.S.C. § 636(b)(1)(C) (in reviewing a magistrate judge’s rulings on dispositive matters, “A judge of the court shall make a *de novo* determination of those portions of the report . . . to which objection is made.”).

II. Perfect 10's Objections to the Order

Magistrate Judge Hillman’s Order is commendably pithy, particularly so given that he apparently waded through more than 20 briefs and held a four-hour hearing on Perfect 10’s motion. Google’s Opposition (“Opp.”) pp. 4:24-5:19. Following are the portions of the Order to which Perfect 10 objects:

A. Judge Hillman’s Ruling Regarding Google’s Production of “DMCA logs in an electronic spreadsheet format”

Perfect 10’s Request for Production (“RFP”) No. 196 sought production of Google’s DMCA log of DMCA notices from third parties. MPA p. 10:15-16. For purposes of this RFP, Perfect 10 defined “DMCA log” as a spreadsheet-type document summarizing DMCA notices received, the identity of the notifying party and the accused infringer, and the actions (if any) taken in response.

Judge Hillman ruled that Google has produced DMCA logs in TIFF format as to Web Search, Image Search, and AdSense. Order p. 2. If Perfect 10 seeks an Excel-formatted production of the same spreadsheets, Judge Hillman likely would order such production unless the parties reached an agreement on the matter within five days.² *Id.* Google was not ordered to produce Blogger DMCA logs, because Perfect 10 propounded no such request. *Id.*

Judge Hillman’s ruling that Google has already produced DMCA logs in TIFF format as to Web Search, Image Search, and AdSense is not clearly erroneous or contrary

²In any case, Google has offered to re-produce its DMCA spreadsheets in Excel format. Opp. p. 14:24-26.

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to law, because Google presented ample evidence supporting that ruling. *See* Opp. p. 14:15-16:28 (referencing relevant declarations). As but one example, “In response to [this Court’s] May 12, 2008 Order requiring the production of Google’s DMCA log pursuant to Request No. 196, Google collected and produced its DMCA tracking spreadsheets” Declaration of Bradley R. Love in Support of Google’s Opposition (“Love Decl.”), Exh. C at p. 5. Perfect 10 has not presented this Court with evidence leading to a “definite and firm conviction that a mistake has been committed.” *Federal Sav. and Loan Ins. Corp.*, 130 F.R.D. 507, 508 (D.D.C. 1990). To the extent that Google has not produced “spreadsheet-type documents” concerning Perfect 10’s DMCA notices for Web Search and Image Search, there is evidence it produced the relevant DMCA logs in their native format. *See* Opp. p. 15:5-14.

Perfect 10’s objections to this portion of the Order boil down to its claim that Google produced documents that do not contain all of the information Perfect 10 would like them to contain, and that the documents are not in Perfect 10’s preferred format. Perfect 10 equates this with Google running afoul of its discovery obligations. Not so. The Court does not interpret its May 13, 2008 order³ regarding RFP No. 196 as requiring Google to create new documents to satisfy Perfect 10’s definition of a DMCA log.

B. Judge Hillman’s Ruling Regarding DMCA Termination Notices

Judge Hillman ruled that Google has produced DMCA termination notices as to Web Search, Image Search, and AdSense.⁴ Order. P. 2. There is no evidence before the Court sufficient to convince it this ruling is clearly erroneous or contrary to law. Even Perfect 10 does not dispute Google produced termination notices resulting from Perfect 10’s DMCA notices. MPA pp. 14:28-15:2. Moreover, there is evidence Google has produced termination notices based on DMCA notices from third parties. Opp. p. 17:10-14; Love Decl., Ex. C at pp. 158-162. Perfect 10 disputes Google’s characterization of

³Docket No. 295.

⁴Actually, Google has produced termination notices for AdSense alone, because “Web Search and Image Search do not have account holders or subscribers, so there are no accounts to terminate for those products.” Opp. p. 17 n.8. Although the Order is incorrect on this point, it has no impact on Judge Hillman’s underlying analysis.

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these emails as being “termination notices” because, among other reasons, they do not contain the word “termination.”

This is another instance of Perfect 10 arguing form over substance, and it is not evidence sufficient to require this Court to overturn Judge Hillman’s Order. To the extent, if any, that Google has not recently supplemented its production of termination notices (third party and otherwise), the Order clearly specifies that any supplemental documents shall be produced within 20 days. The Court expects Google will comply with the Order and produce any responsive termination notices in its possession.

C. Judge Hillman’s Ruling Regarding Third Party DMCA Notices

Judge Hillman ruled that Perfect 10 never requested third party DMCA notices for Web Search, Image Search, AdSense, or Blogger, and did not order such notices produced. Order p. 2. There is no evidence before the Court sufficient to convince it this ruling is clearly erroneous or contrary to law.

At issue here is RFP No. 51, which calls for Google to produce *either* its DMCA log *or* any other documents sufficient to identify all entities other than Perfect 10 from whom Google has received a notice regarding an intellectual property violation. MPA p. 16:8-14. Perfect 10 focuses on the latter portion of its RFP, contending it encompasses a request for third party DMCA notices. As an initial matter, this Court agrees with Judge Hillman that RFP No. 51's language does not constitute a request for third party DMCA notices.

Even if Perfect 10's interpretation of its RFP is correct, the operative language is contingent upon Google not producing its DMCA log. Perfect 10 makes much of the fact that Google did not produce its DMCA log in response to RFP No. 51, supposedly triggering the alternative request for other documents identifying infringers. As discussed above, however, Google *has* produced its DMCA logs in response to this Court’s May 13, 2008 Order regarding RFP No. 196.

D. Judge Hillman’s Rulings Regarding Blogger

Judge Hillman ruled that discovery orders issued prior to the 2008 date when

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Blogger was added to the case did not encompass Blogger-related documents. Order p. 1. Further, he found Perfect 10 never requested Blogger DMCA logs, Blogger DMCA termination notices, Blogger third party DMCA notices, or Blogger Repeat Infringer Tracking Sheets, and Judge Hillman did not order them produced. Order p. 2. There is no evidence before the Court sufficient to convince it these rulings are clearly erroneous or contrary to law.

It is undisputed that Perfect 10 has never propounded a Blogger-specific discovery request, despite assuring this Court, during the hearing on Perfect 10's motion to amend its complaint, that it would seek Blogger-related discovery:

Mr. Mausner: We are going to take discovery regarding Blogger, but it depends what we need obviously.

The Court: But it's going to be along the same lines as the discovery you have been conducting all along, right? It's just about Blogger.

Mr. Mausner: I don't know that the discovery would be the same, but, yes, yes, we are going to take discovery regarding Blogger certainly.

Love Decl., Ex. C at p. 152.

In light of Perfect 10's failure to propound Blogger-specific discovery requests, Perfect 10's contention that it is entitled to Blogger-related discovery is based on two theories. First, it argues that allegations and discovery requests made prior to Blogger being added to the case necessarily encompassed Blogger documents. In the alternative, Perfect 10 argues that once it amended its complaint to add Blogger to the case, Google had a duty to supplement its prior discovery responses with Blogger documents.

The Court agrees with Judge Hillman that prior discovery orders did not embrace Blogger-related documents. For reasons discussed above, certain of Perfect 10's arguments are moot (e.g. it never requested any third party DMCA notices, including those sent to Blogger). Perfect 10 argues strenuously that Blogger has been implicated in

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various categories of responsive documents. Although prior discovery responses may have led to the production of Blogger-related documents, such documents were responsive for reasons *other than* being Blogger-related.

One example of such documents is Perfect 10 DMCA notices produced by Google regarding alleged Blogger infringements in those notices. Another is DMCA logs of AdSense sites, which Judge Hillman found Google has produced. Perfect 10 contends that 50-percent of AdSense sites are also Blogger sites. The fact that such overlaps may exist does not mean that Perfect 10's discovery requests sought Blogger documents on the basis that they were Blogger documents. This is consistent with Judge Hillman's findings regarding Blogger.

Perfect 10 cannot escape the fact that it never set forth Blogger-specific allegations until it amended its complaint to add Blogger to the case. And after that point, Perfect 10 *never served Blogger-specific discovery*. Perfect 10 now seeks to convince the Court that its old discovery requests necessarily embrace Blogger-related documents. When Perfect 10 sought to add Blogger to the case in 2008, it knew it had received no Blogger-specific discovery in response to its outstanding requests. And yet it never mentioned this to the Court when it sought to amend its complaint. Instead, it assured the Court it would seek Blogger discovery.

Nor was it incumbent upon Google to supplement its prior discovery responses after Blogger was added to the case, since the outstanding discovery did not encompass Blogger documents as such. This is particularly true given that Perfect 10 promised in open court to serve Blogger discovery and yet subsequently chose not to do so. Regardless, as Judge Hillman points out in his Order, there is still ample time for Perfect 10 to seek Blogger-related discovery before trial.

E. Judge Hillman's Conclusions That Google Has Not Violated Any Court Orders and That Perfect 10 Has Not Been Prejudiced

For the forgoing reasons, the Court concurs with Judge Hillman's findings that Google has not violated any court orders and, therefore, Perfect 10 has suffered no resulting prejudice.

