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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PERFECT 10, INC., a California
corporation,

Plaintiff,

v.

GOOGLE, INC., a corporation; et al.,

Defendants.

Case No. CV 04-9484 AHM (SHx)

Before Judge A. Howard Matz

**PERFECT 10, INC.'S OPPOSITION
TO GOOGLE INC.'S EX PARTE
APPLICATION TO STRIKE
PERFECT 10'S NOTICE
SUBMITTING GOOGLE'S
RESPONSES AND OBJECTIONS TO
PERFECT 10'S FOURTEENTH SET
OF REQUESTS FOR THE
PRODUCTION OF DOCUMENTS**

Date: None Set

Time: None Set

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 On August 16, 2010, Plaintiff Perfect 10, Inc. (“Perfect 10”) received
2 Defendant Google Inc.’s Responses and Objections to Plaintiff Perfect 10, Inc.’s
3 Fourteenth Set of Requests for the Production of Documents (“Google’s
4 Responses”). A review of Google’s Responses demonstrated that:

5 (1) Defendant Google Inc. (“Google”) was continuing to engage in
6 significant obstruction of discovery in this action, including by refusing to
7 comply with discovery propounded by Perfect 10 concerning Blogger; and

8 (2) Google was taking positions in Google’s Responses that
9 contradicted prior positions taken by Google in opposition to Perfect 10’s
10 Motion for Review of, and Objections to, Judge Hillman’s June 16, 2010 Order
11 concerning Perfect 10’s Motion for Evidentiary and Other Sanctions against
12 Google (the “Motion for Review”), including that Perfect 10’s most recent
13 requests that Google produce its DMCA log, DMCA notices, termination
14 notices, and other documents regarding Blogger were “duplicative” of previous
15 discovery requests propounded by Perfect 10.

16 Accordingly, on August 18, 2010, two days after receiving Google’s
17 Responses, Perfect 10 filed a Notice submitting Google’s Responses to the
18 Court in connection with the Motion for Review (Docket No. 966) (the
19 “Notice”). Apparently unhappy that this Court has been alerted to its
20 contradictory positions and continued obstruction of discovery, Google has now
21 filed an *Ex Parte* Application To Strike Perfect 10’s Notice Submitting
22 Google’s Responses and Objections To Perfect 10’s Fourteenth Set of Requests
23 For Production of Documents (Docket No. 969) (the “Application”). The
24 Application lacks good cause, and should be denied by the Court, on the
25 following grounds:

26 **I. THIS LITIGATION IS STAYED PURSUANT TO STIPULATION.**

27 On August 23, 2010, only six minutes after filing the Application,
28 Google filed a Stipulation For Stay Of Discovery And Other Proceedings

1 Pending Ruling By Court Of Appeals (“Docket No. 970”) (the “Stipulation”).
2 The Stipulation, which was proposed by Google, provides for a stay of
3 discovery and all other proceedings in this Court, except for those matters
4 directly related to the appeal, during the pendency of Perfect 10’s appeal of this
5 Court’s July 30, 2010 Order, which incorporates by reference this Court’s July
6 26, 2010 Order. For this reason alone, this Court should not grant Google’s
7 Application.

8 **II. THE NOTICE SHOULD NOT BE STRICKEN BECAUSE IT**
9 **CONTAINS RELEVANT INFORMATION THAT COULD NOT**
10 **HAVE BEEN SUBMITTED EARLIER.**

11 As explained above, the Notice contains information that is directly
12 relevant to the Motion for Review because it demonstrates Google’s continued
13 practice of obstructing the discovery process and withholding relevant
14 documents. Nevertheless, Google advances two grounds for this Court to strike
15 the Notice. As explained below, both fail.

16 Google first asserts that the Notice is improper because it concerns
17 evidence of events that were not before Magistrate Judge Hillman when he
18 issued his June 16, 2010 Order that is the subject of the Motion for Review.
19 Application at 2. It is undisputed, however, that Perfect 10 could not have
20 possibly submitted the Notice before Magistrate Judge Hillman issued his June
21 16, 2010 Order, because Perfect 10 did not even receive Google’s Responses
22 until August 16, 2010. Perfect 10 was justified in not submitting the Notice to
23 Magistrate Judge Hillman because the evidence at issue – Google’s Responses
24 – did not even exist at the time. Under these circumstances, the Notice is not
25 improper and may be considered by this Court. *See, e.g., Paddington Partners*
26 *v. Bourchard*, 34 F.3d 1132, 1137-1138 (2d Cir. 1994) (party is barred from
27 presenting further evidence to district court in objecting to a magistrate’s ruling
28 only “when it offer[s] no justification for not offering the testimony at the

1 hearing before the magistrate”). *See also Wallace v. Tilley*, 41 F.3d 296, 302
2 (7th Cir. 1994); *Hill v. Chalanor*, 2010 WL 1257930 *3 n.2 (N.D.N.Y., March
3 25, 2010).¹

4 Google next asserts that the Notice should be stricken because it
5 purportedly violates Local Rule 7-10. Application at 3. By its very terms,
6 however, Local Rule 7-10 applies only to responses to reply papers. *See* Local
7 Rule 7-10 (“Absent prior written order of the Court, the opposing party shall
8 not file **a response to the reply.**”) (emphasis added). Here, the Notice cannot
9 possibly be viewed as a response to any reply submitted by Google. On the
10 contrary, the Notice simply attempts to provide the Court with further
11 information based on recent developments that could not have possibly been
12 addressed by Magistrate Judge Hillman or the reply. Google itself has not been
13 hesitant to submit additional briefing in connection with these proceedings
14 absent prior Court order. *See, e.g.,* Google Inc.’s Statement Regarding the
15 Status of DMCA-Related Discovery Issues in P10’s Motion for Evidentiary and
16 Other Sanctions, filed June 1, 2010 (Docket No. 885). Nevertheless, Magistrate
17 Judge Hillman chose not to strike that pleading. June 2, 2010 Minute Order
18 dated June 2, 2010 (Docket No. 887). This Court likewise should not strike the
19 Notice, because it does not violate Local Rule 7-10.

20 Accordingly, for all of the foregoing reasons, this Court should deny
21 Google’s Ex Parte Application to strike the Notice submitted by Perfect 10.
22

23 ¹ None of the three cases upon which Google mistakenly relies [*see* Application
24 at 2] is to the contrary. First, none of these three cases involved evidence that
25 did not exist at the time of the ruling of the Magistrate Judge, as is true here.
26 Moreover, *United States v. Walker*, 601 F.2d 1051 (9th Cir. 1979), one of the
27 cases cited by Google, is wholly inapposite, because it did not even involve a
28 motion for review by a District Court of a ruling by a Magistrate Judge.
Finally, *Paramount Pictures Corp. et al. v. Replay TV, et al.*, 2002 WL
32151632 (C.D. Cal., May 30, 2002), another case cited by Google, cites with
approval the Second Circuit’s opinion in *Paddington Partners*, cited above,
which supports Perfect 10’s position.

1 Dated: August 24, 2010

Respectfully submitted,

2 LAW OFFICES OF JEFFREY N. MAUSNER

3 *s/ Jeffrey N. Mausner*

4 By: _____

Jeffrey N. Mausner

5 Attorneys for Plaintiff Perfect 10, Inc.

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