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Perfect 10, Inc.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PERFECT 10, INC., a California corporation,

Plaintiff,

v.

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

Defendants.

AND CONSOLIDATED CASE

MASTER FILE NO. CV04-9484 AHM (SHX)

Plaintiff Perfect 10, Inc.'s Reply Memorandum Of Points And Authorities In Support Of Its Motion for Review and Reconsideration of Portions of Magistrate Judge Hillman's Order of February 22, 2008 Granting in Part Perfect 10's Motion to Compel Defendant Google, Inc. to Produce Documents, and Objections Thereto

[Declarations Of Jeffrey N. Mausner and Dr. Norman Zada In Support Thereof, Submitted Concurrently Herewith]

Date: April 14, 2008
Time: 10:00 A.M.
Place: Courtroom of Judge Matz

1. INTRODUCTION AND SUMMARY OF ARGUMENT.

Defendant Google, Inc. ("Google") has completely obstructed discovery in this case by: (1) objecting to practically every discovery request; (2) refusing to voluntarily produce virtually any relevant discovery; (3) baselessly objecting to requests for production of documents as being overly burdensome;[1] (4) refusing to produce responsive documents, even when ordered by Judge Hillman to do so;[2] and (5) refusing to state whether or not it is producing documents in response to particular discovery requests, in direct violation of the requirements of Rule 34 of the Federal Rules of Civil Procedure.

Perfect 10's motion for review and reconsideration of portions of Judge Hillman's Order of February 22, 2008 (the "Motion") involves but three examples

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[1] As explained in Section 2, below, Google has now taken the position, only after Perfect 10 filed this Motion, that it will not produce *any* documents in response to Request Nos. 135, 136, and 137, based on undue burden or cost. *See* letter from Rachel Herrick, dated March 19, 2008, attached as Exhibit A to the Declaration of Jeffrey N. Mausner submitted concurrently herewith ("Mausner Decl.").

[2] Google has not produced any documents whatsoever in response to at least 14 different requests for production, despite being ordered to do so by Judge Hillman in his Order of May 22, 2006 (PACER Docket No. 163). These include such requests as: (1) All notices or complaints that GOOGLE received in the years 2001 through 2003 from Perfect 10; (2) All DOCUMENTS that constitute, embody, or relate to GOOGLE's response to any notices or complaints that GOOGLE received in the years 2001 through 2003 from Perfect 10; (3) All DOCUMENTS that constitute or embody GOOGLE's contractual arrangements for the use of digital images on Image Search; (4) internal summary reports sufficient to determine the amount or percentage of searches on Google Image Search and Web Search for each of 22 terms, including Perfect 10, sex, nude, supermodel, and porn, for each year from December 31, 2001 to the present; and (5) DOCUMENTS sufficient to explain GOOGLE'S policy with respect to storing images or web pages on GOOGLE servers, including what materials are stored and how long they are retained. *See* Declaration of Dr. Norm Zada In Support Of Perfect 10's Supplemental Memorandum In Support Of Its Motion To Compel Defendant Google Inc. To Produce Documents, filed on Nov. 5, 2007, ¶ 8 (PACER No. 236) (the "2007 Zada Declaration"), attached as Exhibit B to the Mausner Declaration.

of Google's obstructionist conduct. First, Google's refusal to provide appropriate responses to Request For Production Nos. 135-137 has forced Perfect 10 into unnecessary and wasteful motion practice [*see* Section 2, below]. Second, even though Google has now been ordered by Judge Hillman to produce documents in response to various requests for production, Google refuses to provide a written response stating whether it is producing documents in response to each request, or whether Google is unable to comply with the request because no responsive documents exist [*see* Section 3, below]. Third, Google objects to producing copies of the deposition transcripts of its employees, officers, and directors taken in a lawsuit pending in the United States District Court for the Southern District of New York entitled *Columbia Pictures Industries v. Drury* (the "*Drury* Case"), even though an affidavit of a defendant in that case demonstrates that such deposition testimony is relevant to Perfect 10's copyright infringement claim in this case, because it shows that Google was aware of and assisted in the defendant's infringing activities [*see* Section 4, below]. As explained below, Judge Hillman's rulings with respect to these issues are contrary to law, and should be reversed.

2. GOOGLE'S OBSTRUCTION WITH RESPECT TO REQUEST NOS. 135, 136, AND 137.

The first issue raised by the Motion involves Request Nos. 135, 136, and 137, as modified. These three requests, which are quoted in their entirety on Page 2 of the Motion and Page 4 of the Opposition, required Google to produce "existing logs, data, documents and information from the Google Trends Data Base or elsewhere, sufficient to determine": (i) the approximate number of Google Web Searches which included the name of each of nine different Perfect 10 models, for each of the years 2001 through 2006 (Request No. 135); (ii) the approximate number of Google Image Searches which included the name of each of these same nine models (Request No. 137); and (iii) the approximate number of Google Image Searches which included each of the terms Perfect 10, Perfect Ten, Perfect10, and

perfect10.com (Request No. 136).

In his written Order, Judge Hillman compelled Google to produce documents responsive to these three requests, but did not require Google to state whether it had produced documents sufficient to comply with each request, as sought by Perfect 10. A discussion of the circumstances surrounding these requests demonstrates Google's continually obstructive behavior with respect to discovery, and why this Court should grant the Motion.

Perfect 10 has been trying to get the information covered by Request Nos. 135, 136, and 137 for years. In early 2005, Perfect 10 propounded similar document requests, including a request involving 137 Perfect 10 models. Google objected to these requests, forcing Perfect 10 to file a motion to compel, which was heard on February 22, 2006. *See* Mausner Decl., ¶ 6 and Exhibit C (Request For Production Nos. 43 and 46 and Google's responses thereto). At that hearing, Google convinced Judge Hillman that these were "mega requests," so he deferred ruling on them. Transcript of Hearing on February 22, 2006, at 13, 15, Exhibit D to the Mausner Declaration. Therefore, in an attempt to obtain at least a sampling of this information and avoid Google's objections of undue burden, Perfect 10 propounded Request Nos. 135 and 137, which reduced the number of Perfect 10 model names for which Google had to provide responsive documents from 137 to 9. Once again, however, Google objected, forcing Perfect 10 to make a second motion to compel. In his Order of February 22, 2008, Judge Hillman ordered Google to produce documents responsive to Request Nos. 135, 136, and 137. Google did not file objections with this Court to Judge Hillman's ruling with respect to these three requests. Instead, on March 19, 2008, after Perfect 10 had filed this Motion, Google sent a letter to Perfect 10 stating that it would not produce any documents in response to Request Nos. 135, 136, and 137, because these were also "mega-requests" seeking information that was "not reasonably

accessible because of undue burden or cost." *See* Ex. A to Mausner Declaration.[3]

Google *must* have the requested search information readily available, because it publicly graphs that information. Perfect 10 is simply asking for the raw data (the actual number of searches) Google must have to create its graph. As Perfect 10's president, Dr. Norman Zada, explained in a declaration filed on November 5, 2007:

> 4. Google has a "Google Trends" program which is available to the public, which provides the relative frequency of searches, but does not publicly provide the actual number of searches. In other words, for example, Google will publicly provide the relative frequency of searches on the name of Perfect 10 model Aria Giovanni compared to actress Ashley Judd. Exhibit 10 is a printout I made from Google Trends, showing the relative number of search results on Aria Giovanni (graph in blue) compared to searches on Ashley Judd (graph in red), and John Roberts (graph in green).
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> 5. I have a Ph.D. in Operations Research, a form of Applied Mathematics. Based on my knowledge of mathematics, I can state that Google must maintain readily retrievable information regarding the number of searches done on Perfect 10 model names in order to display graphs which compare the frequency of searches on Perfect 10 model names to the frequency of other searches as shown in Exhibit 10. Another search engine, Overture.com, publicly provides this information regarding number of searches, including searches on the names of Perfect 10 models. Attached as Exhibit 11 is a true and correct print-out of this information for Aria Giovanni from Overture. Exhibit 11 indicates that in January 2007, there were 87,004 overture.com searches done specifically on the search term "Aria Giovanni."

2007 Zada Declaration, ¶¶ 4-5, PACER No. 236.[4] Therefore, it is clear that the information sought by Request Nos. 135, 136, and 137 is readily available to Google, and it is simply continuing to stonewall.[5]

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[3] If Google was going to refuse to produce documents on the ground that Request Nos. 135, 136, and 136 are "mega requests," it should have submitted evidence of that in its opposition to Perfect 10's motion to compel and raised it in its objections to Judge Hillman's ruling. The timing of Google's March 19, 2008 letter, sent *after* Perfect 10 filed the Motion, is Google's latest attempt to obstruct discovery, undercut the Motion, and further delay the production of responsive documents.

[4] For the Court's convenience, a copy of the 2007 Zada Declaration, as well as Exhibits 10 and 11 referred to in Paragraphs 4 and 5 of the declaration quoted above, are attached as Exhibits B, 10, and 11, to the Mausner Declaration.

[5] Also, because Perfect 10 requested this information in discovery in 2005, Google should not have allowed it to become "unavailable," as it now (incorrectly) claims.

3. THIS COURT SHOULD GRANT THE MOTION AND ORDER GOOGLE TO PROVIDE A WRITTEN RESPONSE THAT COMPLIES WITH RULE 34 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND [PROPOSED] FURTHER ORDER NO. 2.

In furtherance of its obstructionism, Google opposes the inclusion of the following language from Perfect 10's [Proposed] Further Order No. 2 in Judge Hillman's written Order: "On or before _____, 2008, Google shall provide a written response to Perfect 10, stating whether it has produced documents in response to each request. If no responsive documents exist, Google shall so state."[6]

Google's opposition to this language and Judge Hillman's failure to include it in his written Order are contrary to law. As a leading treatise makes clear, a party responding to a request for production of documents under Rule 34 of the Federal Rules of Civil Procedure must respond separately to each item in the request by one of the following: (1) a statement "with respect to *each* item or category that inspection and related activities will be permitted as requested (except to the extent of any objections)"; (2) a response of inability to comply with the request, stating that "a diligent search and reasonable inquiry has been made in an effort to locate the item requested"; and the "*reason* the party is unable to comply: e.g., the document never existed; has been lost or stolen; was inadvertently destroyed; or is not in the possession, custody or control of the responding party"; or (3) objections. *See* W. Schwarzer, A. Tashima & J. Wagstaffe, *California Practice Guide: Federal Civil Procedure Before Trial* (TRG 2007) §§ 11:1911-11:1914, at 11-231, 11-232 (emphasis in original). Moreover,

[6] Google also asserts that Perfect 10 has refused to confirm whether it has produced documents in response to Google's document requests. Opposition at 6. This assertion is incorrect and irrelevant. In marked contrast to Google, Perfect 10 has been very forthcoming in responding to discovery. Declaration of Dr. Norman Zada submitted concurrently herewith ("Zada Decl."), ¶¶ 2, 3.

the response "should make clear the extent to which the responding party is willing to comply and the extent to which it is unable or unwilling to comply." *Id.*, § 11:1915, at 11-232.1.[7]

Perfect 10's [Proposed] Order No. 2, as well as the language which Perfect 10 asked Judge Hillman to include in his Order for Request Nos. 135, 136, and 137, seek nothing more than what is required by Rule 34. Once Judge Hillman overruled Google's objections to the requests set forth in his Order, Google was required to provide a written response to each such request, either setting forth its intention to comply with the request (and producing responsive documents), or expressly stating that it was unable to comply, and for what reason. Judge Hillman's failure to include this requirement in his written Order thus is contrary to law. Accordingly, this Court should grant the Motion and order Google to: (1) provide a written response to Perfect 10 on or before May 1, 2008 that complies with the language of [Proposed] Further Order No. 2; (2) produce the documents responsive to Request Nos. 135, 136, and 137 by that same date;[8] and (3) state in

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[7] The case law cited by Google [*see* Opposition at 5] is not to the contrary. The language from *In re G-I Holdings, Inc.*, 218 F.R.D. 428 (D. N.J. 2003), quoted by Google, has nothing whatsoever to do with the issue raised by the Motion: whether Google must provide a written response stating that it is producing documents or that it is unable to comply because the requested documents do not exist. Rather, *In re G-I Holdings* simply stands for the proposition that "[t]he plain phrasing of Rule 34(b) reveals that the producing party has the option of presenting information in one of two ways. If the producing party produces documents in the order in which they were kept in the usual course of business, the Rule imposes no duty to organize and label the documents." *Id.* at 439. Moreover, in *Cardenas v. Dorel Juvenile Group, Inc.*, 230 F.R.D. 611 (D. Kan. 2005), the court specifically held that, under Rule 34(b), a party responding to requests for production of documents may be ordered "to serve supplemental discovery responses in which it identified the particular documents responsive to each request." *Id.* at 619 n.24. Indeed, in a case such as this, where Google has been ordered to produce many categories of documents but has not done so, Google must be required to state if no documents exist, so Perfect 10 can tell if it is disobeying the Court's orders.

[8] Google may contend that this Court should not address the issues raised by its

writing that it has produced documents sufficient to determine the approximate number of searches done on those search requests.

4. THIS COURT SHOULD ORDER GOOGLE TO PRODUCE THE DEPOSITIONS FROM THE *DRURY* CASE, BECAUSE THEY ARE RELEVANT TO PERFECT 10'S CLAIM THAT GOOGLE KNEW ABOUT, ASSISTED, AND PROFITED FROM INFRINGEMENT BY ITS ADVERTISING AFFILIATES.

The *Drury* Case is relevant because the defendants there, owners of download sites that offered pirated movies, songs, and computer software, may well have also offered Perfect 10 images, and because the Google advertising representatives who assisted those infringers likely also assisted one or more of the 39 download sites that are Google AdWords affiliates that have infringed over 585,000 Perfect 10 copyrighted images. Zada Decl., ¶ 4. At the very minimum, the deposition testimony in the *Drury* Case will shed light on the extent to which Google knowingly assists infringing websites while it profits from their thievery.

In its opposition, Google claims, without any support whatsoever, that the infringing downloading websites in the *Drury* Case "involved unrelated parties … [and] unrelated copyrighted works." Opposition at 8. However, the infringers in the *Drury* Case were not "unrelated" to Google, as they paid Google $800,000 out of the $1,100,000 they made from their illicit acts. *See* Affidavit of Luke Sample, ¶ 18, quoted *infra*. Mr. Sample's Affidavit, submitted in the *Drury* Case and attached as Exhibit 1 to Perfect 10's Motion, specifically states that Google knew

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counsel's letter of March 19, 2008, before these issues are litigated (once again) before Judge Hillman. Here, however, where the evidence submitted by Perfect 10 demonstrates both Google's obstructionist tactics and the fact that the documents sought by Request Nos. 135, 136, and 137 are readily available to Google, this Court may properly end the continuing rounds of discovery motions and order Google to produce these documents. At the very least, Perfect 10 is raising the issue of Google's March 19 letter with the Court at this time to explain to the Court the full scope of Google's obstructionist behavior as one example of many.

about, encouraged, and facilitated the infringing activities of websites with which Google had an advertising relationship – websites that offered customers assistance in illegally downloading infringing content from the Internet. *Id.*, ¶¶ 10-19. These websites may well have infringed Perfect 10 images as well. Zada Decl., ¶ 4. As Mr. Sample states, around June, 2003, he and his partner began operating a website business that offered customers assistance in locating and downloading infringing movies, television shows, music and software from the Internet, including through a website with the URL <www.thedownloadplace.com>. In an attempt to increase traffic to their websites, Sample and his partner began advertising on the Google search engine using the Google AdWords program. Affidavit of Luke Sample, ¶¶ 2, 10, 11. The Sample Affidavit then goes on to explain, in great detail, Google's knowledge of, and assistance to, his company's infringing activity:

> 11. We started using the Google AdWords program for our downloading business in the summer of 2003. For example, we created a sponsored link advertisement for the <thedownloadplace.com> that read: "Freaky Friday — free. Join now, movies still in theaters, dvd movies, new releases, adult." We then entered a series keywords that we wanted to bid on, which when typed into Google would prompt our advertisement to appear, including "Freaky Friday free movie," and "Freaky Friday free movie download." As these keywords make clear, we were looking to capture two types of Google users: those who were looking for a legal, authorized source of film downloads, and *those who were looking for a good way to find pirated copies of films and television shows. . . .*
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> 12. . . . Beginning in April 2004, . . . we began communicating with and receiving assistance from individual Google employees on how to structure our AdWords advertising. . . . At that time we communicated with a Google employee named [redacted]. She suggested that we use more targeted keywords than we had been using. For example, she suggested combining "free music" and "listen" into "listen to free music."
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> 13. We acted on Google's suggestions and revamped our AdWords advertising in the spring of 2004. To implement [redacted] suggestion about targeted keywords, we created a single new campaign to use for all of our sponsored links geared toward specific movies. Specifically, in this campaign, we created sponsored links referencing the following films: Anchorman, Bourne Supremacy, Catwoman, Fahrenheit 911, Hellboy, I Robot, Kill Bill, Shrek II, Spiderman 2. The ad text for these links told potential customers that they could get access to "movies still in theaters," "new releases," and "DVD." The keywords associated with these advertisements combined

the title of the film with "download" *(e.g.* "spiderman 2 download"). Later that year, we created another AdWords campaign targeted at television programs and referencing Friends and The Simpsons.

14. In the summer of that year, our monthly spending for Google advertising was in excess of $20,000. In the fall, apparently due to the amount we were spending, Google assigned employees to be our personal account representatives.

15. [Redacted] was the first Google representative assigned to our account. In the fall of 2004, I had email communications with him, and also several telephone conversations with him. He expressed familiarity with our business and the content of our websites, as well as the advertisements and keywords we had been bidding on, including advertisements and keywords utilizing the names of specific films. _…

16. In November 2004, [redacted] offered to have Google "optimize" our advertising campaigns. He explained that Google employees would examine our website and suggest new or revised advertising text and new or revised keywords.

17. In December 2004, Google suggested and we agreed to an "optimization" proposal for a campaign for <thedownloadplace.com> that was geared toward music. As part of this, *Google suggested* that we have a *sponsored links specifically referencing the recording artists Ryan Cabrera, Usher, Nellie,* and several dozen others, *and keywords that combined these artists' names with the word "download."* In January 2005, *Google suggested* and we agreed to an "optimization" for another campaign for the same website, geared toward downloads of software programs**.** Among other things, *Google proposed that we buy sponsored link advertisements such as:*

Microsoft XP Software
Download Unlimited Top Software.
Join Now - See Our Special Offer!

Google proposed, and we agreed to run, similar sponsored links for other popular software programs, *none of which we were authorized to distribute,* including: Microsoft Word, Norton Anti-Virus, Photoshop, and Quicken. The keywords associated with these advertisements combined the software titles with the words "free" and "download."

18**.** During the period we operated this downloading business, *we took in revenues of about $1.1 million***,** all of it from selling memberships to these websites. Of that money**,** *we paid Google more than $800,000* for the AdWords advertising described above.

19. A number of the computer users who downloaded our software found our website through our Google advertising. In fact, from special ad-tracking software, we determined that *virtually all of our business came from users who found our websites through Google searches.*

Affidavit of Luke Sample, Ex. 1 to the Motion, ¶¶ 11-14, 16-19 (emphasis added).[9]

Google's knowledge of, assistance to, encouragement of, and profits from infringement are clearly relevant, particularly if the same defendants have infringed Perfect 10 copyrights, or if the same or similarly situated Google employees are assisting websites that are infringing Perfect 10's copyrights.[10] Accordingly, Judge Hillman's ruling denying Request No. 197 is clearly erroneous and contrary to law.

5. CONCLUSION.

For all of the foregoing reasons, Perfect 10 respectfully requests that this Court grant the Motion in its entirety, with respect to Request Nos. 135, 136, 137, 197 and [Proposed] Further Order No. 2.

Dated: April 4, 2008

Respectfully submitted,
MAUSNER IP LAW

By: Jeffrey N. Mausner
JEFFREY N. MAUSNER
Attorney for Plaintiff Perfect 10, Inc.

[9] Google contends that it cannot produce the depositions because they are subject to a protective order in the *Drury* Case. Opposition at 9, n.6. This assertion provides no reason to deny the Motion. First, nowhere in its Opposition does Google establish what information, if any, in the depositions is confidential. Moreover, if the depositions are subject to a protective order in the *Drury* Case, it likely is information that Google has designated as confidential, since the depositions at issue are of Google's employees. Because there is a protective order in the present case, Google can also designate that information as confidential here.

[10] Perfect 10 has spent almost a year litigating this issue and still does not know if Google has such depositions, because it has refused to so state. This Court should require Google to initially answer at the hearing whether or not such deposition transcripts exist. At a minimum, Google should be required to provide the names of the Google employees who acted as ad representatives for the *Drury* defendants.