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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA

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

14 Plaintiff,

15 vs.

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

18 Defendants.

19 AND COUNTERCLAIM

20 PERFECT 10, INC., a California
21 corporation,

22 Plaintiff,

23 vs.

24 AMAZON.COM, INC., a corporation;
A9.COM, INC., a corporation; and
DOES 1 through 100, inclusive,

25 Defendants.

CASE NO. CV 04-9484 AHM (SHx)
[Consolidated with Case No. CV 05-
4753 AHM (SHx)]

DISCOVERY MATTER

**GOOGLE INC.'S SUPPLEMENTAL
MEMORANDUM IN SUPPORT OF
GOOGLE'S MOTION TO COMPEL
PERFECT 10 TO (1) PRODUCE
DOCUMENTS, (2) COMPLY WITH
THE PROTECTIVE ORDER, AND
(3) AFFIX DOCUMENT CONTROL
NUMBERS TO ITS DOCUMENT
PRODUCTIONS**

**[Supplemental Declaration of Rachel
Herrick Kassabian filed concurrently
herewith]**

Hon. Stephen J. Hillman

Courtroom.: 550
Hearing Date: June 1, 2009
Hearing Time: 2:00 pm

Discovery Cutoff: None Set
Pretrial Conference Date: None Set
Trial Date: None Set

Case No. CV 04-9484 AHM (SHx) [Consolidated
with Case No. CV 05-4753 AHM (SHx)]

GOOGLE'S SUPPLEMENTAL MEMORANDUM

1 **I. P10 SHOULD PRODUCE FINANCIAL DOCUMENTS.**

2 P10 makes several excuses for its failure to produce complete financial records.
3 Each fails. First, P10 claims that discovery has been stayed. It is not, nor has the
4 Court otherwise imposed any “limits” excusing P10 from its discovery obligations.
5 Supplemental Declaration of Rachel Kassabian (“Supp. Decl.”), Ex. B at p. 26, 57.

6 Second, P10 claims Google has not completed meet-and-confer regarding all
7 Requests at issue. To the contrary, P10’s counsel expressly acknowledged that on
8 November 6, 2008 Google “went through each issue” and “asked questions about the
9 objections and I answered them.” Supp. Decl., Ex. A (11/7/08 Kincaid email). P10
10 continues to refuse to modify its responses and objections to those requests. Supp.
11 Decl., ¶ 5. Nor does P10 now suggest that further meet and confer would be fruitful.

12 Third, P10 claims that the parties reached an agreement regarding the
13 production of financial documents and that Google has reneged while P10 has
14 complied. In fact, there was no such agreement. Suppl. Decl., ¶ 7. Moreover, on this
15 score, P10 is attempting to have it both ways. P10 represented that:

16 Perfect 10 does intend to honor its discovery obligations and produce all
17 relevant, non-privileged documents [regarding actual damages].... Perfect 10
18 has already withdrawn its objections to the 27 document requests, and all other
19 requests relating to Perfect 10’s alleged claim of actual damages.

20 Suppl. Decl., Ex. E (1/29/08 Mausner email). P10 thus claims to seek actual
21 damages, yet objects to producing damages-related documents—objections it
22 represented had been withdrawn many months ago. P10 cannot have it both ways.

23 Fourth, P10 claims that “it does not have additional responsive documents” and
24 “they simply don’t exist.” Jt. Stip. at 34-38. If true, then P10 has failed to preserve
25 critical evidence. For instance, P10 has produced just a handful of royalty statements
26 for its alleged licensing relationships, and has failed to provide any financial
27 documents for at least 51 individual months (Jt. Stip. at 26), or documents supporting
28 the figures in the summary financial statements it has produced—*despite the fact that*

1 *most of these documents were created during the four-plus year pendency of this suit.*
2 The gaping holes in P10’s financial record production, including records created (and
3 apparently lost or destroyed) during this litigation, arouse reasonable suspicion that
4 P10 has breached its duty to preserve documents. See A. Farber and Partners, Inc. v.
5 Garber, 234 F.R.D. 186, 193-94 (C.D. Cal. 2006). “[A] court may sanction a party
6 who destroys or fails to preserve relevant evidence.” Id. at 194. A court also can
7 order a party to submit a detailed declaration explaining what happened to the
8 documents, and where they searched. Lone Star Steakhouse and Saloon, Inc. v.
9 Liberty Mut. Ins. Group, 2003 WL 21659662, at *3 (D. Kan. June 4, 2003) (ordering
10 affidavit); Buchanan v. Consolidated Stores Corp., 206 F.R.D. 123, 125 (D. Md.
11 2002) (same). At a minimum, the Court should order P10 to produce the documents
12 and, if P10 does not, require P10 to serve a declaration explaining what it has done
13 with its financial records created on or after the date P10 was on notice of this action.

14 Fifth, P10 *admits* it has other financial materials not yet produced, believing
15 that it only must produce the documents upon which it intends to rely at trial. Jt. Stip.
16 at 39. Not so. Google is entitled to all information relevant to its defense of P10’s
17 claims, not just what P10 cherry-picks “to establish its damages.” Fed. R. Civ. P.
18 26(b)(1). Moreover, it would be impossible to test and challenge P10’s damages
19 claims without *complete* financial records, which likely would show the true reason
20 for P10’s alleged losses. See, e.g., Jt. Stip. at 22-23. Sixth, P10’s interpretation of
21 the Protective Order is also incorrect. It states that Google should “seek an order to
22 compel discovery” of information that “involves the confidentiality rights of a non-
23 party.” Declaration of Rachel Herrick Kassabian, filed 5/7/09, (Dkt. 408-3), Ex. S at
24 ¶ 25. That is precisely what Google is doing by this motion.

25 **II. P10 SHOULD PRODUCE PERFECT10.COM DOCUMENTS.**

26 P10 offers a mountain of excuses for not producing documents and a program
27 relating to certain server logs, password usage reports, and Perfect10.com subscriber
28 information, including that (1) they were not requested; (2) it does not have them, (3)

1 they are irrelevant, (4) they are available from its vendor Paycom, and (5) they are
2 trade secrets or might disclose private user information. These claims fail.

3 First, Google’s requests plainly call for these materials, see, e.g., Req. No. 154
4 (“[a]ll documents concerning ... unauthorized use of passwords to gain access to
5 [P10’s] websites”), and P10 previously *agreed* to produce much of them, including
6 the program that P10 uses to understand its server logs and monitor password usage.
7 P10 cannot escape its earlier waiver of the objections it now attempts to revive.

8 Second, P10 does not disclose whether these documents never existed, or were
9 lost or destroyed. Jt. Stip. at 53-56. Google and this Court are entitled to know what
10 happened to these documents, which P10 was under a duty to preserve given this
11 litigation. See supra at 2. Indeed, P10’s newest claim, that it is suddenly unable to
12 locate the program it was using to search its server logs for password activity last
13 year, *during this litigation* (and *after* Google requested it) is at best suspect. P10
14 should be ordered to produce the documents and, if it fails to provide any, provide a
15 declaration, as above. Third, these documents are indeed relevant. P10 may not
16 claim that Google destroyed its website and cell-phone download business, and then
17 refuse to produce documents reflecting the success or failure of that business. P10
18 must produce all relevant and responsive documents, not just evidence helpful to P10.

19 Fourth, the availability of these documents from other sources is *not* a valid
20 objection—P10 must produce all documents within its control, including documents
21 P10 can obtain from its own vendor. Fed. R. Civ. P. 34(a)(1); In re Bankers Trust
22 Co., 61 F.3d 465, 469 (6th Cir. 1995) (documents are within possession, custody or
23 control when party “has the legal right to obtain the documents on demand”).

24 Fifth, Google is not requesting any personal information of P10 users, only the
25 aggregate “sign-up information from the third-party processor for perfect10.com” that
26 P10 had previously agreed to provide. See Jt. Stip. at 40-42 (P10’s Responses Nos.
27 98-102). Personal information can be redacted if necessary. And even if the software
28 program were a “trade secret,” the Protective Order provides adequate protection.

1 **III. P10 SHOULD PRODUCE CELL-PHONE DOWNLOAD DOCUMENTS.**

2 P10 argues that it has complied with all of Google’s Requests calling for cell-
3 phone licensing documents. Not so—P10’s production remains incomplete. Supp.
4 Decl., ¶ 14-16. Request Nos. 183 and 184 call for records related to P10’s efforts to
5 license its copyrighted works for cell phones, which would include P10’s relationship
6 with FoneStarz, Waat Media, and any others. P10 is claiming harm to the alleged
7 market for its cell-phone downloads, so it must produce documents regarding that
8 alleged market. P10 may not withhold information critical to Google’s fair use
9 defense when it is planning to move for summary judgment on copyright liability.
10 See, e.g., Burnside-Ott Aviation Training Center, Inc. v. U.S., 985 F.2d 1574, 1582
11 (Fed. Cir. 1993) (refusing summary judgment where movant has failed to provide
12 discovery). Moreover, P10's earliest efforts to license its images for cell-phone
13 downloads occurred in 2005—during this litigation. P10 must account, via affidavit,
14 for its apparent failure to preserve these documents during litigation. See supra at 2.

15 **IV. P10 SHOULD PRODUCE DOCUMENTS RELATED TO PICSCOUT.**

16 P10 claims it has produced all documents related to PicScout. In fact, its
17 production related to PicScout remains deficient, including with respect to documents
18 related to the preparation of the Gutelzon Declaration. Supp. Decl., ¶ 17.¹

19 **V. PERFECT 10 SHOULD PRODUCE THE CHART IT PREPARED.**

20 P10's opposition concedes that P10 has not even bothered to look for the chart
21 it prepared for the Net Management case. See Jt. Stip. at 78. If true, P10’s burden
22 objections are baseless, since for all P10 knows, it could take them an hour to find it.
23 This chart is relevant because it provides a “sample” of P10’s registrations, and
24

25 ¹ Despite its year-long refusal to produce, and its opposition to Google’s motion
26 to compel these documents just days ago (see Jt. Stip. at 72-74), P10 has now offered
27 to allow inspection of its “copyright materials.” Supp. Decl., Ex. H (5/14/09 Kincaid
28 email). Thus, a ruling on this issue should be deferred until after the inspection.

1 corresponding images and infringements, which the Court already found P10 should
2 produce, yet P10 has not done so. Kincaid Decl. (Dkt. 409), Ex. 1 (9/25/08 Order).

3 **VI. P10 MUST COMPLY WITH THE PROTECTIVE ORDER.**

4 P10 does not deny that it has violated the Protective Order by vastly over-
5 designating materials. Instead, P10 claims it should not have to comply because: (1)
6 P10 needs to designate its DMCA notices as confidential because it does not want
7 them on chillingeffects.org; and (2) it would be burdensome. Both arguments fail.

8 First, P10's DMCA notices comprise just a portion of its production, and
9 Google would not send P10's Interrogatory responses or document productions to
10 chillingeffects.org in any event, as P10 does not contend they are DMCA notices.

11 Second, P10's burden is no heavier than any other litigant. And because public
12 webpages are within the public domain, P10's hard drive productions likely contain
13 few confidential documents that P10 would need to sort out. Moreover, P10 has
14 affixed many thousands of words and marks onto the pages of its electronic
15 production, so it has the ability to mark them confidential. Also, Google has
16 proposed that P10 simply sort the confidential and non-confidential documents into a
17 separate hard drives and produce that. Supp. Decl., ¶ 19. P10 refuses.

18 **VII. P10 SHOULD BE ORDERED TO AFFIX CONTROL NUMBERS.**

19 P10 needs to identify each document with a unique number or reference.
20 Authentication, a "condition precedent to admissibility," is impossible if the parties
21 cannot identify specific documents produced. Fed. R. Evid. 901(a). P10 has already
22 tried to use un-produced documents as deposition exhibits. Supp. Decl., ¶ 20.
23 Affixing control numbers to P10's production will prevent such abuses in the future.

24 DATED: May 18, 2009

QUINN EMANUEL URQUHART OLIVER &
HEDGES, LLP

25
26 By /s/ Rachel Herrick Kassabian
27 Rachel Herrick Kassabian