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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

PERFECT 10, INC., a California corporation,

Plaintiff,

v.

AMAZON.COM, INC., a corporation;
A9.COM, INC., a corporation;
ALEXA INTERNET, INC., a corporation, and DOES 2 through 10, inclusive,

Defendants.

PERFECT 10, INC.,

Plaintiff,

v.

GOOGLE, INC., a corporation, and DOES 1-100, inclusive

Defendants.

Case No. CV05-4753 AHM (SHx)
CONSOLIDATED WITH CASE NO. CV04-9484 AHM (SHx)

[PROPOSED] ORDER GRANTING IN PART GOOGLE INC.'S MOTION TO COMPEL PERFECT 10 TO PRODUCE COMPLETE AND UNREDACTED FINANCIAL DOCUMENTS AND OTHER DAMAGES-RELATED DOCUMENTS, AND AMAZON.COM AND ALEXA INTERNET'S JOINDER THEREIN

Hon. Stephen J. Hillman

Date: September 22, 2009
Time: 10:00 A.M.
Courtroom: 550

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

1 **[PROPOSED] ORDER**

2 On September 22, 2009, the Court heard argument on various discovery
3 matters raised in Defendant Google Inc.'s Motion to Compel Perfect 10 (1) To
4 Produce Documents, (2) To Comply With The Protective Order, and (3) To Affix
5 Document Control Numbers To Its Document Production, including disputes relating
6 to financial documents and certain related issues arising from the planned deposition
7 of Perfect 10's accountant Bruce Hersh.¹ Defendants Amazon.com and Alexa.com
8 filed an application to join in that motion and to raise these related issues, to which
9 Perfect 10 did not file an opposition and which the Court hereby GRANTS. Having
10 considered the parties' respective briefs and oral argument, and good cause existing
11 therefore, the Court HEREBY ORDERS that Google's Motion and the Amazon
12 Defendants' joinder therein is GRANTED IN PART, as follows:

13 1. Perfect 10 is ordered to produce copies of all of its periodic and annual
14 financial statements and tax returns, including those in the possession of its outside
15 accountant Bruce Hersh, in complete and unredacted form, with the following two
16 exceptions:

17 a. With respect to medical expenses, the names of patients and
18 treating physicians may be redacted;

19 b. With respect to credit card expenses, Perfect 10's credit card
20 numbers may be redacted.

21 Perfect 10 must produce such documents in complete and unredacted form
22 (with the two exceptions noted above) by October 9, 2009.

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25 ¹ At the September 22, 2009 hearing, the Court did not reach Issues II – VI
26 presented in the parties' Joint Stipulation On Google Inc.'s Motion to Compel
27 Perfect 10 (1) To Produce Documents, (2) To Comply With The Protective Order,
28 and (3) To Affix Document Control Numbers To Its Document Production. Those
Issues will be taken up at a later date. This Order rules on Issue I in the
aforementioned Joint Stipulation (and the related issues implicated by the upcoming
deposition of Mr. Hersh), and on Amazon.com and Alexa Internet's joinder therein.

1 2. Settlement payments Perfect 10 has received from third parties are
2 relevant for discovery purposes. Perfect 10 may not redact information regarding
3 such settlement payments, and must disclose information regarding the date, payor
4 and amount of any such settlement payments. This information will be treated as
5 “HIGHLY CONFIDENTIAL” under the terms of the Protective Order. Perfect 10’s
6 compliance with this portion of the Order is stayed for ten (10) days from the hearing
7 date, September 22, 2009. By producing such settlement payment information
8 pursuant to this Order, neither Perfect 10 nor its counsel will be in violation of any
9 protective orders or confidentiality provisions entered into in this action or in any
10 other action, or with any of the settling third-parties.

11 Perfect 10 must produce such information in complete and unredacted form by
12 October 9, 2009.

13 3. Defendants’ request for all source and back up documents supporting the
14 financial statements and tax returns prepared by Mr. Hersh is granted in part, as
15 follows:

16 a. At least ten (10) business days prior to the noticed deposition of
17 its accountant Bruce Hersh, Perfect 10 shall produce to all Defendants copies of all
18 reasonably available back up or source documents upon which Mr. Hersh and Perfect
19 10’s counsel reasonably expect Mr. Hersh to consult or refer to prepare for his
20 deposition in order to give meaningful testimony concerning Perfect 10’s financial
21 condition, including as reflected in Perfect 10’s financial statements and tax returns;

22 b. Mr. Hersh’s deposition will proceed in two stages. The first stage
23 will be for one and one-half days (not to exceed 10.5 hours of testimony), after which
24 the parties shall meet and confer regarding whether (1) it is necessary for Mr. Hersh
25 and/or Perfect 10 to produce any additional source documents that Mr. Hersh and/or
26 Perfect 10 did not already produce, if any, and/or (2) whether further questioning of
27 Mr. Hersh is necessary. If the parties are unable to agree regarding the scope of or
28 need for any further production and/or the necessity of obtaining further testimony

1 from Mr. Hersh, the Court shall conduct a further hearing to decide that dispute, after
2 which Mr. Hersh's deposition shall be completed as necessary in a second stage.

3 4. With respect to the specific Google Document Requests identified in
4 Google's motion to compel, Perfect 10 is ordered to produce responsive documents,
5 to the extent that they have not already been produced by Perfect 10, as follows:

6 a. Google's Document Request No. 81: The Court defers ruling on
7 this Request, without prejudice to Google's renewal of its Motion prior to trial.

8 b. Google's Document Request No. 87: Perfect 10 is ordered to
9 produce any projections of sales, revenue, or profits for each of Perfect 10's
10 contemplated or launched products or services that Perfect 10 can locate with a
11 reasonable search. The Court defers ruling on the Request to the extent it requires
12 Perfect 10 to produce "all" such documents.

13 c. Google's Document Request No. 94: Perfect 10 is ordered to
14 produce responsive documents to the same extent that the Court has ordered
15 production of back up or source documents by Perfect 10 and/or Mr. Hersh (see
16 Paragraph 3.a, *supra*).

17 d. Google's Document Request No. 95: Perfect 10 is ordered to
18 produce documents sufficient to show Perfect 10's 25 largest corporate or business
19 customers for each calendar year and for each of its products or services.

20 e. Google's Document Request No. 104: Perfect 10 is ordered to
21 produce documents sufficient to show the fact alleged in paragraph 11 of the
22 amended complaint in the *Google* case, i.e., that Perfect 10's Web site receives
23 approximately 100,000 unique visitors per month (including documents sufficient to
24 show how Perfect 10 determines that a visitor is unique), and further including log
25 files to perfect10.com that may be located upon a reasonable search.

26 f. Google's Document Request No. 105: Perfect 10 is ordered to
27 produce documents sufficient to show the fact alleged in paragraph 14 of the
28 amended complaint in the *Google* case, i.e., that Perfect 10 has spent millions of

1 dollars advertising and promoting its marks and its products and services; and
2 documents sufficient to show the amounts Perfect 10 earmarked or spent to advertise
3 and promote marks and the amounts Perfect 10 earmarked or spent to advertise and
4 promote products and services.

5 g. Google's Document Request No. 108: Perfect 10 is ordered to
6 produce documents sufficient to show the fact alleged in paragraph 17 of the
7 amended complaint in the *Google* case, i.e., that the described infringement is
8 "devastating to" and threatens the existence of Perfect 10's business, including
9 documents sufficient to show any financial data demonstrating this effect.

10 h. Google's Document Request No. 109: Perfect 10 is ordered to
11 produce documents sufficient to show the fact alleged in paragraph 47 of its answer
12 to Google's counterclaims, i.e., that the revenues Perfect 10 received resulting from
13 searches on Google are substantially less than they should be.

14 i. Google's Document Request No. 110: Perfect 10 is ordered to
15 produce documents sufficient to show the fact alleged in paragraph 47 of its answer
16 to Google's counterclaims, i.e., that the damages caused by activities alleged in the
17 amended complaint far exceed any benefit to Perfect 10 from Google.

18 j. Google's Document Request No. 111: Perfect 10 is ordered to
19 produce documents sufficient to show the fact alleged in paragraph 11 of the
20 declaration of Norman Zada in support of the motion for preliminary injunction
21 ("Zada Declaration"), i.e., that Perfect 10 invested over \$ 36 million to develop a
22 respected brand and goodwill, including documents sufficient to show what
23 expenditures are included in this figure (including expenditures other than the \$12
24 million related to photographs described in that paragraph).

25 k. Google's Document Request No. 112: Perfect 10 is ordered to
26 produce documents sufficient to show all revenues received by Perfect 10 from
27 movies, television, and videos, as described in paragraphs 12 to 14 of the Zada
28 Declaration.

1 l. Google's Document Request No. 162: Perfect 10 is ordered to
2 produce documents sufficient to show any benefit to Perfect 10 resulting from any
3 conduct or action by Google.

4 m. Google's Document Request No. 165: Perfect 10 is ordered to
5 produce documents sufficient to show the market share of Perfect 10 in any market in
6 which it claims to compete, including but not limited to the markets for print
7 magazines generally, for adult-oriented magazines, for websites generally, for adult-
8 oriented websites, for licensing of downloads of images for cell phones generally, and
9 for licensing of downloads of adult-oriented images for cell phones.

10 n. Google's Document Request No. 166: Perfect 10 is ordered to
11 produce documents sufficient to show the effect or impact, if any, of any conduct or
12 action by Google on the market share of Perfect 10 in any of the markets in which it
13 claims to compete, including but not limited to the market for print magazines
14 generally, for adult-oriented magazines, for websites generally, for adult-oriented
15 websites, for licensing of downloads of images for cell phones generally, and for
16 licensing of downloads of adult-oriented images for cell phones.

17 o. Google's Document Request No. 167: Perfect 10 is ordered to
18 produce documents sufficient to show the effect or impact, if any, of Google's Web
19 Search on the market share of Perfect 10 in any of the markets in which it claims to
20 compete, including but not limited to the market for print magazines generally, for
21 adult-oriented magazines, for websites generally, for adult-oriented websites, for
22 licensing of downloads of images for cell phones generally, and for licensing of
23 downloads of adult-oriented images for cell phones.

24 p. Google's Document Request No. 168: Perfect 10 is ordered to
25 produce documents sufficient to show the effect or impact, if any, of Google's Image
26 Search on the market share of Perfect 10 in any of the markets in which it claims to
27 compete, including but not limited to the market for print magazines generally, for
28 adult-oriented magazines, for websites generally, for adult-oriented websites, for

1 licensing of downloads of images for cell phones generally, and for licensing of
2 downloads of adult-oriented images for cell phones.

3 q. Google's Document Request No. 169: Perfect 10 is ordered to
4 produce documents sufficient to show the effect or impact, if any, of Google's
5 AdWords program on the market share of Perfect 10 in any of the markets in which it
6 claims to compete, including but not limited to the market for print magazines
7 generally, for adult-oriented magazines, for websites generally, for adult-oriented
8 websites, for licensing of downloads of images for cell phones generally, and for
9 licensing of downloads of adult-oriented images for cell phones.

10 r. Google's Document Request No. 170: Perfect 10 is ordered to
11 produce documents sufficient to show the effect or impact, if any, of Google's
12 AdSense program on the market share of Perfect 10 in any of the markets in which it
13 claims to compete, including but not limited to the market for print magazines
14 generally, for adult-oriented magazines, for websites generally, for adult-oriented
15 websites, for licensing of downloads of images for cell phones generally, and for
16 licensing of downloads of adult-oriented images for cell phones.

17 s. Google's Document Request No. 171: Perfect 10 is ordered to
18 produce documents sufficient to show, on a yearly basis, all of Perfect 10's strategic
19 marketing and advertising plans for the actual or potential sale, delivery, distribution
20 or licensing for sale, of any and all of Perfect 10's products or services.

21 t. Google's Document Request No. 173: Perfect 10 is ordered to
22 produce documents sufficient to show any contemplated or proposed transaction in
23 which Perfect 10 would invest in, give money to, buy, make a loan to, fund, or take
24 any financial ownership interest in any person.

25 u. Google's Document Request No. 174: Perfect 10 is ordered to
26 produce documents sufficient to show all transactions in which Perfect 10 did invest
27 in, give money to, buy, make a loan to, fund, or take any financial ownership interest
28 in any person.

1 v. Google's Document Request No. 175: Perfect 10 is ordered to
2 produce documents sufficient to show any sale, delivery, distribution, licensing, or
3 other transfer of ownership of Perfect 10's alleged copyrighted materials.

4 w. Google's Document Request No. 176: Perfect 10 is ordered to
5 produce documents sufficient to show any studies or analyses of Perfect 10's actual,
6 estimated or projected profits and losses from the sale, delivery, distribution or
7 licensing for sale, delivery or distribution of its alleged copyrighted materials.

8 x. Google's Document Request No. 177: Perfect 10 is ordered to
9 produce documents sufficient to show the value of Perfect 10's alleged copyrighted
10 materials, including, without limitation, any financial statements (detailed,
11 consolidated or otherwise).

12 y. Google's Document Request No. 179: Perfect 10 is ordered to
13 produce documents (including but not limited to royalty statements) that reflect any
14 revenue earned by Perfect 10 as a result of the use, display, transfer, license or sale
15 (on the Internet or through any media) of Perfect 10's alleged copyrighted materials,
16 to the same extent that the Court has ordered production of back up or source
17 documents by Perfect 10 and/or Mr. Hersh (*see* Paragraph 3.a, *supra*).

18 z. Google's Document Request No. 181: Perfect 10 is ordered to
19 produce documents sufficient to show Perfect 10's efforts to promote or increase
20 revenues generated by perfect10.com.

21 aa. Google's Document Request No. 182: Perfect 10 is ordered to
22 produce documents sufficient to show Perfect 10's efforts to increase paid
23 memberships in perfect10.com.

24 Perfect 10 is ordered to produce all of the above-described documents to all
25 remaining Defendants in the *Google* and *Amazon* cases by October 16, 2009.

26 The foregoing is made without prejudice to any defendant seeking additional
27 documents responsive to the document requests considered at the hearing or
28 requested in deposition subpoenas served upon accountant Bruce Hersh.

1 IT IS SO ORDERED.

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3 Date: _____

Hon. Stephen J. Hillman
United States Magistrate Judge

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