

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 portions of that motion and to raise these related issues,
9 and which the Court hereby GRANTS. Having considered the parties' respective
10 briefs and oral argument, and good cause existing therefore, the Court HEREBY
11 ORDERS that Google's Motion and the Amazon Defendants' joinder therein is
12 GRANTED IN PART AND DENIED 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 to the extent such documents exist, including
15 those in the possession of its outside accountant Bruce Hersh, in complete and
16 unredacted form, with the following two 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 ¹⁶ 2009.

23 _____
24 ¹ Google only asked the Court to rule on Issues I, VII, VIII, and IX at the
25 September 22, 2009 hearing, so the Court did not reach Issues II – VI presented in
26 the parties' Joint Stipulation On Google Inc.'s Motion to Compel Perfect 10 (1) To
27 Produce Documents, (2) To Comply With The Protective Order, and (3) To Affix
28 Document Control Numbers To Its Document Production. This Order rules on Issue
I in the aforementioned Joint Stipulation (and the related issues implicated by the
upcoming deposition of Mr. Hersh).

1 2. Settlement payments Perfect 10 has received from third parties are
2 relevant for discovery purposes. This Court is not ruling on whether this information
3 is relevant for any other purpose. Perfect 10 may not redact information regarding
4 the date, payor, and amount of any such settlement payments. This information will
5 be treated as "HIGHLY CONFIDENTIAL" under the terms of the Protective Order.
6 Perfect 10's compliance with 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. Perfect 10 is not required to
11 produce any information about any settlements with third-parties, other than the date,
12 payor, and amount of any such settlement payments. and may redact the settlement
13 information it is not required to produce.

14 3. Defendants' request for all source documents Mr. Hersh relied on to
15 prepare the financial statements and allocate expenses and income is granted in part,
16 as follows:

17 a. At least ten (10) calendar days prior to the agreed upon deposition date
18 of its accountant Bruce Hersh, Perfect 10 shall produce to all Defendants copies of all
19 source documents reasonably available to Mr. Hersh which he ^{and P10's counsel} reasonably expects to
20 refer to in order to prepare for his deposition, in order to give meaningful testimony
21 concerning Perfect 10's financial condition. ^{Such documents shall include}

22 b. Mr. Hersh's deposition will proceed as follows: Defendants may depose ^{P10's financial statements and} Mr. Hersh up to one and one-half ^{consecutive} days (not to exceed ^{a total of} 10.5 hours of testimony), after ^{for}
23 which the parties shall meet and confer regarding whether it is necessary for Mr.
24 Hersh to produce any additional source documents that Mr. Hersh did not already
25 produce, if any, and/or further questioning of Mr. Hersh. If the parties are unable to
26 agree regarding the scope of or need for any further production and/or the necessity
27
28

1 of obtaining further testimony from Mr. Hersh, the Court shall conduct a further
2 hearing to decide that dispute.

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 or Google, and
6 to the extent that they exist and can be located with a reasonable search, as follows:

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

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

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

18 d. Google's Document Request No. 95: Perfect 10 is ordered to produce
19 documents sufficient to show Perfect 10's 25 largest corporate or business customers

20 e. Google's Document Request No. 104: Perfect 10 is ordered to produce

21 documents sufficient to show the fact alleged in paragraph 11 of the amended
22 complaint in the *Google* case, i.e., that Perfect 10's Web site receives approximately
23 100,000 unique visitors per month (including documents sufficient to show how
24 Perfect 10 determines that a visitor is unique), and further including log files to
25 perfect10.com that may be located upon a reasonable search.

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

1 advertising and promoting its marks and its products and services; and documents
2 sufficient to show the amounts Perfect 10 earmarked or spent to advertise and
3 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 produce
6 documents sufficient to show the fact alleged in paragraph 17 of the amended
7 complaint in the *Google* case, i.e., that the described infringement is “devastating to”
8 and threatens the existence of Perfect 10’s business, including documents sufficient to
9 show any financial data demonstrating this effect.

10 h. Google’s Document Request No. 109: Perfect 10 is ordered to produce
11 documents sufficient to show the fact alleged in paragraph 47 of its answer to
12 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 produce
15 documents sufficient to show the fact alleged in paragraph 47 of its answer to
16 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 produce
19 documents sufficient to show the fact alleged in paragraph 11 of the declaration of
20 Norman Zada in support of the motion for preliminary injunction (“Zada
21 Declaration”), i.e., that Perfect 10 invested over \$ 36 million to develop a respected
22 brand and goodwill, including documents sufficient to show what expenditures are
23 included in this figure (including expenditures other than the \$12 million related to
24 photographs described in that paragraph).

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

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

4 m. Google's Document Request No. 165: Perfect 10 is ordered to produce
5 documents sufficient to show the market share of Perfect 10 in any market in which it
6 claims to compete, including but not limited to the markets 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 n. Google's Document Request No. 166: Perfect 10 is ordered to produce
11 documents sufficient to show the effect or impact, if any, of any conduct or action by
12 Google on the market share of Perfect 10 in any of the markets in which it claims to
13 compete, including but not limited to the market for print magazines generally, for
14 adult-oriented magazines, for websites generally, for adult-oriented websites, for
15 licensing of downloads of images for cell phones generally, and for licensing of
16 downloads of adult-oriented images for cell phones.

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

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

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

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

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

17 s. Google's Document Request No. 171: Perfect 10 is ordered to produce
18 documents sufficient to show, on a yearly basis, Perfect 10's strategic marketing and
19 advertising plans for the actual or potential sale, delivery, distribution or licensing for
20 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 produce
22 documents sufficient to show any contemplated or proposed transaction in which
23 Perfect 10 would invest in, give money to, buy, make a loan to, fund, or take any
24 financial ownership interest in any person.

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

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

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

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

12 y. Google's Document Request No. 179: Perfect 10 is ordered to produce
13 documents sufficient to reflect revenue earned by Perfect 10 as a result of the use,
14 display, transfer, license or sale (on the Internet or through any media) of Perfect 10's
15 alleged copyrighted materials, to the same extent that the Court has ordered
16 production of back up or source documents by Perfect 10 and/or Mr. Hersh (*see*
17 Paragraph 3.a, *supra*).

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

21 aa. Google's Document Request No. 182: Perfect 10 is ordered to produce
22 documents sufficient to show Perfect 10's efforts to increase paid memberships in
23 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, to the extent that they have
26
27
28

1 not already been produced, and to the extent that they exist and can be located with a
2 reasonable search, by October 26, 2009.

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

6 IT IS SO ORDERED.
7

8 Date: 10-6-09



Hon. Stephen J. Hillman
United States Magistrate Judge

9
10 62229951 v1

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28