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16 Attorneys for Defendant GOOGLE INC.

17 UNITED STATES DISTRICT COURT

18 CENTRAL DISTRICT OF CALIFORNIA

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

21 *Plaintiff,*

22 vs.

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

25 *Defendants.*

26 AND COUNTERCLAIM

27 PERFECT 10, INC., a California  
28 corporation,

*Plaintiff,*

vs.

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

*Defendants.*

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

**DISCOVERY MATTER**

Hon. Stephen J. Hillman

**SUPPLEMENTAL DECLARATION  
OF RACHEL HERRICK  
KASSABIAN IN SUPPORT OF  
GOOGLE INC.'S RESPONSE TO  
PERFECT 10, INC.'S  
EVIDENTIARY OBJECTIONS TO  
THE REPLY DECLARATION OF  
RACHEL HERRICK KASSABIAN**

Date: January 15, 2010

Time: 10:00 a.m.

Ctrl: 550

Discovery Cut-off: None Set

Pretrial Conference Date: None Set

Trial Date: None Set

1 I, Rachel Herrick Kassabian, declare as follows:

2 1. I am a member of the bar of the State of California and a partner with  
3 Quinn Emanuel Urquhart Oliver & Hedges, LLP, counsel for Defendant Google Inc.  
4 ("Google") in this action. I make this declaration of my personal and firsthand  
5 knowledge and, if called and sworn as a witness, could and would testify competently  
6 thereto.

7 2. Attached hereto as Exhibit A is a true and correct copy of excerpts of  
8 Google's First Set of Requests for the Production of Documents.

9 3. Attached hereto as Exhibit B is a true and correct copy of letters from  
10 myself to Jeffrey Mausner dated January 29, 2008 and March 18, 2008, respectively.

11 4. Attached hereto as Exhibit C is a true and correct copy of excerpts of my  
12 Declaration dated May 6, 2009 (Dkt. No. 408).

13 5. Attached hereto as Exhibit D is a true and correct copy of excerpts of the  
14 Joint Stipulation on Google Inc.'s Motion to Compel Perfect 10 (1) to Produce  
15 Documents, (2) to Comply with the Protective Order, and (3) to Affix Document  
16 Control Numbers to its Document Production (Dkt. No. 408).

17 6. Attached hereto as Exhibit E is a true and correct copy of excerpts of the  
18 Court's Order dated October 6, 2009 (Dkt. No. 560).

19 7. Attached hereto as Exhibit F is a true and correct copy of a letter from  
20 Mr. Mausner accompanying Perfect 10's document production dated October 15,  
21 2009.

22 8. Attached hereto as Exhibit G is a true and correct copy of excerpts of my  
23 Declaration dated January 6, 2010 (Dkt. No. 701).

24 9. Attached hereto as Exhibit H is a true and correct copy of a letter from  
25 myself to Mr. Mausner dated November 4, 2009.

26 10. Attached hereto as Exhibit I is a true and correct copy of an email  
27 exchange between myself, Mr. Mausner and others, beginning on November 4, 2009  
28 and ending on January 5, 2010. The email exchange concerns Google's efforts to

1 further meet and confer with Perfect 10 regarding Perfect 10's incomplete production  
2 of monthly financial reports. On page 3 of that email exchange, in my email to Mr.  
3 Mausner dated January 4, 2010, I specifically informed him that "[g]iven the  
4 pendency of Google's document preservation motion and the upcoming hearing on  
5 same, it is imperative that P10 respond now" to my earlier meet and confer letters and  
6 emails regarding the missing financial reports. To this date, Mr. Mausner has not  
7 sent me a responsive email or letter answering the specific questions posed in my  
8 prior meet and confer correspondence as to each of the missing financial reports.

9 11. Attached hereto as Exhibit J is a true and correct copy of excerpts of the  
10 transcript of the September 22, 2009 hearing before the Court.

11 12. On October 27, 2009, my colleague Michael Zeller sent a meet and  
12 confer letter to Perfect 10 regarding issues that arose during the deposition of Nadine  
13 Schoenweitz, which is attached to my January 6, 2010 Reply Declaration as Exhibit  
14 B. Having not received any substantive response, Google sent follow-up  
15 communications to Perfect 10 on November 4, 16, and 24, and December 14 and 15.  
16 Despite Google's efforts to resolve those issues informally, Perfect 10 repeatedly  
17 refused to provide a substantive response to the questions posed in Google's letters  
18 until nearly two months later, on December 22, 2009 (more than a week after Google  
19 had already filed its motion for a document preservation order).

20 I declare under penalty of perjury under the laws of the United States of  
21 America that the foregoing is true and correct. Executed January 14, 2010 at Los  
22 Angeles, California.

23 *Rachel Herrick Kassabian*

24 \_\_\_\_\_  
25 Rachel Herrick Kassabian  
26  
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# **EXHIBIT A**

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San Francisco, CA 94111-5894

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6 Attorneys For Defendant and Counterclaimant  
7 GOOGLE INC.

8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA

10  
11  
12 PERFECT 10, INC., a California  
13 corporation,

14 Plaintiff,

15 vs.

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

17 Defendant.

18 GOOGLE INC., a corporation,

19 Counterclaimant,

20 vs.

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

23 Counter-defendant.

Case No. CV04-9484 NM (CWx)

**DEFENDANT GOOGLE INC.'S  
FIRST SET OF REQUESTS FOR  
PRODUCTION OF DOCUMENTS  
TO PLAINTIFF PERFECT 10, INC.**

24 **PROPOUNDING PARTY: DEFENDANT AND COUNTERCLAIMANT**  
25 **GOOGLE INC.**

26 **RESPONDING PARTY: PLAINTIFF AND COUNTER-DEFENDANT**  
27 **PERFECT 10, INC.**

28 **SET NO.: ONE**

GOOGLE INC.'S FIRST SET OF REQUEST FOR  
PRODUCTION OF DOCUMENTS TO PERFECT 10, INC.

Case No. CV04-9484 NM (CWx)

EXHIBIT     A    

PAGE     3

1           68. All documents concerning your efforts to increase the likelihood that  
2 your websites will appear in search results, or will appear more prominently in search  
3 results, on Google or any other Internet search engine.

4           69. All documents referring to or discussing benefits to you of being listed  
5 in, or being prominently listed in, search results by Google or any other Internet  
6 search engine.

7           70. All documents concerning your practices, policies, procedures,  
8 intentions, plans, or actions regarding investigation and identification of, or  
9 prosecution of, claims against Stolen Content Websites for infringement of your  
10 alleged intellectual property.

11           71. All documents that evidence, refer to, or discuss any damages or harm,  
12 including, without limitation, monetary damage, you claim to have suffered, or to be  
13 likely to suffer, as a result of Google's alleged infringements and violations as set forth  
14 in your amended complaint.

15           72. All documents concerning your policies regarding retention, storage,  
16 filing and destruction of documents and things.

17           73. All documents concerning indexes, lists or inventories of documents and  
18 things maintained by or for you.

19 Dated: March 3, 2005

*Andrew P. Bridges*

Andrew P. Bridges  
Michael S. Brophy  
Jennifer A. Golinveaux  
Attorneys for Defendant and  
Counterclaimant Google Inc.

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# **EXHIBIT B**

**quinn emanuel trial lawyers | silicon valley**

555 Twin Dolphin Drive, Suite 560, Redwood Shores, California 94065 | TEL 650-801-5000 FAX 650-801-5100

WRITER'S DIRECT DIAL NO.  
(650) 801-5005

WRITER'S INTERNET ADDRESS  
rachelherrick@quinnemanuel.com

January 29, 2008

VIA E-MAIL, FACSIMILE AND U.S. MAIL

Jeffrey N. Mausner, Esq.  
Warner Center Towers  
21800 Oxnard Street, Suite 910  
Woodland Hills, CA 91367

**Re: Perfect 10's Waiver of Actual Damages**

Dear Jeff:

Please accept this letter as Google's initiation of meet and confer efforts for Google's contemplated motion regarding Perfect 10's waiver of any claim for actual damages in this case.

In responding to Google's first set of requests for production, Perfect 10 sought to avoid producing documents relevant to 27 of Google's requests by expressly electing not to seek actual damages for some or all of the claims in Perfect 10's complaint. For a nine-month period, Perfect 10 disclaimed any intention to seek actual damages on its claims, impacting Google's potential liability and the scope of discovery in the case. Thereafter, Perfect 10 purported to withdraw its express waiver of actual damages. However, Perfect 10's more recent discovery conduct has been consistent with its initial waiver. Accordingly, Google intends to seek clarification from the Court regarding the legal significance of Perfect 10's actions.

In Perfect 10's Response to Google's First Set of Requests for Production dated April 15, 2005, Perfect 10 repeatedly asserted that it would not seek actual damages from Google. For instance, in response to Request Nos. 4, 8, 9, 38, 41, 43, 45, 46, 51, 52, 53, 55, 56, 57, 58, 59, 61, 62, 66, 67, 68, 69, 70, 71, 72, and 73, Perfect 10 declared, "**Perfect 10 is not seeking to recover its actual damages**, but will seek statutory damages or profits of the infringer, and other available remedies." (Perfect 10's 4/18/05 Response to Google's First Requests for Production at 5-33 (emphasis added)). Similarly, in response to Request No. 33, Perfect 10 objected to the

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EXHIBIT

PAGE

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relevance of the information sought "since Perfect 10 is seeking statutory damages or profits of the infringer." (*Id.* at 17). These 27 requests span a wide range of topics. They relate to Perfect 10's other efforts with respect to infringement of copyrights, trademarks, and rights of publicity; to Perfect 10's financial records; to other alleged violations of Perfect 10's supposed intellectual property rights; and to a variety of factors that might reduce the value of the copyrights, trademarks, and rights of publicity asserted by Perfect 10.

As you know, Google subsequently moved to compel the production of documents responsive to the requests to which Perfect 10 had objected based in part upon a waiver of actual damages. During the meet and confer process and in the joint stipulation prepared on Google's motion, Perfect 10 attempted to backtrack on its waiver of actual damages, representing instead that it had merely "offered" to waive actual damages if Google would agree not to press its motion with respect to the 27 requests in question. Absent such a concession from Google, Perfect 10 purported to withdraw its waiver of actual damages. (Joint Stipulation Re: Google's Motion to Compel, at 61-62). In Google's reply, it rejected Perfect 10's revisionist account of the discovery responses, informing Judge Hillman that "Plaintiff has clearly and unequivocally waived actual damages in its previous responses, without conditions, in an effort to avoid discovery...." (*Id.* at 62). At the February 22, 2006 hearing on Google's motion to compel, Judge Hillman did not rule on whether Perfect 10's discovery conduct had effectuated a waiver of its actual damages claim (Transcript of 2/22/06 Hearing at 115-117), but at the November 27, 2007 hearing on Perfect 10's motion to compel, Judge Hillman directed that Google had "better get Judge Matz's attention on this issue, because that does impact issues before me." (Transcript of 11/27/07 Hearing at 34). At this point, no other motions or rulings have been made on the issue of Perfect 10's waiver of actual damages, and the issue is ripe for judicial resolution.

Waiver is any "intentional relinquishment or abandonment of a known right." *Bickel v. City of Piedmont*, 16 Cal. 4th 1040, 946 P.2d 427, 431 (1997). Courts enforce any "knowing, intelligent, and voluntary waiver in circumstances where the [party] might reasonably anticipate some benefit or advantage." *Id.*, at 432. A party can waive a right or privilege through their responses to document requests. *See, e.g., McCormick-Morgan, Inc. v. Teledyne Indus., Inc.*, 765 F. Supp. 611, 613 (N.D. Cal. 1991) (enforcing explicit waiver of attorney-client privilege from statements in written response to document request); *Chapman ex rel. Chapman v. Mutual Service Cas. Ins. Co.*, 35 F. Supp. 2d 693, 696 (E.D. Wis. 1999) (indicating that litigant would not be allowed to later amend discovery responses to contest liability issues it had previously waived).

It is hard to imagine any more "knowing, intelligent, and voluntary" relinquishment of a right or privilege than the 27 clear statements Perfect 10 made in its April 18, 2005 response. Perfect 10 repeatedly stated that it "is not seeking to recover its actual damages" and affirmed that it only "will seek statutory damages or profits of the infringer, and other available remedies." (P10's 4/18/05 Response at 5-33). Clearly, Perfect 10 "reasonably anticipate[d] some benefit or advantage" from the waiver because it made each assertion as an objection to the relevance of Google's discovery requests. (*Id.*)

Reasonable and detrimental reliance on a statement of waiver renders the waiver irrevocable based on policies of equitable estoppel. *See Scott v. Fed. Life Ins. Co.*, 200 Cal.App.2d 384, 391 (Cal.App.2d. Dist. 1962). Google believes the Court will find that it

reasonably relied on Perfect 10's waiver and would be harmed if Perfect 10 now was allowed to revoke it. First, Google's reliance on the truthfulness of signed discovery responses is reasonable. *See* Fed. R. Civ. P. 26(g)(1)(B). Second, Google had no reason to suspect that Perfect 10 would abandon its waiver of actual damages. The first meaningful indication that Perfect 10 purportedly was only "offering" to waive actual damages came almost ten months after the waiver, in Perfect 10's responses in the February 12, 2006 joint stipulation. Third, Google suffered prejudice in that it was partially denied responsive discovery on 27 requests for production, was hampered in its motion to compel this production because its arguments based upon claims of actual damages were constrained by Perfect 10's shifting positions on the waiver issue, has been forced to litigate this protracted dispute even longer without discovery needed to better analyze a settlement, and did not seek additional discovery concerning actual damages during at least a ten-month period of the lawsuit. Under these circumstances, Perfect 10's waiver should be construed as irrevocable.

Additionally, Google believes Perfect 10 should be judicially estopped from now taking a new and clearly inconsistent position at a later stage in the litigation. Judicial estoppel "precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 600 (9th. Cir. 1996). The doctrine may be applied even when a party, like Perfect 10, was not successful in asserting its first position "if by his change of position he is playing 'fast and loose' with the court." *Id.* at 601. The nature of the adversary discovery system necessitates a policy that holds a litigant to the assertions it makes in sworn discovery responses. *See* Fed. R. Civ. P. 26(g)(1)(B). Perfect 10 made repeated and clear assertions in a signed discovery response that stood unchanged for nine months. Perfect 10 then resisted Google's motion to compel and agreed to produce only "summary" financial statements, which Google accepted without prejudice to revisiting the issue at a later date. (Transcript of 2/22/06 Hearing, at 116).

Considering Perfect 10's many inconsistencies during the course of discovery, Google intends to ask the Court to enforce Perfect 10's waiver "to protect the integrity of the judicial process" from manipulation by Perfect 10. *Rissetto*, 94 F.3d at 601. Please let us know if Perfect 10 will stipulate to its waiver of actual damages.

If Perfect 10 refuses to so stipulate, then it must agree to withdraw its objections to these 27 document requests, and all other requests relating to Perfect 10's alleged claim of actual damages, and comply with them in full (to the extent Perfect 10 has not done so already) by immediately producing all responsive documents. Set forth below are the requests at issue, along with an explanation regarding the deficient aspects of Perfect 10's production:

**Document Request No. 4 - All documents concerning your efforts to halt or reduce infringements of your copyrights.**

Perfect 10 has only produced copies of the complaints from 21 of the 25 federal cases in which it is involved. The request is relevant to Perfect 10's purportedly reinstated claims for actual damages. Perfect 10 should produce all documents concerning its efforts to halt or reduce infringement of its copyrights, including without limitation the remaining four missing complaints and all cease and desist letters and DMCA notices regarding Perfect 10's copyrights.

**Document Request No. 8 - All documents concerning communication to persons or entities other than Google in which you have made allegations (against any person or entity) of copyright infringement, other than those documents sought in request number nine.**

The request is relevant to Google's defense against Perfect 10's actual damages claims. Perfect 10 should produce these documents.

**Document Request No. 9 - All DMCA Notifications or claims of infringement that you have sent to persons or entities other than Google.**

This request was granted without limitation by Judge Hillman. Perfect 10 has produced letters detailing claims of infringement sent to adultfriendfinder.com, Amazon.com, AOL, Ask.com, CCBill, Comcast, Earthlink, IceRocket, Infospace, Lycos, Mastercard, MSN, myfootballforum.com, Paypal, Verotel and Yahoo. Perfect 10 has also produced various DMCA notices. Please confirm that these are all the responsive documents in Perfect 10's possession or control relating to this request and that no documents were withheld based on Perfect 10's objections. If it is not, please supplement Perfect 10's production accordingly.

**Document Request No. 32 - All documents concerning efforts by you to halt or reduce infringements of your trademarks.**

This request was granted without limitation by Judge Hillman. Perfect 10 has produced copies of the complaints from 21 of the 25 federal cases in which it is involved, 570 trademark watch notices it received from Thompson, and 5 Cease and Desist letters concerning violations of its trademark rights by perfect10escorts.com, Perfection Magazine, worldhackers.com, entangledweb.com, and crazypasses.com. Please confirm that these are all the responsive documents in Perfect 10's possession or control relating to this request and that no documents were withheld based on Perfect 10's objections. If it is not, please supplement Perfect 10's production accordingly.

**Document Request No. 33 - All financial statements showing your expenditures on advertising and marketing activities in the United States concerning the marks PERFECT 10 and PERFECT10.COM.**

The request is unquestionably relevant to Perfect 10's actual damages claims. Perfect 10 nevertheless has only produced incomplete and redacted "summaries" of its balance sheet and income statements for the years 1997-2005. Perfect 10 should produce complete, detailed financial statements identifying expenditures on advertising and marketing, and further should un-redact its existing production of brief summary financial statements.

**Document Request No. 38 - All financial statements evidencing revenues and expenses relating to your use of the marks PERFECT 10 and PERFECT10.COM.**

The request as well is plainly relevant to Perfect 10's actual damages claims. Perfect 10 has only produced incomplete and redacted "summaries" of its balance sheet and income statements for the years 1997-2005, however. Perfect 10 should produce complete, detailed financial statements showing revenues and expenses relating to its trademarks, and further should un-redact its existing production of brief summary financial statements.

**Document Request No. 41 - All documents concerning communications to persons of entities other than Google in which you have made allegations (against any person or entity) of trademark infringement.**

This request was granted with respect to documents also responsive to Request 32 by Judge Hillman. Perfect 10 has produced copies of the complaints from 21 of the 25 federal cases in which it is involved, 570 trademark watch notices it received from Thompson, and 5 Cease and Desist letters concerning violations of its trademark rights by perfect10escorts.com, Perfection Magazine, worldhackers.com, entangledweb.com, and crazypasses.com. Please confirm that these are all the responsive documents in Perfect 10's possession or control relating to this request and that no documents were withheld based on Perfect 10's objections. If it is not, please supplement Perfect 10's production accordingly.

**Document Request No. 43 - All documents concerning your efforts to protest or prevent infringement or violation of any of the publicity rights claimed by you in this action.**

Perfect 10 has only produced copies of the complaints from 21 of the 25 federal cases in which it is involved. The request is relevant to Perfect 10's actual damages claims. Perfect 10 should produce all documents concerning its efforts to halt or reduce infringement of the publicity rights at issue.

**Document Request No. 45 - All documents concerning photographs, published in publications or media not owned or controlled by you, of models who have appeared in your magazine or web sites.**

Perfect 10 has only produced copies of five images from Stuff, Victoria's Secret and Shape. The request is relevant to Perfect 10's purportedly reinstated claims for actual damages. Perfect 10 should produce all documents concerning photographs of models published in other publications or media.

**Document Request No. 46 - All documents concerning authorization or permission by you for other publications or media, not owned or controlled by you, to display names or photographs of persons whose names or photographs have appeared in your magazine or web sites.**

This request was granted without limitation by Judge Hillman. Perfect 10 has produced agreements with JRM, HDNet, Fonestarz, E!, Battle Dome, Blind Date, Cliffwood Pictures, Columbia Pictures, K-1, Livin Large, MTV, Nash Entertainment, NBC, PlanetRapido.com, Right Angle Media, Sony Pictures, Sopranos Productions, White Chicks Productions, and Woody Fraser Productions. Please confirm that these are all the responsive documents in Perfect 10's possession or control relating to this request and that no documents were withheld based on Perfect 10's objections. If it is not, please supplement Perfect 10's production accordingly.

**Document Request No. 51 - All documents concerning communications to persons or entities other than Google in which you have made allegations (against any person or entity) of violations of rights of publicity owned or exercised by you.**

The request is relevant to Perfect 10's purportedly reinstated claims for actual damages. Perfect 10 should produce these documents.

**Document Request No. 52 - All documents concerning efforts by you to halt or reduce violations of publicity rights owned or exercised by you.**

Judge Hillman deferred the request and, instead, directed Perfect 10 to identify any suits involving rights of publicity in which it was a plaintiff or defendant. The request is relevant to Perfect 10's purportedly reinstated claims for actual damages. Perfect 10 should produce these documents.

**Document Request No. 59 - All documents concerning any communications by any person regarding Google or this lawsuit.**

The request is relevant to Perfect 10's purportedly reinstated claims for actual damages. Perfect 10 should be ordered to produce these documents.

**Document Request No. 66 - All documents filed with a court, served upon an opposing party or counsel, or received from an opposing party or counsel, in copyright, trademark, publicity rights, or unfair competition litigation to which you have been a party.**

Perfect 10 has only produced copies of the complaints from 21 of the 25 federal cases in which it is involved. Perfect 10 should produce all documents from its other litigation on claims similar to those asserted against Google.

**Document Request No. 71 - All documents that evidence, refer to, or discuss any damages or harm, including, without limitation, monetary damage, you claim to have suffered, or to be likely to suffer, as a result of Google's alleged infringements and violations set forth in your amended complaint.**

In response to this request, Perfect 10 has only produced incomplete and redacted "summaries" of its balance sheet and income statements for the years 1997-2005. Perfect 10 should produce all documents that evidence, refer to or discuss the harm it has allegedly suffered by the actions of Google described in Perfect 10's amended complaint, and further, should complete and un-redact its existing production of brief summary financial statements.

**Document Request No. 81 - Your complete tax and accounting books and full corporate earnings reports, including revenues, costs, and profits reported to national or state tax authorities.**

In response to this request, Perfect 10 has only produced incomplete and redacted "summaries" of its balance sheet and income statements for the years 1997-2005. Under this request and Requests Nos. 33, 38 and 71, Perfect 10 has a clear obligation to produce accounting records in light of its purportedly reinstated claim for actual damages. Additionally, Plaintiff's federal and state tax returns are plainly discoverable in this case, in light of the damages Plaintiff seeks (including its purportedly reinstated claim for actual damages and lost profits), and the unavailability of the information from other sources previously disclosed. *See, e.g., Gattegno v. PricewaterhouseCoopers, LLP*, 205 F.R.D. 70, 73 (D. Conn. 2001). Google cannot assess or defend against Perfect 10's purportedly reinstated claim for actual damages without Perfect 10's full and complete disclosure of its revenues and expenses, profits and losses, asset valuations, tax liabilities, accounting methods and other pertinent information that would be contained in these documents.

**Document Request No. 87 - All documents concerning projection of sales, revenue, or profits for each of your contemplated or launched products or services.**

While Perfect 10 has acknowledged the clear relevance of these documents by agreeing to produce them, to the best of Google's knowledge, Perfect 10 has not yet done so. Please produce all relevant and responsive documents immediately.

**Document Request No. 94 - Documents sufficient to identify your profits from each of your products and services, individual and by category, both by year and by the most disaggregate level available.**

Perfect 10 has only produced incomplete and redacted "summaries" of its balance sheet and income statements for the years 1997-2005. Under this request and Requests Nos. 33, 38, 71 and 81, Perfect 10 has a clear obligation to produce accounting records in light of its purportedly reinstated claim for actual damages. Google cannot assess or defend against Perfect 10's purportedly reinstated claim for actual damages without full disclosure of Perfect 10's profits (or losses) from each of its products and services. Perfect 10 should produce these documents immediately.

**Document Request No. 95 - Documents sufficient to identify your 25 largest customers each month in relation to each of your products or services.**

Perfect 10 has refused to produce any documents in response to this request, despite its plain relevance to Perfect 10's purportedly reinstated claims for actual damages. Perfect 10's relationships with its largest customers are at issue here, given Perfect 10's purported reinstatement of its claim for actual damages. Perfect 10 should produce these documents immediately.

**Document Request No. 99 - All documents concerning the number or frequency of visits to each of your Web pages by customers who have paid a fee to enter the site.**

In response to this request, Perfect 10 has produced thousand-page-long text files listing IP addresses and pages viewed in the website. Perfect 10 has also expressly agreed to produce customer sign-up information from its third-party processor. In order for Google to assess and defend Perfect 10's purportedly reinstated claim for actual damages, Perfect 10 must, at a minimum, produce the customer sign-up information from Perfect 10's third-party processor, including the usernames that correspond to the IP addresses identified in the previously-produced text files. Please supplement Perfect 10's production immediately.

**Document Request No. 104 - All documents reflecting or evidencing the fact alleged in paragraph 11 of the amended complaint that your Web site receives approximately 100,000 unique visitors per month, including all documents concerning how you determine that a visitor is unique.**

To date, Perfect 10 has only produced thousand-page long text files listing IP addresses and pages viewed in the website. These logs do not demonstrate how Perfect 10 determines that a given visitor is unique, nor do they include customer usernames. Please supplement Perfect 10's production immediately.

**Document Request No. 105 - All documents reflecting or evidencing the fact alleged in paragraph 14 of the amended complaint that you have spent millions of dollars advertising and promoting your marks and your products and services, and all documents showing the amounts you earmarked or spent to advertise and promote marks and the amounts you earmarked or spent to advertise and promote products and services.**

Perfect 10 has only produced incomplete and redacted "summaries" of its balance sheet and income statements for the years 1997-2005. Under this request and Requests Nos. 33, 38, 71, and 81, Perfect 10 has a clear obligation to produce accounting records in light of its purportedly reinstated claim for actual damages. Google cannot assess or defend Perfect 10's purportedly reinstated claim for actual damages without full disclosure of Perfect 10's trademark advertising and promotion expenses, including any advertising forecasts, plans, reports and the like. Please supplement Perfect 10's production accordingly.

**Document Request No. 108 - All documents reflecting or evidencing the fact alleged in paragraph 17 of the amended complaint that the described infringement is "devastating to" and "threatens the existence of" your business, including all documents with financial data demonstrating this effect.**

Perfect 10 has only agreed to produce incomplete and redacted "summaries" of its balance sheet and income statements for the years 1997-2005 and records of internet searches conducted by Dr. Zada. While Perfect 10 has produced these documents, they are woefully insufficient for Google's need to accurately assess and defend Perfect 10's purportedly reinstated claim for actual damages. Google needs all documents responsive to this request. Please supplement Perfect 10's production accordingly.

**Document Request No. 109 - All documents reflecting or evidencing the fact alleged in paragraph 47 of your answer to Google's counterclaims that the revenues you received resulting from searches on Google are substantially less than they should be.**

Perfect 10 has only agreed to produce incomplete and redacted "summaries" of its balance sheet and income statements for the years 1997-2005 and records of internet searches conducted by Dr. Zada. These documents are insufficient and only marginally responsive. Google needs all documents responsive to this request. Please supplement Perfect 10's production accordingly.

**Document Request No. 110 - All documents reflecting or evidencing the fact alleged in paragraph 47 of your answer to Google's counterclaims that the damages caused by activities alleged in the amended complaint far exceed any benefit to you from Google.**

Perfect 10 has only agreed to produce incomplete and redacted "summaries" of its balance sheet and income statements for the years 1997-2005 and records of internet searches conducted by Dr. Zada. These documents are insufficient and only marginally responsive. Google needs all documents responsive to this request. Please supplement Perfect 10's production accordingly.

**Document Request No. 111 - All documents reflecting or evidencing the fact alleged in paragraph 11 of the declaration of Norman Zada in support of the motion for preliminary injunction ("Zada Declaration") that you invested over \$36 million to develop a respected brand and goodwill and all documents showing what expenditures are included in this figure, including expenditures other than the \$12 million related to photographs described in that paragraph.**

Perfect 10 has only produced incomplete and redacted "summaries" of its balance sheet and income statements for the years 1997-2005. Perfect 10 has a clear obligation to produce detailed accounting records in light of its purportedly reinstated claim for actual damages. Google cannot assess or defend Perfect 10's purportedly reinstated claim for actual damages without full disclosure of Perfect 10's brandings efforts and expenditures, including but not limited to trademark advertising and promotion expenses, advertising forecasts, plans, reports, market studies, valuations and the like. Please supplement Perfect 10's production accordingly.

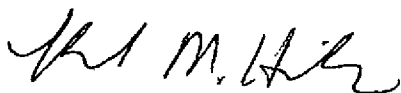
**Document Request No. 112 - All documents concerning revenues received by you from movies, television, and videos as described in paragraphs 12 to 14 of the Zada Declaration.**

Perfect 10 has only produced incomplete and redacted "summaries" of its balance sheet and income statements for the years 1997-2005, none of which identify the requested information. Perfect 10 has a clear obligation to produce this type of detailed revenue data in light of its purportedly reinstated claim for actual damages. Google cannot assess or defend Perfect 10's purportedly reinstated claim for actual damages without full disclosure of the requested information. Perfect 10 should produce responsive documents immediately.

In sum, Perfect 10's refusal to produce all documents relevant to its purportedly reinstated claim for actual damages, even **after** its purported reinstatement effort, plainly belies that effort. Perfect 10 cannot have it both ways. It must either acknowledge its waiver of actual damages, or honor its discovery obligations thereon and produce all responsive documents in the above-identified categories.

This letter is a request for a pre-motion meeting of counsel to discuss this matter pursuant to Local Rule 7-3. If we are not able to resolve the matter through meet and confer efforts, Google will need to seek the Court's attention through motion practice as directed by Judge Hillman. Please contact me as soon as possible regarding your availability for the conference.

Very truly yours,



Rachel M. Herrick

RMH:ar  
51320/2353679.1



**quinn emanuel trial lawyers | silicon valley**

555 Twin Dolphin Drive, Suite 560, Redwood Shores, California 94065 | TEL 650-801-5000 FAX 650-801-5100

March 18, 2008

**VIA E-MAIL & U.S. MAIL**

Jeffrey N. Mausner  
Warner Center Towers  
21800 Oxnard Street, Suite 910  
Woodland Hills, CA 91367  
818-716-2773 – facsimile

Re: Perfect 10's Deficient Document Production Related to Actual Damages

Dear Jeff:

I write to address several deficiencies in Perfect 10's production of documents in response to my letter of January 29, 2008, which addressed Google's document requests relevant to Perfect 10's claim, if any, of actual damages.

**1. Financial Reports and Tax Returns**

First, the bulk of Perfect 10's recent production consists of "Financial Reports" from Perfect 10. Some of these Reports have been produced either as email attachments or on CD. These appear to be monthly reports, but the Reports for the following months are missing:

- Prior to 1997: All months
- For 1997: January through and including July, September, and October
- For 1998: November
- For 1999: April through and including November
- For 2000: All months except March
- For 2001: January through and including May
- For 2002: February, June, July, August, and October
- For 2003: June and August
- For 2004: March and April

51320/2433728.2

**quinn emanuel urquhart oliver & hedges, llp**

LOS ANGELES | 865 South Figueroa Street, 10th Floor, Los Angeles, California 90017 | TEL 213-443-3000 FAX 213-443-3100  
NEW YORK | 51 Madison Avenue, 22nd Floor, New York, New York 10010 | TEL 212-849-7000 FAX 212-849-7100  
SAN FRANCISCO | 50 California Street, 22nd Floor, San Francisco, California 94111 | TEL 415-875-6600 FAX 415-875-6700

EXHIBIT

B

PAGE

14

- For 2005: February
- For 2006: January and February
- For 2007: February, May, June, August, October, and November

Please produce the missing reports. Please also produce Perfect 10's complete and unredacted tax return for 2007, with all schedules attached.

Second, most of the Financial Statements produced include the following disclaimer:

Management has elected to omit substantially all of the disclosures and the statement of cash flows as required by generally accepted accounting principles. If the omitted disclosures were included in the financial statement, they might influence the user's conclusions about your financial position. Accordingly, this financial statement is not designed for those who are not so informed.

This disclaimer renders these Statements not fully responsive to Google's Requests for Production related to actual damages. Please produce all documents reflecting "all of the disclosures and the statement of cash flows as required by generally accepted accounting principles" pertaining to each Financial Statement Perfect 10 produced.

Third, as you know, a great deal of information in both the Financial Statements and in the Tax Returns has been redacted. In your email of March 3, 2008, you explained that the "redacted portions related to either 1) confidential settlements in other lawsuits, or 2) items that do not have anything to do with the actual damages claim." These are not proper bases for redactions. Further, these redactions include categories of information that are highly relevant to Perfect 10's claim of actual damages, including "fixed assets," "total long-term liabilities," all information regarding Perfect 10's "Equity" holdings (including capital stock, retained earnings, and net equity), "total liabilities and equity," "Net Ordinary Income" and "Net Income."

Because this information is relevant to Perfect 10, Inc.'s assets, liabilities, and revenues, and thus to any claims for actual damages, please unredact all of the Financial Statements and Tax Returns. To the extent Perfect 10 is concerned about maintaining the confidentiality of this information, the Protective Order currently in place in this action will be more than sufficient to protect these materials. *See Kansas Food Packers v. Corpak*, 2000 WL 33170870, at \*1 n.4 (D. Kan. Oct. 12, 2000) (ordering production of redacted material in financial statements when the redacted information was relevant and when there was a "protective order ... in place which protects confidential client information in th[e] case"). Because Perfect 10 has designated all of these documents as Highly Confidential under the Protective Order, these materials should be unredacted and produced without further delay.

## 2. Server Logs

As we identified via email to you and to your associate, David Title, we have located in Perfect 10's production a folder titled "server logs," which contains several documents that appear to be many thousands of pages of raw data. You indicated in our teleconference of February 22, 2008 that these documents are responsive to Google's Requests For Production Nos. 98-102. However, Perfect 10's production only includes "server logs" for the years 2003, 2005, and 2006. Please confirm that Perfect

10's production of server logs for 2003, 2005, and 2006 is complete, and please produce server logs for 2004, 2007, and any other years for which server logs exist, going back to the launching of perfect10.com.

Additionally, during that same teleconference of February 22, 2008, Dr. Zada indicated that he would search for, and that Perfect 10 would produce, a software program used by Perfect 10 to analyze log data for certain password-related activities by perfect10.com users. Please also produce that program.

You also identified in an email following our call, also sent on February 22, 2008, a subfolder on the hard drive Perfect 10 produced containing "reports ... regarding unauthorized use of passwords. There is a subfolder on that hard drive titled "password reports," and this subfolder contains excel spreadsheets purporting to reflect, in part, "accesses per username" for usernames generating at least 5,000 visits in one day for the time periods of January 16, 2002 through December 16, 2002, January 8, 2003 through August 5, 2003, all of 2004, and all of 2005. Please confirm that this is the portion of the hard drive you referenced on that call. Please also produce spreadsheets purporting to record this information for all other relevant time periods, from the launch of perfect10.com to the present.

The subfolder additionally contains two text files titled "f83.txt" and f83\_all.txt, both of which appear to be massive listings of various Internet user names in no particular order. Moreover, the subfolder contains a large number of .gif and .html files that appear to reflect various web server statistics in various tables, graphs, pie charts, and the like. All of these documents are not organized in any logical way and are otherwise not useful in their current form. Please state whether Perfect 10 claims these documents are responsive to Google's Requests Nos. 98-102, and if so, please explain how they are relevant to those Requests. Please also explain how those documents are organized, if at all.

Please also produce any other documents relevant to any alleged unauthorized access to perfect10.com by Perfect 10 users, and if no further documents exist, please confirm that Perfect 10's production is complete. Please also produce any documents relevant to any alleged direct infringement of Perfect 10's copyrights (including copying or downloading of Perfect 10 images) by any user who visited perfect10.com, as perfect 10 has produced no such evidence to date.

Further, in Perfect 10's responses to Google's Requests for Production Nos. 98-102, Perfect 10 indicated that it would also produce "sign-up information from the third-party processor for perfect10.com." We have been unable to locate any such documents in Perfect 10's production. Please produce those documents.

### **3. Documents Related to FoneStarz Media Limited ("FoneStarz") and Other Licensees**

Several of Google's document requests, including Requests for Production Nos. 134 and 138-146, called for documents related to alleged licensing of Perfect 10 materials to companies including, but not limited to, FoneStarz Media Limited. Perfect 10 has produced a hard drive containing a subfolder titled "fonestarz." That subfolder contains invoices, purchases orders, and other statements of sales info, virtually all of which are from 2005. Additionally, there is an unsigned agreement between FoneStarz and Perfect 10, also on that hard drive, under the "agreements" subfolder.

On February 29, 2008, we submitted a request to your associate, David Title, seeking either (1) confirmation that this is the total of Perfect 10's production responsive to these requests, or (2) direction the remainder of the responsive documents (if any) in Perfect 10's production. Please respond to these questions. If Perfect 10's production of documents responsive to those requests is incomplete, please collect and produce all remaining documents, including but not limited to all invoices, purchase orders, statements, contracts (including executed copies thereof, if any), correspondence, termination or cancellation documents, and the like.

**4. Perfect 10's Improper Reliance on Limitations in Judge Hillman's Order of May 19, 2006**

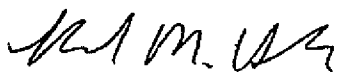
In your email of February 21, 2008, you stated that "Perfect 10 will not withhold any documents or categories of documents specifically requested in the January 29 letter, except for ... requests that were modified or deferred by Judge Hillman in his Order of May 19, 2006." We understand this to mean that, for Requests that Judge Hillman modified in that Order, Perfect 10 will comply only to the Requests as modified, and for any Requests deferred in that Order, Perfect 10 will not comply at all.

As we explained in our January 29, 2008 letter, and in a subsequent email of February 25, 2008, these proposed limitations are improper. Judge Hillman issued the May 19, 2006 Order amidst confusion over whether Perfect 10 had waived its claim to actual damages. Perfect 10's waiver, and its subsequent attempted revocation of that waiver, muddied the waters such that any limitations the Court may have imposed were done in the context of Perfect 10's equivocation. Indeed, as was abundantly clear at the November 27, 2007 hearing, Judge Hillman remains unsure whether Perfect 10 has waived actual damages. Thus, the only reasonable course of action is to return to Google's Requests for Production as originally written. Moreover, even if the limitations in the May 2006 Order were not so tainted, the Court made clear that its orders were made without prejudice to Google's right to revisit them in the future. Please be advised that we are doing so now.

Until Perfect 10 complies in full with its discovery obligations related to actual damages by producing all documents related thereto (including but not limited to all items addressed in my January 29 letter, to which Perfect 10 still has not fully responded, and all items addressed in this letter), Google's position regarding Perfect 10's waiver of actual damages must remain unchanged. Please respond to these letters without delay, and complete Perfect 10's production as requested, by producing all documents responsive to Google's requests for production as originally drafted, without limitation or qualification.

Please note that our review of Perfect 10's production is ongoing. To the extent we identify additional deficiencies in Perfect 10's production, we will bring those matters to your attention at a later date.

Sincerely,



Rachel M. Herrick

RMH:TDN

# **EXHIBIT C**

1 QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP  
 2 Michael T. Zeller (Bar No. 196417)  
 3 michaelzeller@quinnemanuel.com  
 4 865 South Figueroa Street, 10th Floor  
 5 Los Angeles, California 90017-2543  
 6 Telephone: (213) 443-3000  
 7 Facsimile: (213) 443-3100  
 8 Charles K. Verhoeven (Bar No. 170151)  
 9 charlesverhoeven@quinnemanuel.com  
 10 50 California Street, 22nd Floor  
 11 San Francisco, California 94111  
 12 Rachel Herrick Kassabian (Bar No. 191060)  
 13 rachelkassabian@quinnemanuel.com  
 14 555 Twin Dolphin Drive, Suite 560  
 15 Redwood Shores, California 94065-213

16 Attorneys for Defendant Google Inc.

17 UNITED STATES DISTRICT COURT  
 18 CENTRAL DISTRICT OF CALIFORNIA

19 PERFECT 10, INC., a California corporation,

20 Plaintiff,

21 vs.

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

24 Defendants.

25 AND COUNTERCLAIM

26 PERFECT 10, INC., a California corporation,

27 Plaintiff,

28 vs.

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

Defendants.

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

**DECLARATION OF RACHEL HERRICK KASSABIAN IN SUPPORT OF GOOGLE INC.'S MOTION TO COMPEL PERFECT 10 (1) TO PRODUCE DOCUMENTS, (2) TO COMPLY WITH PROTECTIVE ORDER, AND (3) TO AFFIX DOCUMENT CONTROL NUMBERS TO ITS DOCUMENT PRODUCTION**

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

**PUBLIC REDACTED**

1 alternatively proposed that Perfect 10 re-produce its electronic documents on two  
2 separate hard drives, one containing only confidential materials, and the other  
3 containing only public materials. As yet another alternative, Google proposed that  
4 Perfect 10 provide a list of all of the documents it has produced, and state whether  
5 each document contains confidential material. Perfect 10 did not agree to either  
6 proposal.

7 49. Google met-and-conferred with Perfect 10 regarding Perfect 10's  
8 improper designation as "Confidential" of the six charts produced in response to  
9 Google's Interrogatory No. 3, including an October 15, 2008 telephonic conference  
10 of counsel and various written correspondence. Perfect 10 took the position that,  
11 although the charts contained only public information, the particular compilation of  
12 public information rendered the charts confidential. In the course of meet-and-  
13 confer efforts, Perfect 10 also proposed that Perfect 10 would agree to allow Google  
14 to publicly file the charts (and alleged notices of infringement), if Google would  
15 agree not to "post them on Chilling Effects or similar websites."

16 50. Google has met-and-conferred with Perfect 10 regarding its failure to  
17 affix unique control numbers to its electronic document productions at various  
18 times, including most recently in written correspondence on multiple dates in  
19 October 2008, and at a telephonic conference of counsel of October 21, 2008.  
20 Perfect 10 refused to agree to affix control numbers to its document productions.

21 51. Google met-and-conferred with Perfect 10 regarding Perfect 10's  
22 deficient production of financial documents relevant to its claim for actual damages  
23 at various times, including during telephonic conferences of counsel and various  
24 written correspondence. Perfect 10 subsequently produced tax returns and certain  
25 monthly summary financial reports, but that production was incomplete in various  
26 respects. Perfect 10 has not corrected those deficiencies. For instance, Perfect 10  
27 has not produced various missing financial reports, has not confirmed what

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1 happened (if anything) to those missing reports, and has not produced the documents  
2 underlying the summary reports. Additionally, the summary financial reports and  
3 tax returns Perfect 10 has produced are, in most cases, substantially redacted.

4 52. Google met-and-conferred with Perfect 10 regarding Perfect 10's  
5 production of "server log" files, including telephonic conferences of counsel and  
6 various written correspondence. During Google's review of Perfect 10's production,  
7 we located what appear to be "server log" files only for the years 2003, 2005, 2006,  
8 2007, and portions of 2008. Perfect 10 has not identified any other "server logs" in  
9 the documents it produced to Google, nor has it produced other "server log" files.

10 53. Google met-and-conferred with Perfect 10 regarding Perfect 10's  
11 production of password usage reports, including telephonic conferences and various  
12 written correspondence. During Google's review of Perfect 10's production, we  
13 located password usage reports for the time periods January 16, 2002 through  
14 December 16, 2002, January 8, 2003 through August 5, 2003, all of 2004, and all of  
15 2005, and large numbers of other files, all contained in the "passwords reports" file  
16 folder on the hard drive Perfect 10 produced for inspection and copying on April 18,  
17 2006. Regarding the password usage reports, Perfect 10 has not produced any  
18 additional such documents. Regarding the many other documents in the "passwords  
19 reports" file folder, counsel for Google asked counsel for Perfect 10, both in writing  
20 and telephonically, to state whether these documents are responsive to Google's  
21 Requests for Production Nos. 98-102, and explain how the documents were  
22 organized. Perfect 10 has not responded to either question.

23 54. Google met-and-conferred with Perfect 10 regarding Perfect 10's failure  
24 to produce a copy of the software program Perfect 10 uses to understand its server  
25 logs, including telephonic conferences and extensive written correspondence. On  
26 February 22, 2008, Google and Perfect 10 met and conferred telephonically  
27 regarding Perfect 10's deficient responses to Google's Requests for Production Nos.



1 sub-folders. In most instances, Perfect 10 has produced .pdf files of alleged  
2 registration certifications, and has produced alleged deposit materials in the form of  
3 separate free-standing image files (typically in .JPEG format), organized into file  
4 folders labeled with either an alleged copyright registration number, or a verbal  
5 description of the alleged registration. Google has repeatedly requested to inspect  
6 the original copies of Perfect 10's alleged registration deposit materials allegedly  
7 sent the Copyright Office. To date, Perfect 10 has refused Google's request.

8 60. On October 24, 2008 (by letter) and November 6, 2008 (by telephone),  
9 counsel for Google and counsel for Perfect 10 met and conferred regarding Perfect  
10 10's deficient responses to Google's 6th and 7th Sets of Requests for Production.  
11 Among other issues, the parties discussed Perfect 10's improper objections to these  
12 responses. To date, Perfect 10 has refused to produce a chart of alleged  
13 infringements and related documents to Google—documents that would be  
14 responsive to Request for Production Nos. 190 and 191.

15 I declare under penalty of perjury under the laws of the United States of  
16 America that the foregoing is true and correct. Executed May 6, 2009 at Redwood  
17 Shores, California.

18 *Rachel Herrick Kassabian*  
19 Rachel Herrick Kassabian

# **EXHIBIT D**

1 [COUNSEL LISTING ON FOLLOWING  
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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

PERFECT 10, INC., a California corporation,

Plaintiff,

vs.

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

Defendants.

AND COUNTERCLAIM

PERFECT 10, INC., a California corporation,

Plaintiff,

vs.

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

Defendants.

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

**DISCOVERY MATTER**

**JOINT STIPULATION ON  
GOOGLE INC.'S MOTION TO  
COMPEL PERFECT 10 (1) TO  
PRODUCE DOCUMENTS, (2) TO  
COMPLY WITH PROTECTIVE  
ORDER, AND (3) TO AFFIX  
DOCUMENT CONTROL  
NUMBERS TO ITS DOCUMENT  
PRODUCTION**

Hon. Stephen J. Hillman

Date: June 1, 2009  
Time: 2:00 PM  
Crtrm.: 550

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

**PUBLIC REDACTED**

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

JOINT STIPULATION ON GOOGLE'S MOTION TO COMPEL

EXHIBIT D

PAGE 22

1 reports Perfect 10 has produced to Google are certain monthly financial statements,  
 2 Perfect 10 has refused to produce -- or explain its reasons for not producing -- over  
 3 four years' worth of these monthly financial reports. Second, many of the reports  
 4 (and tax returns) that Perfect 10 has produced are substantially redacted based on  
 5 improper claims of irrelevance and confidentiality -- claims that are directly  
 6 contradicted by its claim for monetary damages and the terms of the Protective  
 7 Order in this case. Third, the financial statements that Perfect 10 has produced are  
 8 summaries of Perfect 10's financial condition, necessarily based on other financial  
 9 documents that Google must have to assess Perfect 10's claimed damages. Perfect  
 10 Perfect 10 has no basis for withholding these source documents. Perfect 10 should be  
 11 compelled to produce complete and unredacted copies of its tax returns, monthly  
 12 financial statements and other supporting documents related to the information  
 13 summarized in those monthly financial statements.

14 **2. Perfect 10 Has Failed To Produce Financial Reports**  
 15 **Covering Many Months**

16 Perfect 10's production of financial documents consists of select monthly  
 17 financial statements dating back to 1997. However, there are at least 51 such  
 18 monthly financial statements that are still missing from Perfect 10's production. See  
 19 Kassabian Decl. ¶ 51, and at Exs. HH & II. Specifically, Perfect 10 has produced no  
 20 monthly financial statements for the following months:

21 1997	January, February, March, April, May, June, July, September and 22 October
23 1998	November
24 1999	April, May, June, July, August, September, October and November
25 2000	January, February, April, May, June, July, August, September, 26 October, November and December
27 2001	January, February, March, April and May

1	2002	February, June, July, August and October
2	2003	June and August
3	2004	March and April
4	2005	February
5	2006	January and February
6	2007	February, May, June, August, October and November
7	2008	January, February, March, April, May, June, July, September,
8		October

10 During the meet and confer process, Perfect 10 refused to confirm whether it  
 11 has these missing financial statements in its possession, and if not, what happened to  
 12 them. These are obviously critical issues. For example, if Perfect 10 destroyed the  
 13 financial records just prior to or during this litigation, then Google is entitled to  
 14 pursue spoliation sanctions against Perfect 10, and to ask the Court to strike Perfect  
 15 10's claims of infringement and/or for damages (to the extent Perfect 10 has not  
 16 waived them already). Perfect 10 should be ordered to produce these documents  
 17 without further delay, or to submit a sworn affidavit explaining what happened to  
 18 these documents, and why it was not able to locate and produce these documents  
 19 that clearly existed at one point in time. See Buchanan, 206 F.R.D. 123, 125 (D.  
 20 Md. 2002); Rockwell Int'l Corp. v. H. Wolfe Iron & Metal Co., 576 F.Supp. 511,  
 21 512 (W.D. Pa. 1983); Fed. R. Civ. P. 34(a).

22 **3. Perfect 10's Production Contains Improper Redactions**

23 Many of the financial statements and tax returns that Perfect 10 did produce  
 24 are heavily redacted, rendering them useless in assessing Perfect 10's financial  
 25 condition. For instance, Perfect 10 has redacted categories of information highly  
 26 relevant to Perfect 10's claims of damages, [REDACTED]

27 [REDACTED]

1 After this Court ruled that Perfect 10 was only required to produce summary  
2 financial documents, Perfect 10 and Google entered into an agreement that Perfect  
3 10 would provide various financial documents and Google would agree that Perfect  
4 10 had not waived its right to sue for actual damages. In reliance on that agreement,  
5 Perfect 10 produced highly confidential financial documents. Now, Google is  
6 seeking to have it both ways – Google gets financial documents that are only  
7 relevant to the issue of actual damages, and Google still will not unequivocally  
8 admit that there was no waiver.

9 At a barebones minimum, Google should not be allowed to proceed with this  
10 completely unnecessary motion unless it at least agrees to live up to its part of the  
11 bargain.

12 Google also misrepresents the scope of the dispute over “financial  
13 documents.” This issue solely relates to the issue of actual damages – the position  
14 Google took during the meet and confer process. In fact, Google describes the  
15 dispute as “Perfect 10’s deficient production of documents related to actual  
16 damages.” (Kincaid Decl., ¶4, Exh. 3; email to Valerie Kincaid from Thomas  
17 Nolan, dated October 17, 2008.)

18 Next, Google misrepresents that Perfect 10 has failed to produce financial  
19 documents covering “many months.” During the meet and confer process, Perfect  
20 10 repeatedly told Google that records don’t exist for certain months, and Google  
21 has misrepresented that Perfect 10 instead has the records, but refuses to produce  
22 them.

23 Finally, Google argues that Perfect 10 should be required to produce various  
24 unidentified documents that will provide Google with a complete picture of Perfect  
25 10’s financial condition. Google refuses to accept that Perfect 10 is not a publicly  
26 traded company and thus cannot provide it with the type of financial documents it  
27 wants – they simply don’t exist.

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**PERFECT 10'S CONCLUSION**

For the reasons set forth above, Google's motion should be denied in its entirety. Google should be ordered to reimburse Perfect 10 for the fees it has been forced to incur in opposing an unnecessary motion.

DATED: May 6, 2009

QUINN EMANUEL URQUHART OLIVER & HEDGES. LLP

By /s/ Rachel Herrick Kassabian  
Rachel Herrick Kassabian  
Attorneys for Defendant Google Inc.

DATED: May 6, 2009

THE LAW OFFICES OF JEFFREY N. MAUSNER

By /s/ Jeffrey N. Mausner  
(with permission)  
Jeffrey N. Mausner  
Valerie E. Kincaid  
Attorneys for Plaintiff Perfect 10. Inc.

# **EXHIBIT E**



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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

~~PROPOSED~~ ORDER

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On September 22, 2009, the Court heard argument on various discovery matters raised in Defendant Google Inc.'s Motion to Compel Perfect 10 (1) To Produce Documents, (2) To Comply With The Protective Order, and (3) To Affix Document Control Numbers To Its Document Production, including disputes relating to financial documents and certain related issues arising from the planned deposition of Perfect 10's accountant Bruce Hersh.<sup>1</sup> Defendants Amazon.com and Alexa.com filed an application to join in portions of that motion and to raise these related issues, and which the Court hereby GRANTS. Having considered the parties' respective briefs and oral argument, and good cause existing therefore, the Court HEREBY ORDERS that Google's Motion and the Amazon Defendants' joinder therein is GRANTED IN PART AND DENIED IN PART, as follows:

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

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

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

Perfect 10 must produce such documents in complete and unredacted form (with the two exceptions noted above) by October <sup>16</sup> 2009.

<sup>1</sup> Google only asked the Court to rule on Issues I, VII, VIII, and IX at the September 22, 2009 hearing, so the Court did not reach Issues II – VI presented in the parties' Joint Stipulation On Google Inc.'s Motion to Compel Perfect 10 (1) To Produce Documents, (2) To Comply With The Protective Order, and (3) To Affix 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).

*These issues will be taken up at a later date upon Google's <sup>2</sup> noticed motion*

~~PROPOSED~~ ORDER

CASE NO. CV05-4753 AHM (SHX) CONSOLIDATED WITH CV04-9484 AHM (SHX)

EXHIBIT     E    

PAGE     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  
7 IT IS SO ORDERED.

8 Date: 10-6-09

  
Hon. Stephen S. Hillman  
United States Magistrate Judge

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10 62229951 v1

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~~PROPOSED~~ ORDER

CASE NO. CV05-4753 AHM (SHX) CONSOLIDATED WITH CV04-9484 AHM (SHX)

EXHIBIT E

PAGE 29

# **EXHIBIT F**

LAW OFFICES OF  
JEFFREY N. MAUSNER

Warner Center Towers  
21800 Oxnard Street, Suite 910  
Woodland Hills, California 91367  
Telephone (818) 992-7500  
Facsimile (818) 716-2773  
E-mail: jeff@mausnerlaw.com

October 15, 2009

**VIA FEDERAL EXPRESS  
PRIORITY OVERNIGHT**

Thomas Nolan  
Michael Zeller  
Quinn Emanuel  
865 S. Figueroa Street, 10th Floor  
Los Angeles, California 90017

Rachel Herrick Kassabian  
Charles Verhoeven  
Quinn Emanuel  
555 Twin Dolphin Drive, Suite 560  
Redwood Shores, California 94065

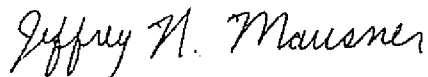
Mark Jansen  
Anthony Malutta  
Timothy Kahn  
Gia Cincone  
Ellie Steiner  
Townsend Townsend & Crew  
Two Embarcadero Center, 8th Floor  
San Francisco, California 94111

Re: *Perfect 10 v. Google*, Case No. CV 04-9484 AHM (SHx)  
*Perfect 10 v. Amazon*, Case No. CV 05-4753 AHM (SHx)

Dear Counsel:

Enclosed please find a disk containing Perfect 10's **HIGHLY CONFIDENTIAL** financial statements and tax returns, pursuant to the Order dated October 6, 2009. One disk has been sent to each address, as listed above. The disk contains an Adobe file with 2,601 pages.

Sincerely,



Jeffrey N. Mausner  
LAW OFFICES OF JEFFREY N. MAUSNER

Disk enclosed

EXHIBIT

F

PAGE

30

# **EXHIBIT G**

1 QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP  
 2 Michael T. Zeller (Bar No. 196417)  
 3 michaelzeller@quinnemanuel.com  
 4 865 South Figueroa Street, 10th Floor  
 5 Los Angeles, California 90017-2543  
 6 Telephone: (213) 443-3000  
 7 Facsimile: (213) 443-3100  
 8 Charles K. Verhoeven (Bar No. 170151)  
 9 charlesverhoeven@quinnemanuel.com  
 10 50 California Street, 22nd Floor  
 11 San Francisco, California 94111  
 12 Rachel Herrick Kassabian (Bar No. 191060)  
 13 rachelkassabian@quinnemanuel.com  
 14 555 Twin Dolphin Drive, Suite 560  
 15 Redwood Shores, California 94065  
 16 Attorneys for Defendant GOOGLE INC.

11 UNITED STATES DISTRICT COURT  
 12 CENTRAL DISTRICT OF CALIFORNIA

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

15 *Plaintiff,*

16 vs.

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

19 *Defendants.*

20 AND COUNTERCLAIM

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

23 *Plaintiff,*

24 vs.

25 AMAZON.COM, INC., a corporation;  
 26 A9.COM, INC., a corporation; and  
 27 DOES 1 through 100, inclusive,

28 *Defendants.*

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

**DISCOVERY MATTER**

Hon. Stephen J. Hillman

**REPLY DECLARATION OF  
 RACHEL HERRICK KASSABIAN  
 IN SUPPORT OF GOOGLE INC.'S  
 MOTION FOR A DOCUMENT  
 PRESERVATION ORDER TO  
 PREVENT FURTHER  
 SPOILIATION OF EVIDENCE BY  
 PERFECT 10, INC.**

Date: January 15, 2010  
 Time: 10:00 a.m.  
 Ctrm: 550

Discovery Cut-off: None Set  
 Pretrial Conference Date: None Set  
 Trial Date: None Set

**PUBLIC REDACTED**

1 I, Rachel Herrick Kassabian, declare as follows:

2 1. I am a member of the bar of the State of California and a partner with  
3 Quinn Emanuel Urquhart Oliver & Hedges, LLP, counsel for Defendant Google Inc.  
4 ("Google") in this action. I make this declaration of my personal and firsthand  
5 knowledge and, if called and sworn as a witness, could and would testify competently  
6 thereto.

7 2. Attached hereto as Exhibit A is a true and correct copy of excerpts of the  
8 transcript of the deposition of Nadine Schoenweitz, taken on October 16, 2009.

9 3. On October 27, 2009, shortly after Ms. Schoenweitz's deposition,  
10 counsel for Google initiated meet and confer with Jeff Mausner (who is representing  
11 both Perfect 10 and Ms. Schoenweitz) regarding [REDACTED]

12 [REDACTED]. A true and correct  
13 copy of Google's October 27, 2009 letter is attached hereto as Exhibit B. Mr.  
14 Mausner did not provide a substantive response to Google's meet and confer efforts  
15 until nearly two months later, by letter dated December 22, 2009 (a true and correct  
16 copy of which is attached hereto as Exhibit C), after Google already had filed the  
17 present motion.

18 4. Attached hereto as Exhibit D is a true and correct copy of excerpts of the  
19 transcript of the deposition of Amy Weber, taken on November 11, 2009.

20 5. Attached hereto as Exhibit E is a true and correct copy of excerpts of the  
21 transcript of the deposition of Amber Smith, taken on November 19, 2009.

22 6. On October 6, 2009, this Court ordered Perfect 10 to produce certain  
23 financial documents, including Perfect 10's missing monthly financial reports (to the  
24 extent such documents exist). True and correct copies of excerpts of the Court's  
25 October 6 Order (Docket No. 560) (ordering the production) and the corresponding  
26 Joint Stipulation (Docket No. 408) (identifying the several dozen specific missing  
27 monthly reports) are attached hereto as Exhibit F. However, Perfect 10 did not  
28 produce any of those missing financial reports in response to the Court's Order.



1 Google met and conferred with Perfect 10 regarding these still-missing financial  
2 reports on various dates beginning on November 4, 2009. True and correct copies of  
3 that meet and confer correspondence are attached hereto as Exhibit G. As of the date  
4 of this declaration, Perfect 10 has confirmed that none of these missing reports  
5 currently exist, and that the missing reports from 2007 were never generated in the  
6 first place. However, Perfect 10 has not confirmed whether the remaining missing  
7 monthly financial reports (including for the years 2004, 2005, 2006, 2008 and 2009)  
8 existed at one time and were destroyed, or were never generated in the first place.

9 7. At page 3 of Perfect 10's opposition brief (Docket No. 690, filed under  
10 seal), Perfect 10 claims that after it had given Google notice that it had inadvertently  
11 produced two allegedly privileged emails, Google ignored that notice and filed those  
12 emails as an exhibit to Google's motion anyway (citing Exhibit N to my previous  
13 declaration, Docket No. 686, filed under seal). This is incorrect. After receiving  
14 Perfect 10's December 9, 2009 email regarding this allegedly inadvertent production  
15 (a true and correct copy of which is attached hereto as Exhibit H), Google removed  
16 the allegedly privileged content described in Perfect 10's December 9 email from that  
17 exhibit by (1) removing the first email Perfect 10 claimed was completely privileged  
18 and (2) redacting the allegedly privileged portion of the second email. This can be  
19 seen by simply looking at Exhibit N to my previous declaration, which has a large  
20 redacted portion [REDACTED]

21 [REDACTED] Google did not use or file any of the allegedly privileged material  
22 Perfect 10 described in its December 9 email.

23 I declare under penalty of perjury under the laws of the United States of  
24 America that the foregoing is true and correct. Executed January 6, 2010 at San  
25 Francisco, California.

26 *Rachel Herrick Kassabian*

27 \_\_\_\_\_  
28 Rachel Herrick Kassabian

# **EXHIBIT H**

**quinn emanuel trial lawyers | silicon valley**

555 Twin Dolphin Drive, Suite 560, Redwood Shores, California 94065 | TEL: (650) 801-5000 FAX: (650) 801-5100

WRITER'S DIRECT DIAL NO.  
(650) 801-5005

WRITER'S INTERNET ADDRESS  
rachelkassabian@quinnemanuel.com

November 4, 2009

**VIA E-MAIL & U.S. MAIL**

Jeffrey N. Mausner, Esq.  
Warner Center Towers  
21800 Oxnard Street, Suite 910  
Woodland Hills, CA 91367  
jeff@mausnerlaw.com

Re: *Perfect 10, Inc. v. Google Inc.*: Production of Financial Documents

Dear Jeff:

In reviewing Perfect 10's October 15, 2009 production of its unredacted financial statements and tax returns pursuant to the Court's October 6 Order, we have discovered that Perfect 10's June 30, 2004 and December 31, 2001 financial statements still contain several impermissible redactions, including numerous redactions concerning the Beverly Park property. We presume this was an inadvertent oversight, as these two monthly statements appear to be unchanged from those versions produced by Perfect 10 earlier in this litigation. Please produce complete and unredacted versions of Perfect 10's financial statements for June 30, 2004 and December 31, 2001, consistent with the Court's October 6 Order.

Additionally, Judge Hillman's October 6 Order obligates Perfect 10 to produce "all of its periodic and annual financial statements . . . to the extent such documents exist." *Id.* In previous letters to Perfect 10 dated March 18, 2008 and August 28, 2008, Google noted that in spite of the fact that Perfect 10 maintains its financial statements on a monthly basis, there were numerous gaps in Perfect 10's production. These deficiencies were neither corrected nor explained by the October 15, 2009 production. As just one example, for the year 2007 (during the pendency of this litigation), Perfect 10 failed to produce financial statements for the months of February, May, June, August, October, and November. Please produce all of these missing financial statements (as itemized in Google's March 18, 2008 and August 28, 2008 correspondence). If

**quinn emanuel urquhart oliver & hedges, llp**

LOS ANGELES | 865 South Figueroa Street, 16th Floor, Los Angeles, CA 90017 | TEL (213) 413-5000 FAX (213) 413-3100

NEW YORK | 51 Madison Avenue, 22nd Floor, New York, NY 10010 | TEL (212) 849-7000 FAX (212) 849-7100

SAN FRANCISCO | 50 California Street, 22nd Floor, San Francisco, CA 94111 | TEL (415) 875-6600 FAX (415) 875-6700

CHICAGO | 250 South Wacker Drive, Suite 330, Chicago, IL 60606 | TEL (312) 463-2961 FAX (312) 463-2962

LONDON | 16 Old Bailey, London EC4M 7EG United Kingdom | TEL +44(0)20 7653 2000 FAX +44(0)20 7653 2100

TOKYO | Akasaka Twin Tower Main Bldg., 6th Fl., 17-22 Akasaka 2-Chome, Minato-ku, Tokyo 107-0052 Japan | TEL +81 3 5561-1711 FAX +81 3 5561-1712

EXHIBIT           H          

PAGE           34

such documents are no longer in Perfect 10's possession, custody or control (including in Mr. Hersh's files), please explain what happened to them.

Please provide all of the above-referenced documents and information on or before November 9, 2009.

Very truly yours,



Rachel Herrick Kassabian

RHK/brl

01980.51320/3184187.4

# **EXHIBIT I**

**Thomas Nolan**

---

**From:** Rachel Herrick Kassabian  
**Sent:** Tuesday, January 05, 2010 1:24 PM  
**To:** Jeffrey Mausner  
**Cc:** 'Jansen, Mark T. '; trahn@townsend.com; ajmalutta@townsend.com; 'Steiner, Elham F.'; 'Valerie Kincaid'; Thomas Nolan; Michael T Zeller; Brad R. Love  
**Subject:** RE: Perfect 10, Inc. v. Google Inc.: Production of Financial Documents

Jeff,

You still have not answered our questions. I will restate them below for ease of reference -

1. With regard to the December 31, 2001 and June 30, 2004 financial statements, are you saying that the original unredacted versions have been lost or destroyed? That's what it sounds like you are saying -- please confirm if this is NOT the case.
2. For each of the following missing monthly financial statements (other than the 2007 statements), please identify which specific statements (1) were lost or destroyed (and how/when), and which (2) were never created in the first place:

1997	January, February, March, April, May, June, July, September and October
1998	November
1999	April, May, June, July, August, September, October and November
2000	January, February, April, May, June, July, August, September, October, and November
2001	January, February, March, April and May
2002	February, June, July, August and October
2003	June and August
2004	March and April
2005	February
2006	January and February
2007	<i>February, May, June, August, October and November [according to P10 these were not generated in the first place]</i>
2008	January, February, April, July, October, and November

2009

January, February, April, June, July, and August

These questions have been outstanding for six weeks. Your prompt response by the close of business today would be appreciated.

**Rachel Herrick Kassabian | Partner**  
**Quinn Emanuel Urquhart Oliver & Hedges LLP**  
555 Twin Dolphin Drive, Suite 560  
Redwood Shores, CA 94065  
650.801.5005 Direct  
650.801.5000 Main  
650.801.5100 Fax  
[rachelkassabian@quinnemanuel.com](mailto:rachelkassabian@quinnemanuel.com)  
[www.quinnemanuel.com](http://www.quinnemanuel.com)

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**From:** Jeffrey Mausner [mailto:[jeff@mausnerlaw.com](mailto:jeff@mausnerlaw.com)]

**Sent:** Tuesday, January 05, 2010 11:28 AM

**To:** Rachel Herrick Kassabian

**Cc:** 'Jansen, Mark T. '; [trcahn@townsend.com](mailto:trcahn@townsend.com); [ajmalutta@townsend.com](mailto:ajmalutta@townsend.com); 'Steiner, Elham F.'; 'Valerie Kincaid'; Thomas Nolan; Michael T Zeller; Brad R. Love

**Subject:** RE: Perfect 10, Inc. v. Google Inc.: Production of Financial Documents

Rachel: On November 23, 2009, Perfect 10 responded to Google's informal discovery requests. That response included answers to what you asked in your November 25, 2009 request for additional informal discovery. However, in an ongoing effort to respond to Google's inquiries, we will repeat what we said already, and see if there is anything more we can do.

With regard to the December 31, 2001 and June 30, 2004 financial statements, Perfect 10 could not locate unredacted copies. Of course, we checked with Mr. Hersh's office. Please identify any redacted information that Google believes is relevant and not discernible from other sources. As you know, Perfect 10 provided Google with unredacted statements before and after those dates. Google has accountants/experts who know if there is any redacted information that is not in those previous and subsequent statements. Is there something Google believes is missing?

With regard to the 2007 monthly statements that were not produced, those documents were not generated. A financial statement is not generated by Perfect 10's accountant every month. Once again, Perfect 10 produced statements for the previous and subsequent months. Have Google's accountants/experts identified something specific they believe is missing?

Perfect 10 produced its existing financial statements, therefore, there is nothing more for it to do.

Also, how does any of this relate to the pending motions for document preservation orders? Google has not raised any such issue. Jeff.

---

**From:** Rachel Herrick Kassabian [mailto:rachelkassabian@quinnemanuel.com]  
**Sent:** Monday, January 04, 2010 2:32 PM  
**To:** 'Jeffrey Mausner'  
**Cc:** 'Jansen, Mark T. '; 'trcahn@townsend.com'; 'ajmalutta@townsend.com'; 'Steiner, Elham F.'; 'Valerie Kincaid'; Thomas Nolan; Michael T Zeller; Brad R. Love  
**Subject:** RE: Perfect 10, Inc. v. Google Inc.: Production of Financial Documents

Jeff,

It has been nearly six weeks since we sent you the November 25<sup>th</sup> email below. P10 still has not responded. Given the pendency of Google's document preservation motion and the upcoming hearing on same, it is imperative that P10 respond now. Please do so by noon tomorrow, January 5.

**Rachel Herrick Kassabian | Partner**  
**Quinn Emanuel Urquhart Oliver & Hedges LLP**  
555 Twin Dolphin Drive, Suite 560  
Redwood Shores, CA 94065  
650.801.5005 Direct  
650.801.5000 Main  
650.801.5100 Fax  
[rachelkassabian@quinnemanuel.com](mailto:rachelkassabian@quinnemanuel.com)  
[www.quinnemanuel.com](http://www.quinnemanuel.com)

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---

**From:** Thomas Nolan  
**Sent:** Friday, December 11, 2009 1:02 PM  
**To:** 'Jeffrey Mausner'  
**Cc:** 'Jansen, Mark T. '; 'trcahn@townsend.com'; 'ajmalutta@townsend.com'; 'Steiner, Elham F.'; Rachel Herrick Kassabian; 'Valerie Kincaid'  
**Subject:** RE: Perfect 10, Inc. v. Google Inc.: Production of Financial Documents

Jeff,

Please respond to this email.

Best Regards,

**Thomas Nolan**  
*Associate,*  
Quinn Emanuel Urquhart Oliver & Hedges LLP.

865 S. Figueroa St 10th Floor  
Los Angeles, Ca 90017  
213-443-3885 Direct  
213.443.3000 Main Office Number  
213.443.3100 FAX  
[thomasnolan@quinnemanuel.com](mailto:thomasnolan@quinnemanuel.com)  
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---

**From:** Rachel Herrick Kassabian  
**Sent:** Wednesday, November 25, 2009 11:16 AM  
**To:** 'Jeffrey Mausner'; Thomas Nolan  
**Cc:** 'Jansen, Mark T. '; 'trcahn@townsend.com'; 'ajmalutta@townsend.com'; 'Steiner, Elham F.'; 'Valerie Kincaid'  
**Subject:** RE: Perfect 10, Inc. v. Google Inc.: Production of Financial Documents

Jeff,

Thanks for your email. With regard to the December 31, 2001 and June 30, 2004 financial statements, are you saying that the original unredacted versions have been lost or destroyed? And has P10 checked with Mr. Hersh's office to see if he maintained copies?

Please also identify:

- (1) which of the missing financial statements were generated, but lost or destroyed (and what happened to those documents), and
- (2) which of the missing financial statements were never created in the first place.

Thanks,

Rachel

**Rachel Herrick Kassabian | Partner**  
Quinn Emanuel Urquhart Oliver & Hedges LLP  
555 Twin Dolphin Drive, Suite 560  
Redwood Shores, CA 94065  
650.801.5005 Direct  
650.801.5000 Main  
650.801.5100 Fax  
[rachelkassabian@quinnemanuel.com](mailto:rachelkassabian@quinnemanuel.com)  
[www.quinnemanuel.com](http://www.quinnemanuel.com)

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---

**From:** Jeffrey Mausner [mailto:[jeff@mausnerlaw.com](mailto:jeff@mausnerlaw.com)]  
**Sent:** Monday, November 23, 2009 7:37 AM  
**To:** Thomas Nolan  
**Cc:** 'Jansen, Mark T. '; 'trcahn@townsend.com'; 'ajmalutta@townsend.com'; 'Steiner, Elham F.'; Rachel Herrick Kassabian; 'Valerie Kincaid'  
**Subject:** RE: Perfect 10, Inc. v. Google Inc.: Production of Financial Documents

Rachel: This is in response to your letter dated November 4, 2009 regarding financial statements. Per the Court's October 6 order, Perfect 10 produced the financial statements the

Court ordered it to produce "to the extent such documents exist." (See October 6, 2009 Order, paragraph 1.)

With regard to the December 31, 2001 and June 30, 2004 financial statements, Perfect 10 only has the copies it produced. We have been unable to locate unredacted copies.

With regard to financial statements that Perfect 10 did not produce for relatively recent years (for example 2007), those documents don't exist because they were not generated. Jeff.

**From:** Thomas Nolan [mailto:thomasnolan@quinnemanuel.com]  
**Sent:** Wednesday, November 04, 2009 11:54 AM  
**To:** Jeffrey Mausner  
**Cc:** 'Jansen, Mark T. '; trcahn@townsend.com; ajmalutta@townsend.com; Steiner, Elham F.; Rachel Herrick Kassabian; 'Valerie Kincaid'  
**Subject:** Perfect 10, Inc. v. Google Inc.: Production of Financial Documents

Jeff,

Please see the attached.

Best Regards,

**Thomas Nolan**  
*Associate,*  
**Quinn Emanuel Urquhart Oliver & Hedges LLP.**

865 S. Figueroa St 10th Floor  
Los Angeles, Ca 90017  
213-443-3885 Direct  
213.443.3000 Main Office Number  
213.443.3100 FAX  
[thomasnolan@quinnemanuel.com](mailto:thomasnolan@quinnemanuel.com)  
[www.quinnemanuel.com](http://www.quinnemanuel.com)

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# **EXHIBIT J**

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

PERFECT 10, INC.,	)	
	)	
PLAINTIFF,	)	
	)	
VS.	)	CASE NO. CV 04-9484-AHM(SHX)
	)	
	)	
GOOGLE, INC.,	)	LOS ANGELES, CALIFORNIA
	)	SEPTEMBER 22, 2009
	)	(10:02 A.M. TO 11:09 A.M.)
	)	(11:21 A.M. TO 12:52 A.M.)
DEFENDANT.	)	(1:35 P.M. TO 2:43 P.M.)
_____	)	(2:52 P.M. TO 3:09 P.M.)

HEARING  
BEFORE THE HONORABLE STEPHEN J. HILLMAN  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:	SEE NEXT PAGE
COURT REPORTER:	RECORDED
COURTROOM DEPUTY:	SANDRA L. BUTLER
TRANSCRIBER:	DOROTHY BABYKIN COURTHOUSE SERVICES 1218 VALEBROOK PLACE GLENORA, CALIFORNIA 91740 (626) 963-0566

PROCEEDINGS RECORDED BY ELECTRONIC SOUND RECORDING;  
TRANSCRIPT PRODUCED BY TRANSCRIPTION SERVICE.

1 EMAIL STRING I THINK YOU WOULD SEE, YOUR HONOR, THAT WHENEVER  
2 THEY WANT TO SHOW SOMETHING TO SOMEBODY, AND IT'S NOT -- IT'S  
3 NOT HIGHLY -- YOU KNOW, THAT INVOLVED A CASE WHERE THEY  
4 WANTED TO SHOW IT TO THEIR EXPERTS AND PEOPLE WHO WORKED IN  
5 THE COMPANY AND SO ON. WE SAID, FINE, DO IT. THEY JUST  
6 ASKED US. WITHIN AN HOUR I SAID, FINE, SHOW IT TO THEM.

7 IT'S GOING TO BE EXTREMELY BURDENSOME FOR US TO GO  
8 THROUGH AND STAMP EACH DOCUMENT "CONFIDENTIAL" OR  
9 "NON-CONFIDENTIAL." IT'S GOING TO BE JUST AS -- YOU KNOW,  
10 MORE BURDENSOME THAN PUTTING A NUMBER ON IT. AND WE JUST  
11 CAN'T DO IT. WE CANNOT DO EVERY --

12 THE COURT: ALL RIGHT. LET ME SEE THE PROTECTIVE  
13 ORDER. I APPRECIATE YOUR BEING HONEST AS TO THE DIFFICULTY.

14 MS. KASSABIAN: I APOLOGIZE, YOUR HONOR. THERE'S A  
15 LITTLE BIT OF HIGHLIGHTING ON THERE, BUT THERE'S NO WRITING  
16 OR ANYTHING.

17 THE COURT: OKAY.

18 MS. KASSABIAN: OH, NEVER MIND. WE HAVE A CLEAN  
19 COPY.

20 THE COURT: OKAY.

21 (PAUSE IN PROCEEDINGS.)

22 MR. MAUSNER: YOUR HONOR, I'D ALSO LIKE TO SHOW  
23 YOUR HONOR WHAT GOOGLE HAS DESIGNATED AS CONFIDENTIAL --

24 THE COURT: OKAY.

25 MR. MAUSNER: -- MORE SO THAN EVEN PERFECT 10.

1 MS. KASSABIAN: AND, AGAIN, YOUR HONOR, THAT  
2 OBVIOUSLY HAS NOTHING TO DO WITH WHY WE'RE HERE TODAY. AND  
3 IF PERFECT 10 HAS A PROBLEM WITH GOOGLE'S DESIGNATIONS, THEY  
4 CAN MEET AND CONFER WITH US AND FILE A MOTION, AND WE'LL DEAL  
5 WITH THAT IN DUE COURSE.

6 MR. MAUSNER: WELL, WE CAN'T DO THAT. WE CAN'T --  
7 WE CAN'T DO AS MANY MOTIONS AND AS MANY LETTERS AND EMAILS AS  
8 GOOGLE DOES TO US OBVIOUSLY.

9 THE COURT: IS THE PROBLEM REALLY WITH THE  
10 CONFIDENTIALITY DESIGNATION OR WITH LOCAL RULE 79-3 SEALING.

11 WHERE'S THE PROBLEM?

12 MS. KASSABIAN: CERTAINLY SEALING IS ONE OF THE  
13 BIGGEST RESULTING PROBLEMS WITH PERFECT 10'S  
14 OVER-DESIGNATION. AND WE CITED IN OUR BRIEFING, YOUR HONOR,  
15 THE ULLICO CASE. I'M NOT SURE IF I'M PRONOUNCING THAT RIGHT.

16 THE COURT: YES. I KNOW.

17 MS. KASSABIAN: U-L-L-I-C-O.

18 WE HAVE A VERY SIMILAR SITUATION HERE. WHEN A  
19 PARTY OVER-DESIGNATES, EVERY TIME WE WANT TO FILE A DOCUMENT  
20 WITH THE COURT, EVERY TIME WE WANT TO SHOW A DOCUMENT AT A  
21 DEPOSITION, EVERY TIME WE WANT TO REVIEW A DOCUMENT FOR  
22 WORK-PRODUCT PURPOSES AND POSSIBLY SHOW IT TO OTHERS, WE  
23 WOULD HAVE TO PICK UP THE PHONE AND CALL PERFECT 10 AND ASK  
24 THEM IF IT'S OKAY.

25 THAT IS NOT HOW THE PROTECTIVE ORDER WORKS. NOR

1 SHOULD THE COURT'S FILES CONSIST OF A BUNCH OF SEALED  
2 DOCUMENTS THAT DON'T NEED TO BE SEALED BECAUSE THERE WAS  
3 OVER-DESIGNATION HERE.

4 AND JUST FOR TRANSCRIPT PURPOSES, THAT'S  
5 U-L-L-I-C-O, IN RE ULLICO, INC. LITIGATION, 237 FRD 314,  
6 DISTRICT OF COLUMBIA 2006.

7 (PAUSE IN PROCEEDINGS.)

8 THE COURT: WHO ARE THE KIND OF PEOPLE THAT YOU'RE  
9 REQUESTING PERMISSION -- YOU'RE FINDING YOURSELF HAVING TO  
10 REQUEST PERMISSION?

11 MS. KASSABIAN: I'LL GIVE YOU A PERFECT EXAMPLE,  
12 YOUR HONOR.

13 UNDER THE PROTECTIVE ORDER, IF WE WANT TO SHOW  
14 CONFIDENTIAL DOCUMENTS TO, LET'S SAY, A CONSULTING EXPERT,  
15 SOMEONE WHO WAS UNDER NO OBLIGATION TO DISCLOSE THEIR  
16 IDENTITY TO PERFECT 10 BECAUSE THEY'RE NOT BEING DESIGNATED  
17 AS A TESTIFYING EXPERT, IF PERFECT 10 HAS SLAPPED A  
18 CONFIDENTIALITY STICKER ON THAT HARD DRIVE, WE CAN'T SHOW  
19 THAT EXPERT PAGE 1 WITHOUT SENDING A LETTER TO PERFECT 10  
20 ANNOUNCING OUR INTENTIONS.

21 WE SHOULD NOT HAVE TO DO THAT WITH NON-CONFIDENTIAL  
22 DOCUMENTS.

23 THE COURT: OKAY. AND --

24 MR. MAUSNER: YOUR HONOR, I DON'T HAVE A COPY OF  
25 THE PROTECTIVE ORDER, BUT I THINK THEY CAN SHOW CONFIDENTIAL

EXHIBIT

5

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C E R T I F I C A T E

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I CERTIFY THAT THE FOREGOING IS A CORRECT  
TRANSCRIPT FROM THE ELECTRONIC SOUND RECORDING OF THE  
PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

DOROTHY BABYKIN

10/2/09

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FEDERALLY CERTIFIED TRANSCRIBER

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DATED

DOROTHY BABYKIN

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