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10 UNITED STATES DISTRICT COURT
 11
 12 CENTRAL DISTRICT OF CALIFORNIA

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

15 Plaintiff,

16 v.

17 AMAZON.COM, INC., et al.,

18 Defendants.

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

22 **Discovery Matter Before Magistrate
23 Judge Hillman**

24 **PERFECT 10'S OPPOSITION TO
 25 GOOGLE'S JOINDER RE MOTION
 26 TO COMPEL PRODUCTION OF
 27 MICROSOFT SETTLEMENT
 28 AGREEMENT**

PERFECT 10, INC., a California
corporation,

Plaintiff,

v.

GOOGLE, INC., et al.,

Defendants.

Date: None set
 Time: None set
 Ctrm.: Courtroom of Judge Stephen J.
 Hillman

Discovery Cutoff: None Set
 Motion Cutoff: None Set
 Pretrial Conf.: None Set
 Trial Date: None Set

1 As discussed in more detail below, both this Court and other courts have
2 recognized the importance of maintaining the confidentiality of confidential
3 settlement agreements. Ending that policy will undoubtedly make it more difficult
4 to settle cases, in this Court and elsewhere. There must be a very good reason for a
5 court to abrogate the parties' specifically agreed to terms; and when that is done,
6 only the relevant portions of the settlement agreement, rather than the agreement as
7 a whole, should be ordered produced.

8 **1. There Is No Basis Whatsoever For Google to See Any More of a**
9 **Confidential Settlement Agreement That Specifically States That Google Is**
10 **Not Released in Any Way.**

11 Both Google and Amazon.com have already been informed of the monetary
12 amount of the settlement. Both have also been informed of the release language
13 relating to Amazon.com's use of Microsoft's search results.

14 Amazon's main reason for seeking the full Settlement Agreement, that it
15 provides a partial release of claims against the Amazon Defendants only to the
16 extent their services, results, or advertising are or were received from Microsoft,
17 specifically and explicitly does not apply to Google. As the Court can see from the
18 quoted portion of the Settlement Agreement set forth in the Joint Stipulation filed
19 under seal, Google is explicitly not released from any claims whatsoever. So there
20 is absolutely no legitimate argument that Google should be entitled to see any more
21 of the confidential Settlement Agreement than it has already seen. Allowing a
22 third party such as Google to see the entirety of a confidential settlement
23 agreement that does not release it in any way, sets a very dangerous precedent and
24 will make settlement of future cases much more difficult in this district and
25 elsewhere. This is an issue of great importance, not only to parties to these cases,
26 but generally, because of the effect it will have on settlements overall. This matter
27 has been picked up by news media, without any initiation by the parties to the case.
28 *See* Mausner Declaration Re Google Joinder, submitted herewith, Exhibit A.

1 **2. There Is No Reason for the Amazon Defendants, Let Alone Google, to**
2 **See Any More of the Settlement Than They Have Already Seen.**

3 Perfect 10 disagrees with the basis for the Court’s February 9 initial ruling:
4 “The lengthy Release and covenant not to sue provisions appear to be relevant to
5 issues of liability and/or damages.” As discussed above, that ruling clearly does
6 not apply to Google. The fact that Perfect 10 chose to settle with Microsoft by
7 releasing certain claims against Amazon does not impact the liability or damages
8 of Google, who was expressly not released.

9 In the case of the Amazon defendants, the disclosure should be limited to
10 only the Release and portions of the covenant not to sue provisions; other parts of
11 the Settlement Agreement, which are not relevant, should not be ordered produced
12 to Amazon.

13 When it entered into the settlement with Microsoft, Perfect 10 believed that
14 the Settlement Agreement would be confidential; it would not have agreed to
15 certain terms if it had known that the same Court that had earlier upheld the
16 confidentiality of settlement agreements would decide differently for Google and
17 Amazon. The Settlement Agreement with Microsoft is, by its terms, Confidential
18 from Google and Amazon.

19 In the *Perfect 10 v. Net Management* litigation, this Court ruled that Perfect
20 10 was not required to provide any third-party settlement information, let alone the
21 settlement agreements themselves:

22 ***The court concludes that the settlement agreements and related***
23 ***settlement documents should not be produced. Not only should the***
24 ***strong public policy cautioning disclosure of confidential settlement***
25 ***documents be honored in this case, but the court concludes that the***
26 ***settlement documents have no relevance to Perfect 10’s claims***
27 ***against the defendants in this case....***

28 (July 21, 2003 Order in *Perfect 10 v. Net Management Services, et al.*, CV02-

1 3735-LGB (SHx), attached to Declaration of Jeffrey N. Mausner in Support of
2 Perfect 10, Inc.’s Portions of the Joint Stipulation Re: Amazon Defendants’ Motion
3 to Compel Production of Microsoft Settlement Agreement (“Mausner Decl.”),
4 Docket No. 364-13, Exhibit 2, p. 2, emphasis added.)

5 Other courts have also recognized the importance of keeping settlement
6 agreements confidential. In *Davenport v. Indiana Masonic Home Foundation, Inc.*,
7 2003 WL 1888986 at *3 (S.D. Ind. 2003), the Court held: “Settlement serves an
8 important role in expediting and improving the efficiency of the litigation process.
9 *See Grove Fresh Distribs., Inc. v. John Labatt Ltd.*, 888 F.Supp. 1427, 1441
10 (N.D.Ill.1995). Thus, courts are generally reluctant to order disclosure of
11 negotiations or documents related to a settlement agreement.”

12 In *Butta-Brinkman v. FCA Intern., Ltd.*, 164 F.R.D. 475 , 476-77 (N.D. Ill.
13 1995), the court held:

14 Finally, the defendant contends that it should not be required to turn
15 over confidential settlement agreements reached in other cases involving
16 sexual harassment. FCA argues that the strong congressional policy
17 favoring settlement weighs in favor of keeping such documents protected,
18 so long as the information is available through other means. *See Cook v.*
19 *Yellow Freight Sys., Inc.*, 132 F.R.D. 548, 554-55 (E.D.Cal.1990)
20 (denying motion to compel production of documents containing
21 information about confidential settlement discussions); *Bottaro v. Hatton*
22 *Assocs.*, 96 F.R.D. 158, 160 (E.D.N.Y.1982) (denying motion to compel
23 production of settlement agreement); *see also Grove Fresh Distribs., Inc.*
24 *v. John Labatt, Ltd.*, 888 F.Supp. 1427, 1441 (N.D.Ill.1995) (“And while
25 there is simply no legitimate public interest to be served by disclosing
26 settlement agreements, the parties to the agreement are likely to have a
27 compelling interest in keeping the settlement amount confidential.”)
28 (quotations omitted). We find this reasoning compelling. Absent a

1 showing by the plaintiff that she will be unable to obtain the relevant
2 information through other discovery requests or interrogatories, we
3 believe these settlement documents ought to retain their confidentiality.
4 Accordingly, we sustain this portion of FCA's objection, and deny the
5 plaintiff's motion to compel the production of confidential settlement
6 agreements reached with other employees.

7 *See also Folb v. Motion Picture Industry Pension & Health Plans*, 16 F.Supp.2d
8 1164, 1174-75 (C.D. Ca. 1998)(Judge Paez):

9 '[i]f any comments about the dispute made during the negotiation process
10 were later to be construed as admissions, or even to be used to show bias,
11 as permitted in FED. R. EVID. 408, the posturing of the parties in the
12 negotiations could well reduce or eliminate any likelihood of settlement, or
13 even serious negotiation, for the parties would be extremely cautious about
14 advancing a settlement proposal that might be used against them. Thus,
15 they may never get beyond their "positions," even if they both may
16 genuinely want to settle their dispute.' [citation omitted] ...

17 'settlement negotiations protected under California's constitutional right of
18 privacy even though parties had not executed written confidentiality
19 agreement required to invoke California's mediation privilege'' [citation
20 omitted] ...

21 This conclusion takes on added significance when considered in
22 conjunction with the fact that many federal district courts rely on the
23 success of ADR proceedings to minimize the size of their dockets.

24 An order requiring Perfect 10 to produce the entire Settlement Agreement to
25 Google and Amazon would make it much more difficult for Perfect 10 to settle
26 those cases. Google and Amazon would know what Perfect 10 was willing to
27 agree to with Microsoft. This would undercut Perfect 10's negotiating position and
28 might prevent any settlement. Ordering production of a confidential settlement

1 agreement will also discourage other defendants from settling, since they will
2 know that their agreement to keep the terms confidential may be set aside by the
3 Court. Google's Joinder in Amazon's motion to compel production of the
4 Microsoft Settlement Agreement should therefore be denied.

5 If the Court does order the production of any further portions of the
6 Settlement Agreement to Google or Amazon.com, Perfect 10 requests that the
7 Magistrate Judge stay the Order until Perfect 10's objection to Judge Matz can be
8 heard.

9 Dated: March 16, 2010

Respectfully submitted,
LAW OFFICES OF JEFFREY N. MAUSNER

10
11 By: Jeffrey N. Mausner

12 Jeffrey N. Mausner
13 Attorney for Plaintiff Perfect 10, Inc.
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