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**** E-filed April 1, 2011 ****

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE GOOGLE ADWORDS
LITIGATION,

No. C08-03369 JW (HRL)

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS’
MOTION FOR LEAVE TO SERVE
INTERROGATORIES AND TO
COMPEL**

[Re: Docket No. 222]

BACKGROUND

Through its AdWords program, defendant Google, Inc. (“Google”) places the advertisements of its customers on internet web pages and charges those customers when internet users click on them. In this consolidated putative class action, Google customers Pulaski & Middleman, LLC (“Pulaski”), JIT Packaging, Inc. (“JIT Packaging”), RK West, Inc. (“RK West”), and Richard Oesterling (“Oesterling”) (collectively, “Plaintiffs”) claim that Google improperly placed advertisements on “parked domains,” websites that typically lack content but which display ads related to their registered domain name, and “error page websites,” websites with an unregistered domain name or that simply display the results of a malformed search query.

The pleadings in this case have gone through several iterations. On November 23, 2010, Judge Ware granted Plaintiffs’ motion for leave to file a Third Amended Complaint. Docket No. 164. In so ordering, Judge Ware also extended class discovery until February 14, 2011. Id.

1 Plaintiffs filed their Third Amended Complaint on November 29, 2010. Docket No. 166
2 (“Third Amended Complaint” or “TAC”). And, with class discovery extended, Plaintiffs served
3 their Sixth Set of Interrogatories on December 14, 2010 and their First Set of Requests for
4 Admission (“RFAs”) on December 15, 2010. Docket No. 222-1 (“Jonckheer Decl.”), Exs. A, B.
5 Google responded to these interrogatories and RFAs on January 13 and January 14, 2011,
6 respectively, objecting to the discovery at issue here. Id., Exs. C, D.

7 Plaintiffs now move (1) for leave to serve their Sixth Set of Interrogatories and (2) to compel
8 Google to respond to Interrogatory Nos. 1, 2, 3, 4, 7, 8, and 9 and to RFA No. 13. Docket No. 222
9 (“MTC”). Google opposed Plaintiffs’ motion (Docket No. 211 (“Opp’n”)) and oral argument was
10 heard on March 15, 2011.

11 DISCUSSION

12 A. Whether Plaintiffs’ Propounding of Their Sixth Set of Interrogatories Was Proper

13 As an initial matter, Google argues that Plaintiffs should not have been able to serve their
14 Sixth Set of Interrogatories because they have already served more than 25 interrogatories in this
15 action.

16 Google first points to Federal Rule of Civil Procedure 33(a)(1), which says that “[u]nless
17 otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25
18 written interrogatories, including all discrete subparts.” It is true that Plaintiffs have exceeded that
19 number. However, it also appears that Plaintiffs were acting consistently with the course of conduct
20 in this large and complicated case. Indeed, Plaintiffs exceeded the 25 interrogatory limit when they
21 served their Third Set of Interrogatories back on March 29, 2010, and Google did not object on this
22 basis then or when Plaintiffs thereafter served their Fourth and Fifth Sets of Interrogatories, either.
23 Under these circumstances, the Court believes it fair to approve of Plaintiffs’ service of their Sixth
24 Set of Interrogatories.¹

25 _____
26 ¹ Google also argues that, in the briefing on their motion for leave to file a Third Amended
27 Complaint, Plaintiffs repeatedly told Judge Ware that there would be no need for additional class
28 discovery, so Plaintiffs should be judicially estopped from conducting further discovery. Google’s
argument is not compelling because Judge Ware nevertheless extended the class discovery period to
February 15, 2011 and Plaintiffs’ interrogatories and RFAs were served and required responses well
before that deadline.

1 B. Whether Google Should Be Compelled to Respond to the Discovery Requests at Issue

2 1. Interrogatory Nos. 1 and 2

3 These two interrogatories seek certain click data related to parked domain and error page
4 clicks for Plaintiffs.² This data includes the “conversion score,” which is a metric Google uses to
5 price clicks from websites contained in its network, and the “smart pricing discount,” which is a
6 discount Google applies to the price of a click. “This data,” Plaintiffs argue, “is relevant because it
7 further reveals the manner in which Google charged Plaintiffs for the clicks, and bears on Plaintiffs’
8 model for developing a method for calculating class-wide relief, a necessary showing at the class
9 certification stage.” MTC at 10. Indeed, Plaintiffs’ expert has relied on such conversion-related click
10 data, including conversion scores and smart pricing discounts, in his formulation of a model for
11 class-wide restitution. *Id.* at 10-11.

12 Google argues that this information is not necessary. As it points out, Plaintiffs’ expert
13 already submitted his report that lays out different models for class-wide relief, and Plaintiffs never
14 indicated previously that the report was lacking because of a shortage of data. Indeed, Plaintiffs’
15 conceded at oral argument that the information sought would add to their expert’s models, but it
16 certainly is not a “missing link.” Even so, this does not mean that the information is not relevant to
17 class certification. And because it is relevant, it is proper for Plaintiffs’ to seek it.

18 Plaintiffs’ motion to compel responses to Interrogatory Nos. 1 and 2 is GRANTED.

19 2. Interrogatory Nos. 3, 4, 7, 8, and 9

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22 ² Interrogatory No. 1 asks Google to “[s]tate the following information for each parked domain click
23 Google identified in response to plaintiffs’ Fifth Set of Interrogatories, Interrogatory No. 1: (a) the
24 Conversion Score value of the Property Code at the time the click was made; (b) the Smart Pricing
25 discount (in dollar terms) that was applied to the click; (c) the high and low ends of the Confidence
26 Interval assigned to the Property Code on the date of the click; (d) the default multiplier for the
27 Property Code on the date of the click; (e) whether the default multiplier identified in response to (d)
28 was applied; (f) if the default multiplier was applied, the reason for applying it. Interrogatory No. 2
asks Google to “[s]tate the following information for each error page click Google identified in
response to plaintiffs’ Fifth Set of Interrogatories, Interrogatory No. 2: (a) the Conversion Score
value of the Property Code at the time the click was made; (b) the Smart Pricing discount (in dollar
terms) that was applied to the click; (c) the high and low ends of the Confidence Interval assigned to
the Property Code on the date of the click; (d) the default multiplier for the Property Code on the
date of the click; (e) whether the default multiplier identified in response to (d) was applied; (f) if
the default multiplier was applied, the reason for applying it.”

1 These interrogatories seek information related to a metric used by Google called
2 “conversions per dollar” or CPD.³ CPD measures the average cost of a conversion and helps to
3 measure the quality of a website within the Google network. Plaintiffs claim that evidence produced
4 demonstrates that CPD was lower for parked domains and error pages than for other pages. They
5 say that “Google has relied extensively on Conversion Rates [data that] it has produced to argue that
6 parked domain and error pages provide comparable value to Plaintiffs as other pages in its network,”
7 and “[c]omparative CPD figures will allow Plaintiffs to evaluate this argument.” MTC at 11.
8 Plaintiffs thus contend that the information sought by these interrogatories is relevant to class
9 certification because they bear upon Google’s defenses to certification. *Id.* at 13; Reply at 5.

10 The Court is satisfied that these interrogatories seek information that is relevant to class
11 certification in this case. While Google argues in its opposition that Plaintiffs have not made any
12 showing that this information is relevant to class certification, it did suggest at oral argument that it
13 intends to oppose class certification in part by arguing that Plaintiffs do not have a valid method to
14 determine the relative performance of advertisements on certain websites. In this regard, Plaintiffs
15 represent that their expert uses a CPD-based damages model and convincingly argue that the
16 information sought by these interrogatories would assist with the presentation of this model.

17 Plaintiffs’ motion to compel responses to Interrogatory Nos. 3, 4, 7, 8, and 9 is GRANTED.

18 3. RFA No. 13

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21 ³ Interrogatory No. 3 asks Google to “[s]eparately state the mean and median CPD for ads placed on
22 AFD sites contained in the Search Network for July 11, 2004 through December 31, 2004, calendar
23 years 2005, 2006, 2007, and January 1, 2008 through March 31, 2008, respectively.” Interrogatory
24 No. 4 asks Google to “[s]eparately state the mean and median CPD for ads placed on AFD sites
25 contained in the Content Network for July 11, 2004 through December 31, 2004, calendar years
26 2005, 2006, 2007, and January 1, 2008 through March 31, 2008, respectively.” Interrogatory No. 7
27 asks Google to “[s]eparately state the mean and median CPD for ads placed on Google.com for July
28 11, 2004 through December 31, 2004, calendar years 2005, 2006, 2007, and January 1, 2008
through March 31, 2008, respectively.” Interrogatory No. 8 asks Google to “[s]eparately state the
mean and median CPD for ads placed on AFS sites, excluding AFD and AFE sites, for July 11,
2004 through December 31, 2004, calendar years 2005, 2006, 2007, and January 1, 2008 through
March 31, 2008, respectively.” Interrogatory No. 9 asks Google to “[s]eparately state the mean and
median CPD for ads placed on AFC sites, excluding AFD and AFE sites, for July 11, 2004 through
December 31, 2004, calendar years 2005, 2006, 2007, and January 1, 2008 through March 31, 2008,
respectively.”

1 RFA No. 13 seeks an admission that Google prohibited parked domain publishers in its
2 network from including any Google-related labeling, branding, or attribution on their websites.⁴
3 While the information sought by RFA No. 13 may be, as Plaintiffs stated at oral argument, a
4 “central piece” of Plaintiffs’ underlying claims, the Court is not convinced that it relates to class
5 certification. As Google points out, RFA No. 13 “does not actually ask whether Google applied a
6 uniform practice as to the class (a question that could conceivably be relevant to assessing
7 commonality) and instead goes to the substantive, merits-based question of what Google’s actual
8 business practice was.” Opp’n at 8.

9 Plaintiffs’ motion to compel a response to RFA No. 13 is DENIED.

10 **CONCLUSION**

11 Based on the foregoing, Plaintiffs’ motion is GRANTED IN PART and DENIED IN PART.
12 Google shall respond to Interrogatory Nos. 1, 2, 3, 4, 7, 8, and 9 within 14 days from the date of this
13 order.

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15 **IT IS SO ORDERED.**

16 Dated: April 1, 2011

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19 HOVARD R. LLOYD
20 UNITED STATES MAGISTRATE JUDGE

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27 _____
28 ⁴ RFA No. 13 asks Google to “[a]dmit that at all times during the CLASS PERIOD, GOOGLE prohibited participants in Google’s AdSense for Domains program from including any ‘GOOGLE labeling, branding or attribution’ on AFD SITES.”

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27 **Counsel are responsible for distributing copies of this document to co-counsel who have not registered for e-filing under the court's CM/ECF program.**

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