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14 Attorneys for Plaintiff PERFECT 10, INC.

15  
 16 UNITED STATES DISTRICT COURT  
 17 CENTRAL DISTRICT OF CALIFORNIA

18 PERFECT 10, INC., a California  
 corporation,

19 Plaintiff,

20 vs.

21  
 22 MICROSOFT CORPORATION; and  
 DOES 1 through 100, inclusive,

23 Defendant.

) Case No. CV 07-5156 AHM (SHx)

) **STIPULATION AND**  
 ) **PROTECTIVE ORDER**

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1 All parties to this action hereby stipulate to, and request that the Court enter, the  
2 following Protective Order.

3 Good cause appearing:

4 IT IS HEREBY ORDERED that this Protective Order pursuant to Rule 26(c) of  
5 the Federal Rules of Civil Procedure be, and is hereby, entered.

6 1. This Protective Order ("Order") shall be applicable to and govern all  
7 depositions, documents produced in response to requests for production of documents,  
8 answers to interrogatories, responses to requests for admission, and all other discovery  
9 taken pursuant to the Federal Rules of Civil Procedure, or furnished informally by  
10 agreement between the parties, as well as testimony adduced at trial and other  
11 information hereafter furnished, directly or indirectly, by or on behalf of any party or  
12 nonparty in connection with this action which that party or nonparty in good faith  
13 believes comprise or reflect proprietary information used by it in, or pertaining to, its  
14 business, which is not generally known and which the party would normally not  
15 reveal to third parties or would cause third parties to maintain in confidence,  
16 including, without limitation, trade secrets as defined in California Civil Code Section  
17 3426.1, financial data, contracts and agreements, employee information, current and  
18 future business plans, and marketing documents.<sup>1</sup> The term "document" as used in  
19 this Order, shall have the broadest meaning permissible under the Federal Rules of  
20 Civil Procedure and shall include, without limitation, all "writings," "recordings" and  
21 "photographs" as defined in Rule 1001 of the Federal Rules of Evidence, and any  
22 information stored in any computer system or other electronic or optical data storage  
23 device.

24 2. Material or information designated as "Confidential" pursuant to this  
25 Order ("Confidential Material") shall be used by any recipients solely for the purpose  
26 of conducting this litigation, and not for any other purpose whatsoever, and such

27 \_\_\_\_\_  
28 <sup>1</sup> This Protective Order does not apply to hearings before the Magistrate Judge or  
hearings or trial before the District Court. The parties, any party in interest, and/or the  
witnesses, can move the Court to seal any court proceeding for reasons consistent with  
this Protective Order.

1 information shall not be disclosed to anyone except as provided herein. No expert or  
2 consultant shall review or gain access to Confidential Material unless he or she has  
3 executed the Notification of Protective Order and Undertaking (attached as Exhibit  
4 A).

5 **Confidential Designation of Material**

6 3. Any information or materials produced by any party or nonparty as part  
7 of discovery in this action may be designated "Confidential" by such party or nonparty  
8 pursuant to Paragraph 4 of this Order.

9 4. The designation of information or material as "Confidential" for purposes  
10 of this Order shall be made in the following manner by the party or nonparty seeking  
11 protection:

12 (a) In the case of documents, exhibits, briefs, memoranda,  
13 interrogatory responses, responses to requests for admission, or other materials (apart  
14 from depositions or other pretrial or trial testimony): by affixing a plainly visible  
15 confidentiality designation legend to (i) the cover page of such document, or on the  
16 outside of any media for storing electronic documents, stating either "Confidential" or  
17 "This Document Contains Material Designated as Confidential Pursuant to the  
18 Protective Order Entered in this Case", and (ii) each page containing any confidential  
19 information or material, at the time such documents are produced or such information  
20 is disclosed, or as soon thereafter as the party or nonparty seeking protection becomes  
21 aware of the confidential nature of the information or material disclosed and sought to  
22 be protected hereunder. Whoever seeks designation of a native-format computer file  
23 as Confidential Material shall, to avoid altering the original file, not affix a label to the  
24 electronic file itself, but shall inform the receiving party in writing of the designation.

25 (b) In the case of depositions or other pretrial or trial testimony: (i) by  
26 a statement on the record, by counsel, during such deposition or other pretrial or trial  
27 proceeding that the entire transcript or a portion thereof shall be designated hereunder;  
28 or (ii) by written notice of such designation sent by counsel to all parties within ten

1 (10) days after the delivery to counsel of the transcript of the deposition. At or before  
2 a deposition, the deponent or his counsel, or any other counsel of record, acting in  
3 good faith, may invoke the provisions of this Order in a timely manner, giving  
4 adequate warning to counsel for the party or nonparty that testimony about to be given  
5 is deemed protected under this Order. The parties may modify this procedure for any  
6 particular deposition or proceeding through agreement on the record at such  
7 deposition or proceeding or otherwise by written stipulation, without approval of the  
8 Court. If any document or information designated under this Order is used during the  
9 course of a deposition, that portion of the deposition record reflecting such  
10 confidential information shall be sealed and stamped accordingly, and access thereto  
11 shall be limited pursuant to the other terms of this Order.

12 (c) A party or nonparty furnishing documents and things to another  
13 party shall have the option to require that all or batches of documents and things be  
14 treated as confidential during inspection and to make its designations of particular  
15 documents and things at the time copies of documents and things are produced or  
16 furnished.

17 5. Confidential Material under this Order, or copies or extracts therefrom  
18 and compilations thereof, may be disclosed, described, characterized, or otherwise  
19 communicated or made available in whole or in part only to the following persons:

20 (a) Outside counsel of record in this litigation and staff and supporting  
21 personnel of such attorneys, such as contract attorneys, paralegals, secretaries,  
22 stenographic and clerical employees and contractors, and outside copying, imaging  
23 and presentation services (if used), who are working on this litigation under the  
24 direction of such attorneys and to whom it is necessary that the materials be disclosed  
25 for purposes of this litigation;

26 (b) In-house counsel for the parties herein who are necessary for the  
27 furtherance of this litigation and in-house paralegal;

28 (c) One officer of each of the parties;

1 (d) Subject to Paragraphs 6 and 8 herein, persons who are expressly  
2 retained or sought to be retained by a party as consultants or testifying experts, such as  
3 accountants, statisticians, economists, industry or technical experts; provided that the  
4 disclosure of Confidential Material to any persons under this subparagraph shall only  
5 be to the extent necessary to perform their work on this litigation.

6 (e) Subject to Paragraph 8 herein, any other persons who are  
7 designated to receive Confidential Material by order of this Court after notice to the  
8 parties, or by written stipulation of the parties.

9 (f) Subject to Paragraph 7 and Paragraph 8 herein, any person who  
10 gives testimony in deposition or trial in this action.

11 (g) The Court and Court personnel.

12 (h) Subject to Paragraph 8, court reporters, interpreters and  
13 videographers employed in connection with this action.

14 (i) The parties retain the right to apply to the Court for an order  
15 restricting certain individuals from access to certain information. To accomplish this,  
16 counsel for a party wishing to restrict access to information shall produce the  
17 information (i.e. document) to all counsel for which there is no objection, with a  
18 request that the information not be disseminated to other individuals involved in this  
19 litigation pending further order of the Court. The moving party shall, thereafter,  
20 within (7) seven days, file the information under seal with the Magistrate Judge and  
21 identify the person (by name and title) who the moving party objects to seeing the  
22 information and why the moving party believes the information should not be received  
23 by this person(s). If the Court is inclined to grant the order, it will notify the  
24 aggrieved party and invite briefing before issuing an order.

25 6. For the purposes of this Order, a consultant shall be restricted to a person  
26 who is retained or employed as a bona fide consultant or expert for purposes of this  
27 litigation, whether full or part time, by or at the direction of counsel for a party, and  
28 who is not retained by, employed by, or otherwise affiliated with any party to this

1 action. The name, business address, curriculum vitae ("CV") and affiliation of each  
2 such consultant or testifying expert must be disclosed to the producing party at least  
3 five (5) court days prior to such person's review of material designated under this  
4 Order. The CV shall contain a list of all present employers/clients as well as all past  
5 employers/clients for the 36 months preceding the date of employment in this case.  
6 During that five-day period, counsel for the designating party shall have the  
7 opportunity to oppose the proposed disclosure. Any party opposing disclosure shall  
8 within such five (5) day period provide the other party with a written objection, setting  
9 forth in reasonable detail the specific grounds for such opposition. If no written  
10 objection is received by 5:00 p.m., Pacific time, on the fifth day following the date of  
11 disclosure of the identity of the proposed consultant or testifying expert, then the party  
12 seeking to disclose may do so and failure to object shall constitute waiver of the  
13 specific objection. However, after the five-day period has expired without objection,  
14 a party may still move the Magistrate Judge to allow it to object to an expert if it can  
15 show: a) there is new, material information relating to the expert, which was not  
16 available to the moving party within the five-day objection period; and b) had the  
17 moving party been aware of the information at the time, the moving party would have  
18 objected to the expert. In the event that an objection is received, the objecting party  
19 shall, within two (2) court days send to the other party by facsimile or next business  
20 day delivery its portion of a joint stipulation, modeled on the procedure used by this  
21 District, to be furnished the court in connection with any motion regarding the  
22 objection. Within three (3) court days of receipt of such portion of the joint  
23 stipulation, the party seeking to disclose shall send its portion of a joint stipulation to  
24 the objecting party by facsimile or next business day delivery. Within two (2) court  
25 days of receipt of both portions of the joint stipulation, the objecting party shall file  
26 the joint stipulation, with the Court and both parties shall seek a hearing at the Court's  
27 earliest convenience. In the event such resolution by the Court is necessary, the  
28 material at issue shall not be disclosed to the consultant or testifying expert pending

1 resolution of the issue by the Court.

2 7. Each person set forth in Paragraph 5 to be examined as a witness, may be  
3 so examined at trial or during a deposition concerning any information or material  
4 designated under this Order, which that person had lawfully received or authored prior  
5 to and apart from this action. During examination, any such witness may be shown  
6 information or material designated under this Order by a party which appears on its  
7 face or from other documents or testimony to have been received or authored by that  
8 witness from, or communicated to that witness by, that same party provided that the  
9 examining party makes a reasonable effort to obtain the compliance of the witness  
10 with Paragraph 8.

11 8. Each person set forth in Paragraph 5 who is not (i) outside counsel to a  
12 party to this litigation, or staff directly employed by such outside counsel; or (ii) the  
13 Court or Court personnel to whom Confidential Material is to be disclosed, shall, prior  
14 to receiving such material, be furnished with a copy of this Order, a copy of the  
15 Court's Notification of Protective Order and Undertaking, which the person shall read  
16 and sign (Attached as Exhibit A). Counsel for the party seeking to disclose  
17 Confidential Material to any such person pursuant to this paragraph shall be  
18 responsible for permanently retaining the executed originals of all such Notifications.

19 9. All Confidential Material shall be securely maintained in a manner  
20 intended to preserve confidentiality. Access to such material shall be permitted only  
21 to those designated persons set forth in Paragraph 5 above as persons properly having  
22 access thereto. The recipient of any Confidential Material shall use its best efforts, but  
23 at no time less than reasonable efforts under the circumstances, to maintain the  
24 confidentiality of such information.

25 10. Nothing contained in this Order shall affect the right of any party to make  
26 any objection, claim any privilege, or otherwise contest any request for production of  
27 documents, interrogatory, request for admission, subpoena, or question at a deposition  
28 or to seek further relief or protective order from the Court as permitted by the Federal

1 Rules of Civil Procedure. Nothing in this Order shall constitute an admission or  
2 waiver of any claim or defense by any party.

3 11. No provision of this Order shall be deemed to create a waiver as to  
4 inadvertently-produced discovery materials that are protected from discovery on the  
5 basis of privilege or the work-product doctrine under Rule 26 of the Federal Rules of  
6 Civil Procedure. The inadvertent production of such documents does not waive any  
7 privilege or immunity with respect to such production or with respect to other  
8 materials or information referred to in the materials produced, so long as a request for  
9 the return of such documents or information is made within ten (10) Court days after  
10 the producing party learns of the inadvertent production. Within five (5) Court days  
11 of such request, the receiving party shall take reasonable efforts to return the  
12 inadvertently produced documents identified and all copies thereof, and certify in  
13 writing that it has done so. Nothing in this Paragraph shall prejudice the right of any  
14 party to seek discovery of communications, documents and things as to which a claim  
15 of privilege has been made.

16 12. In the event that counsel for any party determines to file or submit to this  
17 Court any Confidential Material or any papers containing, quoting, or describing such  
18 information, those materials shall be filed under seal in sealed envelopes on which  
19 shall be endorsed the caption of this action and a statement substantially in the  
20 following form:

21 **CONFIDENTIAL**

22 This envelope contains documents that are subject to an  
23 order governing discovery and the use of confidential  
24 discovery material entered by the Court in this action.  
25 The envelope shall not be opened or the contents thereof  
26 displayed or revealed except by Order of the Court.  
27 Violation hereof may be regarded as contempt of the  
28 Court.

1 Subject to the Court's convenience and needs, documents filed under seal shall  
2 be kept under seal by the Clerk until further Order of the Court.

3 13. Any documents and information produced by nonparties, pursuant to  
4 subpoena or otherwise may be designated pursuant to the terms of this Order by any  
5 party or nonparty.

6 14. A party shall not be obligated to challenge the propriety of material  
7 designated under this Order at the time the designation is made and failure to do so  
8 shall not preclude a subsequent challenge thereto. In the event that any party to this  
9 litigation disagrees at any state of these proceedings with such designation, such party  
10 shall provide to the designating person or entity a letter detailing its objection to the  
11 designation. The designating person or entity shall respond by letter within three (3)  
12 court days to such letter. If not resolved, the objecting party may file a motion  
13 objecting to the designation. In any such motion, the burden of proving that  
14 information has been properly designated under this Order is on the person or entity  
15 making such designation.

16 **Other Provisions**

17 15. Nothing in this Order shall preclude any party to the lawsuit or its  
18 counsel: (a) from showing Confidential Material to an individual who either prepared  
19 or reviewed the document prior to the filing of this action; or (b) from disclosing or  
20 using, in any manner or for any purpose, any Confidential Material from the party's  
21 own files which the party itself has designated under this Order.

22 16. Nothing in this Order shall prevent disclosure beyond the terms of this  
23 Order if the party designating material consents in writing to such disclosure, or if a  
24 court orders such disclosure. A party requested to disclose Confidential Material to a  
25 nonparty pursuant to a validly served subpoena, civil investigative demand, discovery  
26 procedure permitted under the Federal Rules of Civil Procedure or other formal  
27 discovery request shall object to its production to the extent permitted by applicable  
28 law and notify the requesting nonparty of the existence of this Order and that the

1 material requested by the nonparty has been designated under this Order, and shall  
2 further give notice of such request, by facsimile and next business day delivery, upon  
3 the party which designated the material as soon as is reasonably possible, but in all  
4 instances sufficiently prior to the date on which such confidential material is to be  
5 produced to the nonparty. Once such notice is given, the designating party shall take  
6 all steps it believes are necessary to protect the Confidential Material and the non-  
7 designating party is not required to take any further action.

8 17. If a party inadvertently fails to designate material and/or information,  
9 when producing or otherwise disclosing such material and/or information, it shall not  
10 be deemed a waiver in whole or in part of a party's claim of confidentiality, either as  
11 to the specific information disclosed or as to any other information relating thereto or  
12 on the same or related subject matter. As soon as the receiving party has knowledge  
13 of the inadvertent production, the information must be treated as if it had been  
14 designated under this Protective Order, and the receiving party must endeavor in good  
15 faith to obtain all copies of the document which it distributed or disclosed to persons  
16 not authorized to access such information by Paragraphs 5 or 14 above, as well as any  
17 copies made by such persons. The costs of doing so shall be paid by the designating  
18 party.

19 18. All counsel for the parties who have access to Confidential Material  
20 acknowledge they are bound by this Order and submit to the jurisdiction of this Court  
21 for purposes of enforcing this Order.

22 19. Entering into, agreeing to, and/or producing or receiving information or  
23 material designated under this Order, or otherwise complying with the terms of this  
24 Order shall not:

25 (a) operate as an admission by any party that any particular  
26 information or material designated under this Order contains or reflects trade secrets,  
27 proprietary or commercially sensitive information or any other type of confidential  
28 information;

1 (b) operate as an admission by any party that the restrictions and  
2 procedures set forth herein constitute or do not constitute adequate protection for any  
3 particular information designated under this Order;

4 (c) prejudice in any way the rights of any party to object to the  
5 production of documents they consider not subject to discovery;

6 (d) prejudice in any way the rights of any party to object to the  
7 authenticity or admissibility into evidence of any document, testimony or other  
8 evidence subject to this Order;

9 (e) prejudice in any way the rights of any party to seek a determination  
10 by the Court whether any information or material should be subject to the terms of this  
11 Order;

12 (f) prejudice in any way the rights of any party to petition the Court  
13 for a further protective order relating to any purportedly confidential information;

14 (g) prevent the parties to this Order from agreeing in writing or on the  
15 record during a deposition or hearing in this action to alter or waive the provisions or  
16 protections provided for herein with respect to any particular information or material  
17 with written or on the record consent of the party disclosing such information.

18 20. This Order shall not be construed to apply to any information that: (a) is  
19 available to the public other than through a breach of this Order or other duty of  
20 confidentiality; (b) a receiving party can demonstrate was already known to the party  
21 at the time of disclosure and was not subject to conditions of confidentiality; or (c) a  
22 receiving party can demonstrate was developed by that party independently of any  
23 disclosure by a designating party or nonparty.

24 21. In the event that information in the possession or control of a person or  
25 entity involves the confidentiality rights of a non-party or its disclosure would violate  
26 a protective order issued in another action, the party with possession or control of the  
27 information will promptly attempt to obtain the consent of the non-party to disclose  
28 the information under this Order. If the consent of the non-party is refused or

1 otherwise cannot be obtained, the party will promptly thereafter notify the party  
2 seeking discovery by the written response due date for such discovery of: (a) the  
3 existence and description (to the extent disclosable) of the information without  
4 producing such information and; (b) the identity of the nonparty (provided, however,  
5 that such disclosure of the identity of the non-party does not violate any  
6 confidentiality obligations). The party seeking discovery may then make further  
7 application to the non-party or seek an order to compel discovery.

8       22. Within sixty (60) days after the final termination of litigation between the  
9 parties (including appeals), all Confidential Material and all copies thereof (including  
10 summaries and excerpts) shall be either returned to the party that produced it or  
11 destroyed and a certification of destruction supplied to the producing party; provided,  
12 however, that for each party, counsel who is entitled access to such designated  
13 material pursuant to this Order may retain one complete and unredacted set of its work  
14 product that contains designated material as well as pleadings and papers filed with  
15 the Court or served on the other party solely for reference in the event of, and only in  
16 the event of, further proceedings or litigation between the parties, a dispute over such  
17 counsel's performance, or a dispute over the use or dissemination of Confidential  
18 Material. Such retained copy of pleadings and papers shall be maintained in a file  
19 accessible only by properly authorized counsel under the provisions of, and bound by,

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

PERFECT 10, INC., a California corporation,

Plaintiff,

vs.

MICROSOFT CORPORATION; and  
DOES 1 through 100, inclusive,

Defendant.

) Case No. CV 07-5156 AHM (SHx)

) **NOTIFICATION OF PROTECTIVE  
ORDER GOVERNING  
INFORMATION IN THIS CASE  
AND UNDERTAKING**

1 The United States District Court in Los Angeles has issued a protective order in  
2 this case, which limits the dissemination of Confidential Material produced in  
3 discovery. You are now subject to this order and are prohibited by court order from  
4 communicating any Confidential Material you obtained through discovery in this case  
5 to any persons other than those specified in the protective order. If you intentionally  
6 disseminate this information in violation of this Court's order, you could be subject to  
7 sanctions, which could include fines and, in an extreme case, incarceration for  
8 contempt of court.

9 If for any reason you believe you should not be subject to this order or would  
10 like to request an order from the Court exempting you from this order, you should  
11 request a hearing before this Court and obtain a ruling before you disseminate any of  
12 the information. You can request a hearing by telling any of the attorneys in this case  
13 that you want to be heard. The attorney will then arrange for the Court to hold a  
14 hearing. If you prefer, you can instead call the Court's clerk and request a hearing  
15 date.

16 BY ORDER OF THE COURT.

17  
18 \_\_\_\_\_  
19 Hon. Stephen J. Hillman  
20 United States Magistrate Judge

21  
22 I declare under penalty of perjury that I have read the Protective Order issued in  
23 this case and that I agree to abide by and be bound by its terms.

24 Executed this \_\_\_\_\_ day of \_\_\_\_\_, 2008 in

25 \_\_\_\_\_  
26  
27 Print Name

27 \_\_\_\_\_  
Signature