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Attorneys for Plaintiff Perfect 10, Inc.

9 UNITED STATES DISTRICT COURT  
 10 CENTRAL DISTRICT OF CALIFORNIA

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

13 Plaintiff,

14 v.

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

17 Defendants.

18  
19 AND CONSOLIDATED CASE

Master Case No.: 04-9484 AHM (SHx)

NOTICE OF MOTION AND MOTION  
OF PLAINTIFF PERFECT 10, INC. FOR  
ORDER GRANTING LEAVE TO FILE  
[PROPOSED] SECOND AMENDED  
COMPLAINT; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF

[DECLARATION OF JEFFREY N.  
MAUSNER IN SUPPORT THEREOF;  
DECLARATION OF DR. NORMAN  
ZADA IN SUPPORT THEREOF;  
[PROPOSED] SECOND AMENDED  
COMPLAINT; AND [PROPOSED]  
ORDER SUBMITTED  
CONCURRENTLY HEREWITH]

Date: July 7, 2008  
Time: 10:00 a.m.  
Place: Courtroom 14, Courtroom of the  
Honorable A. Howard Matz

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

1 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on July 7, 2008, at 10:00 a.m., or as soon  
3 thereafter as this matter may be heard, in the Courtroom of the Honorable A.  
4 Howard Matz, Courtroom 14 at the above-entitled Court, located at 312 North  
5 Spring Street, Los Angeles, California 90012-4793, Plaintiff Perfect 10, Inc.  
6 (“Perfect 10”) will and hereby does move this Court, pursuant to Rule 15(a) of the  
7 Federal Rules of Civil Procedure, for an Order granting Perfect 10 leave to file a  
8 Second Amended Complaint in this action. The proposed Second Amended  
9 Complaint and a proposed Order are being lodged with this motion. In addition,  
10 true and correct copies of the proposed Second Amended Complaint (without the  
11 exhibits thereto) and a redlined version of the proposed Second Amended  
12 Complaint comparing it to the Amended Complaint currently on file in this action  
13 are attached as Exhibits 10 and 11 to the accompanying declaration of Perfect 10’s  
14 counsel, Jeffrey N. Mausner.

15 This motion is made on the grounds that justice requires that Perfect 10 be  
16 granted leave to file the proposed Second Amended Complaint (the “Proposed  
17 Complaint”). The Proposed Complaint seeks to add allegations regarding activities  
18 that Google has concealed from this Court, the Ninth Circuit, and Perfect 10: (1)  
19 that Google is storing thousands of full-size infringing Perfect 10 copyrighted  
20 images on its servers, along with millions of full-size images belonging to other  
21 copyright holders; and (2) that Google is hosting infringing websites that infringe  
22 thousands of Perfect 10’s copyrighted images. The Proposed Complaint also seeks  
23 to add claims for unjust enrichment, misappropriation, and unfair competition  
24 under common law and Section 17200 *et seq.* of the California Business and  
25 Professions Code against defendant Google, Inc. (“Google”); and to clarify certain  
26 allegations supporting Perfect 10’s existing claims for copyright infringement,  
27 trademark infringement, trademark dilution, and violation of the rights of publicity  
28 against Google.

1 Under Federal Rule of Civil Procedure 15(a), leave to amend is to be freely  
2 granted. Perfect 10 is acting in good faith in requesting leave to amend, there has  
3 been no undue delay in filing this Motion, Perfect 10 has not previously amended  
4 the complaint by motion,<sup>1</sup> the amendment will not be futile, and Google will not be  
5 prejudiced by the amendment.

6 This Motion is based upon this Notice of Motion, the Memorandum of  
7 Points and Authorities attached hereto, the proposed Second Amended Complaint  
8 and the proposed Order lodged concurrently herewith, the Declarations of Jeffrey  
9 N. Mausner and Dr. Norman Zada filed concurrently herewith, the complete files  
10 and records in this action, and all matters that may be presented to the Court at or  
11 before the hearing on the Motion, including in any reply papers.

12 This Motion is made following the conference of counsel pursuant to Local  
13 Rule 7-3, which took place on April 9, 2008.

14  
15 Dated: June 12, 2008

Respectfully submitted,

16  
17 By: Jeffrey N. Mausner  
18 JEFFREY N. MAUSNER  
Attorney for Plaintiff Perfect 10, Inc.

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27 <sup>1</sup> The Amended Complaint was filed as a matter of right, two months after the  
28 original Complaint and before Google filed a responsive pleading.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **1. INTRODUCTION AND SUMMARY OF ARGUMENT.**

3 Plaintiff Perfect 10, Inc. (“Perfect 10”) seeks leave to file a Second  
4 Amended Complaint because it has learned, contrary to Google’s representations  
5 to this Court and the Ninth Circuit, that Google has stored thousands of full-size  
6 Perfect 10 copyrighted images on its servers. Perfect 10 has also learned that  
7 Google is hosting hundreds of websites that offer, in total, tens of thousands of  
8 infringing copies of Perfect 10 copyrighted images. Accordingly, through this  
9 motion, Perfect 10 seeks leave to plead additional allegations in support of its  
10 existing claims against Google. Perfect 10 also seeks to add claims against Google  
11 for unjust enrichment, misappropriation, and unfair competition under common  
12 law and Section 17200 *et seq.* of the California Business and Professions Code.  
13 The proposed Second Amended Complaint (the “Proposed Complaint”) is being  
14 lodged with this motion.<sup>2</sup>

15 When Perfect 10 sought to enjoin Google from infringing Perfect 10’s  
16 copyrighted images, Google repeatedly asserted, both to this Court and before the  
17 Ninth Circuit, that it did not store any full-size images on its servers. Relying at  
18 least in part on Google’s assertions, the Ninth Circuit denied Perfect 10’s request  
19 for injunctive relief and Perfect 10 was forced to shut down its print magazine.  
20 Over the past year, however, Perfect 10 has learned that Google’s assertions were  
21 false, both in its Court filings and in its discovery responses. Contrary to its  
22 representations, Google has been storing, on its own servers, millions of full-size  
23 images – including thousands of full-size Perfect 10 copyrighted images. The  
24 Proposed Complaint thus alleges that “Google stores hundreds of thousands of

25 \_\_\_\_\_  
26 <sup>2</sup> In addition, a copy of the Proposed Complaint, without the exhibits thereto, is  
27 attached as Exhibit 10 to the Declaration of Jeffrey N. Mausner, submitted  
28 concurrently herewith (the “Mausner Decl.”) and a redlined version of the  
Proposed Complaint, comparing it to the Amended Complaint currently on file, is  
attached as Exhibit 11 to the Mausner Declaration.

1 unauthorized copyrighted images on its servers” (¶18), and that Google is hosting  
2 websites that infringe Perfect 10 copyrights (¶¶28, 37).

3         Allowing Perfect 10 to plead these additional allegations will not cause any  
4 prejudice to Google. Fact discovery remains ongoing, and no discovery cut-off  
5 date has been set. Nor has a trial date or a pre-trial conference date been set. In  
6 fact, Google still has not even taken its first deposition in this matter. Accordingly,  
7 allowing Perfect 10 to amend its complaint to add certain allegations would not  
8 delay this case in any manner.

9         Nevertheless, Google has refused to stipulate to the filing of the Proposed  
10 Complaint. During the meet-and-confer process, Google did not assert that the  
11 Proposed Complaint would delay this matter or cause any prejudice to Google.  
12 Nor did Google object to Perfect 10 adding the claims for unjust enrichment,  
13 misappropriation, and unfair competition. Rather, Google insisted that it would  
14 not even *consider* stipulating to the Proposed Complaint unless Perfect 10  
15 submitted evidence to Google that supported more than 20 different factual  
16 allegations in the Proposed Complaint. Although a plaintiff is not required to first  
17 prove its case before being entitled to amend its complaint, Perfect 10 attempted to  
18 avoid unnecessary motion practice by offering to provide Google with evidence  
19 supporting any two of the new allegations. Google refused. Google has forced  
20 Perfect 10 to do a very substantial amount of unnecessary work to litigate this case,  
21 and we believe this is just more of the same.

22         As discussed below, it is well settled that leave to amend should be freely  
23 granted. Here, Perfect 10 is seeking to plead additional allegations against Google  
24 – allegations that Perfect 10 has only recently learned about, and which contradict  
25 the representations that Google has previously made to this Court and the Ninth  
26 Circuit. Since fact discovery remains ongoing and Google has not even begun  
27 taking depositions, the Proposed Complaint will not prejudice Google or delay the  
28 resolution of this case in any manner. Perfect 10 therefore respectfully submits

1 that its motion for leave to file the Proposed Complaint should be granted.

2 **2. FACTUAL AND PROCEDURAL BACKGROUND.**

3 Perfect 10 filed suit against Google on November 19, 2004. On January 18,  
4 2005, before Google filed a responsive pleading, Perfect 10 filed its Amended  
5 Complaint, the current operative pleading in this action. Mausner Decl., ¶4.

6 On August 24, 2005, Perfect 10 moved for a preliminary injunction to enjoin  
7 Google from infringing or contributing to the infringement of any copyrighted  
8 image owned by Perfect 10 for which Google receives notice. *Perfect 10 v.*  
9 *Google, Inc.*, 416 F. Supp. 2d 828, 834-35 (C.D. Cal. 2006).

10 a. **Google Represented To This Court And The Court Of Appeals That**  
11 **It Did Not Store Full Size Images On Its Servers.**

12 In opposition to the preliminary injunction motion, Google asserted that “a  
13 user’s web browser fetches any images from their original location and not from  
14 Google’s servers.” (Google’s Opposition to Perfect 10, Inc.’s Motion for  
15 Preliminary Injunction, page 2 lines 13-14, attached as Exhibit 18 to Mausner  
16 Decl. (Pacer No. 43); Declaration of Alexander Macgillivray in Support of  
17 Google’s Opposition to Plaintiff’s Motion for Preliminary Injunction, page 2 lines  
18 18-19, attached as Exhibit 19 to Mausner Decl. (Pacer No. 42).)

19 Before the Court of Appeals, Google also claimed that “Google stores only  
20 the HTML code and text of pages in its cache, not images” and that “when  
21 displaying archived pages, the browser will summon images from the third-party  
22 source’s Web server (not from Google) to appear on the archived Web page, even  
23 if the current page does not link to the image.” (Appellee/Cross-Appellant Google  
24 Inc.’s Response/Principal Brief, page 11; Google’s Fourth Brief on Cross-  
25 Appeal/Reply Brief, page 5, attached as Exhibits 21 and 22 to Mausner Decl.)

26 Google has made similar false statements in its discovery responses. Google  
27 has denied four separate requests for admission asking Google to admit that: (1)  
28 “GOOGLE has copied onto its servers Perfect 10 copyrighted images that are at

1 least 4” x 5” in size;” (2) “GOOGLE has displayed to consumers Perfect 10  
2 copyrighted images that are at least 4” x 5” in size;” (3) “full sized copies of  
3 Perfect 10’s photographs are stored on Google’s servers;” and (4) “full sized  
4 copies of Perfect 10’s photographs are delivered to Internet users from Google’s  
5 servers.” (See Google Inc.’s Response To Plaintiff’s Corrected First Set of  
6 Requests For Admissions Nos. 26, 27, 213, 214, dated April 18, 2005, attached as  
7 Exhibit 23 to Mausner Decl.)<sup>3</sup>

8 On February 17, 2006, this Court issued its opinion granting in part and  
9 denying in part Perfect 10’s motion for preliminary injunction. In its opinion, this  
10 Court relied upon Google’s assertions that it does not store any full-size images on  
11 its servers, including those described above:

12 [W]hen a user clicks on a thumbnail returned as the result of a  
13 Google Image Search, his computer pulls up a page comprised of two  
14 distinct frames, one hosted by Google and a second hosted by the  
15 underlying website that originally hosted the full-size image. The two  
16 frames are divided by a gray horizontal line a few pixels high. The  
17 upper frame is the Google frame. . . . The lower frame contains, or  
18 shows, the original web page on which the original image was found.  
***Google neither stores nor serves any of the content (either text or  
images) displayed in the lower frame; rather, the underlying third  
party website stores and serves that content.***

19 *Perfect 10*, 416 F. Supp. 2d at 833-34 (emphasis added). The Court then  
20 distinguished this case from cases in which “defendants . . . actually hosted and  
21 served the infringing content.” *Id.* at 841. Applying the “server test,” this Court  
22 then concluded that “for the purposes of direct copyright infringement, Google's  
23 use of frames and in-line links does not constitute a ‘display’ of the full-size  
24 images stored on and served by infringing third-party websites. Thus, P10’s claim  
25

26 <sup>3</sup> Google has made this misrepresentation from the beginning of the case. In  
27 Paragraph 19 of its Answer to Amended Complaint and Counterclaims, filed on or  
28 about February 2, 2005, Google stated: “Google denies that its image search yields  
high quality copies of images that reside on Google’s own servers.” (Exhibit 20 to  
Mausner Decl.)

1 of direct infringement with respect to these actions will likely fail.” *Id.* at 844.<sup>4</sup>

2 On appeal, Google made the same assertions that it made before this Court.  
3 The Ninth Circuit, like this Court, relied at least in part upon Google’s assertions  
4 that it does not store full-size images on its servers, stating that the “full-sized  
5 images [are] *stored on third-party computers.*” *Perfect 10, Inc. v. Amazon.com,*  
6 *Inc.*, 508 F.3d 1146, 1155 (9th Cir. 2007) (emphasis added). Furthermore, the  
7 Ninth Circuit stated that

8 Google cannot stop *any* of the third-party websites from reproducing,  
9 displaying, and distributing unauthorized copies of Perfect 10's  
10 images because that infringing conduct takes place on the third-party  
11 websites. Google cannot terminate those third-party websites or block  
12 their ability to “host and serve infringing full-size images” on the  
13 Internet. *Perfect 10*, 416 F. Supp. 2d at 831 (emphasis added).

14 508 F.3d at 1174.

15 **b. New Information Discovered By Perfect 10 Shows That Google Does,**  
16 **In Fact, Store Full Size Infringing Images On Its Servers.**

17 Google’s contention that it does not store full-size images on its servers is  
18 false. Specifically, Perfect 10 has discovered that:

19 (1) The domain names *blogspot.com* and *blogger.com* are both registered to  
20 and controlled by Google. Google hosts, via its *blogspot.com* hosting program,  
21 hundreds of websites that offer, in total, tens of thousands of infringing Perfect 10  
22 copyrighted images.

23 (2) Google also stores thousands of full-size Perfect 10 copyrighted images  
24 on its servers, under the domain name *blogger.com*, which is owned and controlled  
25 by Google. The domain servers for *blogger.com* are *GOOGLE.COM*.

26 <sup>4</sup> In connection with vicarious liability, this Court stated: “If the phrase ‘right and  
27 ability to control’ means having substantial input into or authority over the  
28 decision to serve or continue serving infringing content, Google lacks such right or  
ability.” *Perfect 10*, 416 F. Supp. 2d at 858.

1 See Declaration of Dr. Norman Zada, submitted concurrently herewith (“Zada  
2 Decl.”), ¶¶3-11 and Exhibits 1-6. In connection with its motion for preliminary  
3 injunction, Perfect 10 submitted exhibits which contained at least 20 Perfect 10  
4 copyrighted images from websites hosted by Google, without realizing that these  
5 websites were hosted on Google’s servers. *Id.*, ¶8. One such example was from  
6 the website [lingieredreams.blogspot.com](http://lingieredreams.blogspot.com). Perfect 10 did not know at that time that  
7 [lingieredreams.blogspot.com](http://lingieredreams.blogspot.com) was being hosted by Google, and that Google had  
8 stored a full-sized copy of Perfect 10’s image on its own servers, so that when  
9 Google in-line linked to that image, it was displaying the full-size image from  
10 servers owned and controlled by Google. *Id.*<sup>5</sup>

11 Perfect 10 has discovered many examples of Google Image Search results  
12 which in-line link to full-size Perfect 10 copyrighted images hosted by Google.  
13 For example, on April 28, 2008, a Google Image Search on Perfect 10 model  
14 “Caneel Carswell” returned four Perfect 10 copyrighted “thumbnail” images from  
15 the Google hosted websites [ostracomacucar.blogspot.com](http://ostracomacucar.blogspot.com),  
16 [jornalmax.blogspot.com](http://jornalmax.blogspot.com), [a-rosa.blogspot.com](http://a-rosa.blogspot.com), and [mafiadacova.blogspot.com](http://mafiadacova.blogspot.com).  
17 Clicking on the “See full-size image link” caused the user to see full-size Perfect  
18 10 copyrighted images on Google’s servers. (Zada Decl. ¶7 and Exhibit 3).  
19 Perfect 10 has also learned that Google is storing on its own servers thousands of  
20 full-size images of Perfect 10’s best models, including at least 14 distinct full-size  
21 images of Victoria Secret and Sports Illustrated swimsuit cover model, Marisa  
22 Miller. (*Id.*, ¶9 and Exhibit 5). In addition, Google is storing on its own servers  
23 millions of full-sized images of major celebrities, including at least 1000 full-size  
24 images of Victoria Secret model Adriana Lima. (*Id.*, ¶14 and Exhibit 9). Google’s  
25 Image Search results on Paris Hilton suggest that Google may be storing as many

26 <sup>5</sup> Incredibly, the same copyrighted image of Perfect 10 model Natalia Sirocka that  
27 Perfect 10 submitted approximately three years ago in connection with the  
28 preliminary injunction motion is still being stored on Google’s servers as of April  
30, 2008. See Zada Decl., ¶8 and Exhibit 4.

1 as 591,000 full-size images of Paris Hilton or images related to Paris Hilton on its  
2 own servers. (*Id.*, ¶13 and Exhibit 8).

3 **3. GOOGLE WILL NOT BE PREJUDICED BY THE TIMING OF THE**  
4 **AMENDMENT AND IT WILL CAUSE NO DELAY. THIS COURT**  
5 **SHOULD GRANT THE MOTION AND PERMIT PERFECT 10 TO**  
6 **FILE THE PROPOSED COMPLAINT.**

7 Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to  
8 amend “shall be freely given when justice so requires.” Courts applying Rule  
9 15(a), including the Ninth Circuit, have uniformly recognized that the policy  
10 favoring amendment of pleadings is to be applied with “extreme liberality.”  
11 *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003). *See*  
12 *also DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (when  
13 deciding whether to grant leave, “a court must be guided by the underlying purpose  
14 of Rule 15 – to facilitate decision on the merits rather than on the pleadings or  
15 technicalities”); *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973) (the  
16 Ninth Circuit has a “strong policy to permit the amending of pleadings”). As the  
17 Supreme Court has held:

18 In the absence of any apparent or declared reason – such as  
19 undue delay, bad faith or dilatory motive on the part of the movant,  
20 repeated failure to cure deficiencies by amendments previously  
21 allowed, undue prejudice to the opposing party by virtue of allowance  
22 of the amendment, futility of amendment, etc. – the leave sought  
23 should, as the rules require, be “freely given.”

24 *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962). Applying this  
25 liberal standard, the Ninth Circuit has stated that Rule 15(a) creates a presumption  
26 in favor of granting leave to amend: “Absent prejudice, or a strong showing of any  
27 of the remaining *Foman* factors, there exists a presumption under Rule 15(a) in  
28 favor of granting leave to amend.” *Eminence Capital*, 316 F.3d at 1052.

Here, Google cannot establish either prejudice or a strong showing of any of

1 the remaining *Foman* factors sufficient to permit this Court to deny the Motion.  
2 First, there can be no possible prejudice to Google from the filing of the Proposed  
3 Complaint given that there is no discovery cut-off date in this action and no trial  
4 date has been set. Mausner Decl., ¶4. It is thus not surprising that counsel for  
5 Google did not attempt to claim prejudice during the parties' pre-motion "meet and  
6 confer." *Id.*, ¶7.

7 Second, Perfect 10 has filed this motion in good faith, without undue delay  
8 or a dilatory motive. The Ninth Circuit issued its mandate on December 26, 2007  
9 (Pacer Docket No. 243), and the record was returned to this Court on February 11,  
10 2008 (Pacer Docket No. 246). Within weeks, on March 2, 2008, Perfect 10 sent  
11 the Proposed Complaint to Google in connection with the conference of counsel.  
12 Mausner Decl., ¶5 and Exhibit 12. But as noted above, counsel for Google refused  
13 Perfect 10's request to stipulate to the filing of the Proposed Complaint, and would  
14 not even *consider* a stipulation unless Perfect 10 first provided Google with the  
15 "evidentiary basis" for more than 20 separate allegations in the Proposed  
16 Complaint. *Id.*, ¶6 and Exhibit 13.

17 A plaintiff, however, is not required to "prove" the proposed allegations it  
18 seeks to add in an amended complaint before it is able to amend. Rather, as the  
19 Ninth Circuit explained in the analogous context of a motion to dismiss for failure  
20 to state a claim: "'The issue is not whether a plaintiff will ultimately prevail but  
21 whether the claimant is entitled to offer evidence to support the claims. Indeed it  
22 may appear on the face of the pleadings that a recovery is very remote and unlikely  
23 but that is not the test.'" *Jackson v. Carey*, 353 F.3d 750, 755 (9th Cir. 2003),  
24 quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Thus, contrary to Google's  
25 demands, Perfect 10 is not required to prove its case before it is allowed to amend.

26 Moreover, as demonstrated in the accompanying declaration of Perfect 10's  
27 president, Dr. Norman Zada, the allegations about which Google complains have  
28 an abundance of evidentiary support. These include: (1) the allegation in

1 Paragraph 18 of the Proposed Complaint that “Google stores hundreds of  
2 thousands of unauthorized copyrighted images on its servers” (Zada Decl., ¶¶9-11,  
3 13-14 and Exhibits 5-6, 8-9); (2) the allegation in Paragraph 26(b) that full-size  
4 images reside on Google’s servers (*id.*, ¶9 and Exhibit 5); (3) the allegation in  
5 Paragraph 28 that Google hosts Stolen Content Websites (*id.*, ¶¶3, 5, 7-12 and  
6 Exhibits 1, 3-7); (4) the allegation in Paragraph 19 that “Google offers hundreds of  
7 thousands of unauthorized marketable images,” from “images of mainstream  
8 Hollywood celebrities and supermodels” to “images of humans having sex with  
9 animals” (*id.*, ¶¶13-16 and Exhibits 8-9); and (5) the allegation in Paragraph 20  
10 that in response to searches on Perfect 10 model names, Google now “provides  
11 hundreds of images, many of which have nothing to do with the model, including  
12 extremely explicit images of other people engaged in sex, including sex with  
13 animals” (*id.*, ¶16 and Exhibit 9).

14 During the pre-motion “meet and confer,” Google's counsel also asserted  
15 that certain allegations in the Proposed Complaint are “salacious, irrelevant to  
16 Perfect 10’s claims against Google, and included solely to embarrass or disparage  
17 Google.” *See* Exhibit 13 to Mausner Decl. (letter of April 4, 2008), at page 5.  
18 Google is incorrect. In evaluating Google’s fair use defense, the Ninth Circuit  
19 stated that Google’s search engine had a “public benefit.” *Perfect 10, Inc. v.*  
20 *Amazon.com, Inc.*, 508 F.3d at 1166. The allegations about which Google  
21 complains are directly relevant to whether Google’s search engine provides a  
22 public benefit and whether Google is entitled to a fair use defense.<sup>6</sup>

23 In short, Google has not demonstrated a single reason why leave to amend  
24 should not be freely granted in this case. Google has not shown, or even claimed,

25 <sup>6</sup> In her letter of April 4, 2008, counsel for Google asserted that certain proposed  
26 amendments “appear to lack a legal basis.” *See* Exhibit 13 to Mausner Decl., at  
27 page 5. Accordingly, Perfect 10 removed the allegation that it was entitled to  
28 statutory damages under the Lanham Act and clarified its claim for punitive  
damages under its unfair competition claim in the Proposed Complaint. Mausner  
Decl., ¶¶8-9 and Exhibits 14, 15.

1 that it would be prejudiced by the Proposed Complaint. There is no discovery cut-  
2 off or trial date set, and the amendment would not cause any delay.

3 **4. CONCLUSION.**

4 For all of the foregoing reasons, Perfect 10 respectfully requests that this  
5 Court grant its motion for leave to file its proposed Second Amended Complaint.

6  
7 Dated: June 12, 2008

Respectfully submitted,

8 LAW OFFICES OF JEFFREY N. MAUSNER

9  
10 By: Jeffrey N. Mausner  
11 JEFFREY N. MAUSNER  
12 Attorney for Plaintiff Perfect 10, Inc.

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