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9 Attorneys for Plaintiff Perfect 10, Inc.

10 UNITED STATES DISTRICT COURT  
 11 CENTRAL DISTRICT OF CALIFORNIA

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

14 Plaintiff,

15 v.

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

18 Defendants.

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

DECLARATION OF JEFFREY N. MAUSNER IN SUPPORT OF MOTION OF PLAINTIFF PERFECT 10, INC. FOR ORDER GRANTING LEAVE TO FILE SECOND AMENDED COMPLAINT

[NOTICE OF MOTION AND MOTION; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF DR. NORMAN ZADA IN SUPPORT THEREOF; [PROPOSED] SECOND AMENDED COMPLAINT; AND [PROPOSED] ORDER SUBMITTED CONCURRENTLY HEREWITH]

19 AND CONSOLIDATED CASE

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 **DECLARATION OF JEFFREY N. MAUSNER**

2 I, Jeffrey N. Mausner, declare as follows:

3 1. I am a member of the State Bar of California and admitted to practice  
4 before this Court. I am counsel of record for Plaintiff Perfect 10, Inc. (“Perfect  
5 10”) in this action. All of the matters stated herein are of my own personal  
6 knowledge, except where otherwise stated, and if called as a witness, I could and  
7 would testify competently thereto. I make this declaration in support of Perfect  
8 10’s motion for an Order granting Perfect 10 leave to file its [Proposed] Second  
9 Amended Complaint, filed concurrently herewith (the “Motion”).

10 2. Attached hereto as Exhibit 10 is a true and correct copy of Perfect  
11 10’s [Proposed] Second Amended Complaint, without the exhibits thereto. The  
12 exhibits are attached to the [Proposed] Second Amended Complaint that is being  
13 lodged concurrently with the Motion.

14 3. Attached hereto as Exhibit 11 is a “redlined version” of the  
15 [Proposed] Second Amended Complaint, comparing it to the Amended Complaint  
16 currently on file in this action.

17 4. This is the first time that a motion to amend the complaint against  
18 Google has been filed in this case. Perfect 10 filed its Amended Complaint in this  
19 action as of right on January 18, 2005, before Google filed a responsive pleading  
20 and only two months after Perfect 10 commenced this action, on November 19,  
21 2004. At present, neither a trial date nor a discovery cut-off date has been set in  
22 this action. Google has not taken any depositions in the case.

23 5. On March 2, 2008, I sent to Rachel M. Herrick, Esq. of Quinn  
24 Emanuel Urquhart Oliver & Hedges, LLP, counsel of record for Google, a copy of  
25 the [Proposed] Second Amended Complaint that Perfect 10 was proposing to file  
26 and a “red-lined” version comparing it to the Amended Complaint. I asked Ms.  
27 Herrick if Google would stipulate to the filing of the Second Amended Complaint,  
28 or if it would be necessary to file a motion. Attached hereto as Exhibit 12 are true

1 and correct copies of my e-mails to Ms. Herrick attaching the [Proposed] Second  
2 Amended Complaint and the exhibits thereto (without the attachments).

3 6. In response, I received a letter from Ms. Herrick setting forth  
4 Google's position. A true and correct copy of Ms. Herrick's letter to me, dated  
5 April 4, 2008, is attached hereto as Exhibit 13.

6 7. On April 9, 2008, I participated in a conference of counsel in  
7 connection with the Motion with Ms. Herrick and others, pursuant to Local Rule 7-  
8 3. During the course of the conference, I offered to provide Ms. Herrick with the  
9 evidentiary basis for two of the allegations of the [Proposed] Second Amended  
10 Complaint, if Google would agree to stipulate to the filing of the [Proposed]  
11 Second Amended Complaint. Ms. Herrick refused this offer, saying that Google  
12 would have to see the evidentiary support for all of the allegations set forth in her  
13 April 4, 2008 letter before Google could determine whether it would stipulate to  
14 the filing of the [Proposed] Second Amended Complaint. Counsel for Google did  
15 not claim that Google would be prejudiced by the timing of the proposed  
16 amendment.

17 8. In the second to last paragraph of her letter of April 4, 2008 attached  
18 hereto as Exhibit 13, Ms. Herrick asserted that some of "Perfect 10's proposed  
19 amendments appear to lack a legal basis," and then listed three subparagraphs  
20 setting forth those proposed amendments. In response, Perfect 10 removed the  
21 allegation that it was entitled to statutory damages under the Lanham Act and  
22 clarified its claim for punitive damages in the [Proposed] Second Amended  
23 Complaint. Attached hereto as Exhibit 14 is a true and correct copy of an e-mail  
24 from me to Ms. Herrick, dated April 18, 2008 (without the attachments thereto), in  
25 which I attached a revised version of the [Proposed] Second Amended Complaint  
26 which contained the changes I discussed with Ms. Herrick, based upon the  
27 assertions in the second to the last paragraph of her letter, and a redlined version  
28 comparing the newest version of the [Proposed] Second Amended Complaint with

1 the version that I had forwarded to Ms. Herrick on March 2, 2008.

2 9. Attached hereto as Exhibit 15 is a true and correct copy of an e-mail I  
3 sent to Ms. Herrick on April 22, 2008, in which I specifically identified the  
4 changes to the [Proposed] Second Amended Complaint made by Perfect 10 in  
5 response to the assertions in the second to last paragraph of her letter of April 4,  
6 2008 (Exhibit 13).

7 10. On May 19, 2008, after the conference of counsel in connection with  
8 the Motion, the Ninth Circuit issued a memorandum opinion in *Stewart Title of*  
9 *California, Inc. v. Fidelity National Title Co.*, holding, among other things, that the  
10 Copyright Act does not preempt a California law misappropriation claim.  
11 Therefore, on May 21, 2008, I sent Ms. Herrick: (i) a copy of the *Stewart Title*  
12 opinion; (ii) an updated [Proposed] Second Amended Complaint, which is attached  
13 hereto as Exhibit 10 and which added a misappropriation claim; (iii) the “redlined  
14 version” of the [Proposed] Second Amended Complaint which is attached hereto as  
15 Exhibit 11; and (iii) a highlighted version of the updated [Proposed] Second  
16 Amended Complaint, pointing out the changes from the previous version discussed  
17 in Paragraph 8, above. Attached hereto as Exhibit 16 is a true and correct copy of  
18 my e-mail to Ms. Herrick, dated May 21, 2008, attaching these documents (without  
19 the attachments). Google has not raised any specific new objection to this change.

20 11. Attached hereto as Exhibit 17 is a true and correct copy of my e-mail  
21 to Ms. Herrick, dated May 29, 2008 (without the attachment), in which I forwarded  
22 to Ms. Herrick an updated version of Exhibit 7 to the [Proposed] Second Amended  
23 Complaint, a copyright chart, which contained new applications and the  
24 registration numbers for some registrations that were issued since the last chart I  
25 had forwarded Ms. Herrick. This version of Exhibit 7 is attached to the [Proposed]  
26 Second Amended Complaint that Perfect 10 seeks to file.

27 12. Attached hereto as Exhibit 18 are true and correct copies of portions  
28 of “Google’s Opposition to Perfect 10’s Motion for Preliminary Injunction,” filed

1 by Google in this action on or about September 26, 2005 (Pacer No. 43), which  
2 include the pages cited by Perfect 10 in its Memorandum of Points and Authorities  
3 in support of the Motion.

4 13. Attached hereto as Exhibit 19 are true and correct copies of portions  
5 of the “Declaration of Alexander Macgillivray in Support of Google’s Opposition  
6 to Plaintiff’s Motion for Preliminary Injunction,” filed by Google in this action on  
7 or about September 26, 2005 (Pacer No. 42), which include the pages cited by  
8 Perfect 10 in its Memorandum of Points and Authorities in support of the Motion.

9 14. Attached hereto as Exhibit 20 are true and correct copies of portions  
10 of Google’s Answer to Amended Complaint and Counterclaims, filed by Google in  
11 this action on or about February 2, 2005, which include the pages cited by Perfect  
12 10 in its Memorandum of Points and Authorities in support of the Motion.

13 15. Attached hereto as Exhibit 21 is a true and correct copy of portions of  
14 Google’s “Second Brief on Cross-Appeal Appellee/Cross-Appellant Google  
15 Inc.’s Response/Principal Brief,” filed by Google in the Ninth Circuit on or about  
16 July 11, 2006, which includes the page cited by Perfect 10 in its Memorandum of  
17 Points and Authorities in support of the Motion.

18 16. Attached hereto as Exhibit 22 is a true and correct copy of portions of  
19 Google’s “Fourth Brief on Cross-Appeal Appellee/Cross-Appellant Google Inc.’s  
20 Reply Brief,” filed by Google in the Ninth Circuit on or about September 19, 2006,  
21 which includes the page cited by Perfect 10 in its Memorandum of Points and  
22 Authorities in support of the Motion.

23 17. Attached hereto as Exhibit 23 are true and correct copies of portions  
24 of “Defendant Google Inc.’s Response To Plaintiff’s Corrected First Set of  
25 Requests For Admissions ,” served by Google in this action on or about April 18,

26 ///

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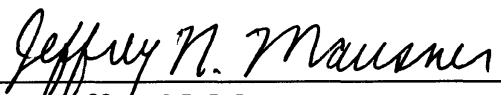
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2005, which include Requests For Admission Nos. 26, 27, 213, and 214, and Google's responses thereto.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

Executed on June 12, 2008, at Woodland Hills, California.

  
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Jeffrey N. Mausner