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11 UNITED STATES DISTRICT COURT
 12 CENTRAL DISTRICT OF CALIFORNIA

13 PERFECT 10, INC., a California
 corporation,
 14
 Plaintiff,
 15
 vs.
 16
 GOOGLE INC., a corporation; and
 17 DOES 1 through 100, inclusive,
 18
 Defendants.

CASE NO. CV 04-9484 AHM (SHx)
 [Consolidated with Case No. CV 05-
 4753 AHM (SHx)]

DEFENDANT GOOGLE INC.'S
 EX PARTE APPLICATION FOR

(1) RELIEF FROM THE TWENTY
 DAY REQUIREMENT OF LOCAL
 RULE 7-3 AND

(2) A CONTINUANCE OF THE JULY
 7, 2008 NOTICED HEARING DATE
 FOR PERFECT 10, INC.'S MOTION
 FOR LEAVE TO FILE ITS
 [PROPOSED] SECOND AMENDED
 COMPLAINT

19 AND COUNTERCLAIM

20 PERFECT 10, INC., a California
 corporation,
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 Plaintiff,
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 vs.
 23
 AMAZON.COM, INC., a corporation;
 24 A9.COM, INC., a corporation; and
 25 DOES 1 through 100, inclusive,
 26
 Defendants.

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

1 Pursuant to the Federal Rules of Civil Procedure and this Court's Local
2 Rule 7-19, Defendant Google Inc. ("Google") respectfully submits this *ex parte*
3 application seeking (1) relief from the twenty-day requirement of Local Rule 7-3
4 and (2) a continuance of the July 7, 2008 noticed hearing date on Perfect 10, Inc.'s
5 ("Perfect 10") motion for leave to file its (proposed) Second Amended Complaint.

6 Google makes this application on two grounds. First, Google's lead
7 counsel, Michael T. Zeller, is unavailable on July 7, 2008 because he is currently in
8 trial in the matter sub nom. Bryant v. Mattel, Inc., Case No. CV 04-9049 SGL,
9 which trial is not expected to conclude until the end of July. Second, given the
10 scope and complexity of the issues raised by Perfect 10's motion, and Perfect 10's
11 failure to disclose material aspects of its motion during the meet and confer process,
12 Google needs additional time to prepare its opposition papers. Specifically, Perfect
13 10's motion for leave seeks to improperly and dramatically expand the scope of its
14 case by adding new causes of action and new theories of liability directed at Google
15 products and services never before at issue in this case. Many of Perfect 10's
16 proposed amendments appear futile, meritless and/or untimely. Perfect 10's moving
17 papers also present large amounts of completely new evidence, which evidence
18 Perfect 10 failed to disclose during the parties' meet and confer discussions relating
19 to this motion, and which will require extensive factual investigation by Google and
20 its counsel. Accordingly, Google requests expedited judicial intervention to
21 continue the July 7 hearing date to a date in August that is convenient for the Court.

22 Pursuant to Local Rule 7-19, on June 17, 2008, Jeffrey N. Mausner of
23 the Law Offices of Jeffrey N. Mausner (address: 21800 Oxnard Street, Suite 910,
24 Woodland Hills, California 91367, telephone: (818) 992-7500)), counsel of record
25 for Perfect 10, was given notice of this *ex parte* application. Mr. Mausner did not
26 respond to the notice. Google presumes Perfect 10 opposes this application.

27 This application is based on this Application and the accompanying
28 memorandum, the Declaration of Rachel M. Herrick ("Herrick Decl.") filed

1 concurrently herewith, the pleadings and other papers on file in this action, and all
2 matters of which the Court may take judicial notice.

3 Respectfully submitted,

4 DATED: June 18, 2008

QUINN EMANUEL URQUHART OLIVER &
HEDGES, LLP

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By /s/ Rachel M. Herrick
Rachel M. Herrick
Attorneys for Defendant Google Inc.

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1 **Memorandum of Points and Authorities**

2 **I. PERFECT 10 HAS DEMONSTRATED NO COMPELLING NEED TO**
3 **HAVE ITS MOTION HEARD ON JULY 7, 2008, AND NO POSSIBLE**
4 **PREJUDICE FROM HAVING IT HEARD IN AUGUST.**

5 Perfect 10 filed the operative complaint in this case on January 14,
6 2005. The parties have been actively litigating this case for years, including the
7 filing of a motion for preliminary injunction, an appeal to the Ninth Circuit and
8 remand, and extensive discovery efforts. Late last week, more than three and a half
9 years into this litigation, Perfect 10 filed a motion to amend its complaint. Perfect
10 10 first expressed its intention to move for amendment approximately a year and a
11 half ago, in January 2007. Herrick Decl. ¶ 6. For reasons unknown, Perfect 10
12 apparently abandoned those efforts. Perfect 10 re-initiated meet-and-confer efforts
13 on its proposed Second Amended Complaint with present counsel on March 2,
14 2008—over three months ago. *Id.* at ¶ 7. Perfect 10 e-filed its motion and
15 supporting materials on various dates between June 12 and 17, 2008, and noticed the
16 hearing on its motion for July 7. *Id.* at ¶ 8.

17 As discussed at greater length below, Google made a timely request to
18 continue the noticed hearing date on Perfect 10's motion to any date in August that
19 would be convenient for Perfect 10. Google asked for the continuance because
20 Google's lead counsel—who is currently in trial in Riverside, California and will
21 remain so occupied throughout the month of July—is currently unable to prepare for
22 and attend the hearing. *Id.* at ¶ 9. Despite Google's reasonable request for a
23 continuance in these circumstances, Perfect 10 has refused to extend Google's
24 counsel this basic professional courtesy.

25 This case has been pending for years, and Perfect 10 has been talking
26 about filing a motion for leave to amend its complaint for a full year and a half—
27 since January 2007. Perfect 10 has given no rational explanation for why, after
28 delaying the filing of its motion for eighteen months, the motion is now suddenly so

1 urgent that Google should be denied the right to have its lead counsel involved in
2 the briefing and argument on the motion. Nor has Perfect 10 identified any possible
3 prejudice it would suffer from having its motion heard in August rather than in July.
4 Id. at ¶ 10.

5 **II. GOOGLE'S LEAD COUNSEL, MICHAEL T. ZELLER, IS**
6 **UNAVAILABLE ON JULY 7, 2008 BECAUSE HE IS CURRENTLY**
7 **AND WILL CONTINUE TO BE IN TRIAL IN THE CENTRAL**
8 **DISTRICT OF CALIFORNIA (EASTERN DIVISION) THROUGH**
9 **THE END OF JULY.**

10 As Google explained to Perfect 10 during the parties' meet and confer
11 efforts preceding this Application, Google's lead counsel, Michael T. Zeller, is
12 currently in the midst of one of the biggest and highest-profile civil trials in recent
13 memory—the lawsuit between Mattel and MGA over the ownership of Bratz dolls,
14 a billion-dollar brand, sub nom. Bryant v. Mattel, Inc., Case No. CV 04-9049 SGL,
15 consolidated with Case Nos. CV 04-09059 and CV 05-02727. Herrick Decl. ¶ 2.
16 Trial is currently pending before the Honorable Stephen G. Larson in the Central
17 District of California, Eastern Division, in Riverside, California, and is expected to
18 continue through the end of July. Id. at ¶¶ 2, 4. Mr. Zeller is intimately involved in
19 all aspects of the trial, has overseen the day-to-day events of the case since the filing
20 of the complaint over four years ago in April 2004, deposed the bulk of the key
21 witnesses, is in the courtroom every minute of every day that court is in session, and
22 is one of the three lead attorneys for Mattel who are examining witnesses in the trial.
23 Id. at ¶ 3. Because of the all-consuming nature of his trial responsibilities, Mr.
24 Zeller is currently unable to devote any time to Google's opposition to Perfect 10's
25 motion, and will not be able to return to Los Angeles in order to prepare for and
26 attend the July 7, 2008 hearing on the motion. Id. at ¶ 5.

1 **III. BECAUSE PERFECT 10'S MOTION FOR LEAVE TO AMEND**
2 **PRESENTS COMPLEX AND SUBSTANTIAL QUESTIONS OF LAW**
3 **AND FACT, AND INCLUDES FACTS AND ARGUMENTS THAT**
4 **WERE NEVER DISCLOSED IN MEET-AND-CONFER**
5 **DISCUSSIONS, GOOGLE NEEDS ADDITIONAL TIME TO**
6 **EVALUATE THEM.**

7 In addition to Mr. Zeller's unavailability, good cause exists to continue
8 the July 7, 2008 hearing date on Perfect 10's motion for the additional reason that
9 the motion presents complex and voluminous issues that were not fully disclosed to
10 Google during the parties' meet and confer discussions. Under the Local Rules,
11 Google's opposition papers would ordinarily be due on Monday, June 23—a mere 3
12 business days from today. Civil L.R. 7-9. This is simply not enough time to
13 respond to Perfect 10's motion.

14 Perfect 10's motion is no ordinary request for leave to make ministerial
15 or technical amendments to its complaint. To the contrary, Perfect 10 seeks to add
16 entirely new causes of action—for unjust enrichment, misappropriation, unfair
17 competition under Cal. Bus. & Prof. Code § 17200, and unfair competition under
18 the common law. None of these claims has ever been a part of this case (though
19 Perfect 10 certainly could have alleged them many years ago had it been diligent),
20 and each presents complex questions of law and fact. Based on preliminary
21 research, Google believes that many—if not all—of these claims are deeply flawed
22 and unsupported by law or fact, and that their amendment would be entirely futile
23 and untimely. However, to reach a reasoned conclusion on each of these brand-new
24 claims, Google needs adequate time to research, evaluate, and, as appropriate,
25 oppose their addition to the case.

26 Moreover, Perfect 10's motion seeks to add an entirely new set of
27 claims against Google based upon an entirely new theory of copyright liability—
28 claims that appear to be time barred. As this Court is aware, this case has proceeded

1 since November 2004 on the theory that Google's search functions (i.e. Web Search
2 and Image Search) effectuate copyright infringement. By its proposed amendments,
3 however, Perfect 10 now seeks to add brand new claims directed at Google's
4 blogger.com and blogspot.com websites—Google services which have *nothing* to do
5 with Google search, and which have never before been at issue in this action.

6 In support of its proposed amendments, Perfect 10 presents a dizzying
7 array of brand-new "evidence," in two separate declarations, and in 20 separate
8 exhibits comprised of several hundred pages of documents and a CD containing 133
9 separate files (which CD Google's counsel was not served with until just yesterday).
10 Perfect 10 made no mention whatsoever of this "evidence" during the parties' meet-
11 and-confer efforts preceding this motion, nor did Perfect 10 disclose these materials
12 to Google prior to filing them on various dates between June 12 and 17, 2008.

13 Perfect 10 also failed to disclose (or even mention) the blogspot.com and
14 blogger.com claims and theories prior to its filing.

15 Google needs sufficient time to review all of this voluminous new
16 information, conduct relevant factual and legal research, and respond to Perfect 10's
17 motion as appropriate. Preliminary research, however, reveals that this new
18 "evidence" is flawed, and that Perfect 10 had actual knowledge of the facts giving
19 rise to its alleged claims against Google related to blogspot.com and blogger.com at
20 least five years ago. Accordingly, these new claims appear to be time-barred, and
21 thus futile. Google requests adequate time to fully research and brief these issues
22 for the Court's consideration.

23 Finally, it bears note that Perfect 10's motion levies serious accusations
24 against Google, which accusations are as untrue as they are improper. Nevertheless,
25 Google is entitled to respond to these attacks in due course, and will demonstrate the
26 falsity of these accusations in its opposition materials.

27 Perfect 10's transparent attempt to sandbag Google by filing a motion
28

1 involving voluminous new materials and arguments *never disclosed* during the meet
2 and confer process is made all the more obvious by Perfect 10's senseless refusal to
3 agree to a simple continuance of the hearing to permit Google to respond on the
4 merits, with the guidance of its lead counsel. Such intransigent tactics only serve to
5 impose greater burdens on this Court's resources, burdens that Perfect 10 easily
6 could have avoided with an ounce of cooperation. During the April 14, 2008
7 hearing in this case, this court admonished Perfect 10 to make efforts to work things
8 out with opposing counsel where possible, to avoid the need for court intervention.
9 Regrettably, it appears that Perfect 10 has not heeded this message.

10 **Conclusion**

11 For the above-stated reasons, Google respectfully requests that the
12 Court grant its *ex parte* application to continue the hearing date on Perfect 10's
13 motion for leave to file a second amended complaint from July 7, 2008 to a date in
14 August that is convenient for the Court. If the Court has no preference, Google
15 suggests a hearing date of August 11, 2008.

16
17 DATED: June 18, 2008

QUINN EMANUEL URQUHART OLIVER &
HEDGES, LLP

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19 By /s/ Rachel M. Herrick
20 Rachel M. Herrick
21 Attorneys for Defendant Google Inc.
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