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8 UNITED STATES DISTRICT COURT
 9 CENTRAL DISTRICT OF CALIFORNIA

10 PERFECT 10, INC., a California
 11 corporation,
 12 Plaintiff,
 13 v.
 14 GOOGLE INC., a corporation; and
 15 DOES 1 through 100, inclusive,
 16 Defendants.

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

PERFECT 10'S OPPOSITION TO
 GOOGLE'S EX PARTE APPLICATION
 FOR CONTINUANCE OF HEARING
 DATE ON MOTION FOR ORDER
 GRANTING LEAVE TO FILE SECOND
 AMENDED COMPLAINT;
 DECLARATIONS OF JEFFREY N.
 MAUSNER AND DR. NORMAN ZADA
 IN SUPPORT THEREOF

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

17 AND CONSOLIDATED CASE

1 Defendant Google, Inc. (“Google”) has filed an *ex parte* application (the
2 “Application”), seeking to continue the hearing on Perfect 10’s motion for leave to
3 file its proposed Second Amended Complaint (the “Motion”) for at least one
4 month.¹ The Application is the latest example of Google’s continued attempts to
5 obstruct and delay this case, while Perfect 10’s business is dying.

6 Google’s Application is based on a false premise – that Michael T. Zeller of
7 Quinn Emanuel Urquhart Oliver & Hedges, LLP (“Quinn Emanuel”) has been
8 Google’s primary litigator in this case. Not only has Mr. Zeller not been the
9 primary litigator for Google, he thus far has been almost completely absent from
10 the case. Declaration of Jeffrey N. Mausner, attached hereto (“Mausner Decl.”),
11 ¶2. For example, Mr. Zeller has not been involved in a single meet and confer, has
12 not written any of Google’s e-mails relating to the Motion or Perfect 10’s attempt
13 to amend, and has not participated in any conversations with counsel for Perfect 10
14 regarding this issue. With the exception of Mr. Zeller’s appearance at one hearing
15 in this case and his attendance as an observer at one deposition in the *Amazon* case,
16 virtually all of the litigation in this case has been done by Rachel Herrick and
17 Thomas Nolan, two of the other lawyers at Quinn Emanuel. *Id.*

18 Perfect 10 has been quite accommodating with extensions requested by
19 Google in the past, and would do so again here, except that Google has been
20 needlessly delaying the case, as well as engaging in unnecessary motion practice.
21 For example, despite the fact that Judge Hillman ruled that Perfect 10’s president,
22 Dr. Norman Zada, could see all the discovery in this case, Google has refused to
23 allow Dr. Zada to see discovery that Google recently produced in response to this
24 Court’s Order of May 13, 2008 (Pacer Docket No. 294). Instead, Google has

25
26 ¹ When it filed the Application, Google failed to comply with this Court’s rules
27 regarding *ex parte* applications. Paragraph 5 of this Court’s Procedures and
28 Schedules specifically states that a moving party filing an *ex parte* application
“shall serve the opposing party by FAX, hand service or email ...” Google failed
to do so. Perfect 10’s counsel only obtained the Application by checking the Pacer
Docket. Declaration of Jeffrey N. Mausner, attached hereto, ¶9.

1 asserted that, at some future unnamed date, it intends to relitigate the scope of the
2 protective order to prevent Dr. Zada from seeing documents relating to image
3 recognition and search term frequency. Mausner Decl., ¶ 3. Moreover, Google
4 recently threatened Perfect 10 with another *ex parte* application, if Perfect 10 did
5 not agree to Google's request for an extra month to prepare a portion of its
6 discovery responses, which this Court had ordered Google to produce by June 16,
7 2008. Perfect 10 agreed to Google's request for a 30 day extension just a few days
8 ago. *Id.*, ¶4. Additionally, after Perfect 10 spent substantial resources to obtain
9 two separate court orders requiring Google to produce its DMCA log, Google still
10 has not produced the log that was ordered by this Court, even though it claims that
11 it has done so. *See* Declaration of Dr. Norman Zada, attached hereto ("Zada
12 Decl."), ¶ 2.² Google's other discovery abuses are too numerous to discuss here.

13 Perfect 10 cannot allow Google to keep delaying the ultimate resolution of
14 this case while Perfect 10's business is being ruined. As detailed in the Motion,
15 Google misrepresented and concealed the fact that it stores thousands of infringing
16 full-size copyrighted Perfect 10 images on its servers. Memorandum of Points and
17 Authorities in support of the Motion, filed June 12, 2008 (Pacer No. 297), at 3-6.
18 These misrepresentations led, at least in part, to the denial of Perfect 10's Motion
19 for a Preliminary Injunction. *Id.* at 1, 3-6.

20 Google's motion contains a number of false or misleading statements. First,
21 Google misleadingly claims that this Court should grant the Application because
22 Perfect 10 waited a year and a half to amend its complaint. Memorandum of
23 Points and Authorities in support of the Application ("Memo") at 3. However,
24 Perfect 10 did not know of Google's misrepresentations and concealments

25
26 ² In its Order of June 16, 2008, this Court ordered Google to produce its DMCA
27 log, which was defined as a "spreadsheet-type document summarizing DMCA
28 notices received, the identity of the notifying party and the accused infringer, and
the actions (if any) taken in response." Google has not produced such a document,
although it claims that it has. *Zada Decl.*, ¶ 2.

1 regarding the storing of infringing images on its servers a year and a half ago.
2 Mausner Decl. ¶ 5-6.

3 Second, Google asserts that Perfect 10 failed to disclose the evidence
4 regarding Google's storing of full-size images on its servers during the meet-and-
5 confer process. Memo at 6. As explained in Perfect 10's moving papers in support
6 of the Motion, Perfect 10 offered to provide Ms. Herrick with the evidence
7 supporting its claim that full size images reside on Google's servers (a fact
8 obviously known to Google), and one other factual allegation in the proposed
9 Second Amended Complaint, if Google would then stipulate to the filing of the
10 complaint. Google refused that offer, insisting that Perfect 10 provide proof of all
11 the factual allegations before Google would even *consider* a stipulation. *See*
12 Mausner Declaration in support of the Motion, filed on June 12, 2008, Pacer No.
13 301.

14 Third, Google complains about the new causes of action that Perfect 10
15 seeks to add (Memo at 5), even though it *never objected* to the new causes of
16 action during the meet-and-confer process. Google's only objections were to the
17 new factual allegations, requiring that Perfect 10 submit proof of all of the new
18 factual allegations, and to factual allegations that it deemed to be salacious. *See*
19 Exhibit 13 to the Mausner Declaration in Support of the Motion, Pacer No. 301.

20 Fourth, Google falsely asserts that documents comprising the Motion were
21 filed from June 12 to June 17. Memo at 6. As can be seen from the Pacer Docket
22 in the case, all but one document in support of the Motion were filed on June 12;
23 the one additional document was filed on June 13. Google already has had more
24 than one week to prepare its opposition – an amount of time that is more than
25 sufficient under the Local Rules. This is simply a motion to amend the complaint;
26 Google will have sufficient time later to try to prove that the allegations are not
27 true.

1 Finally, Google makes several other statements in the Application that are
2 completely unsupported and simply wrong. For example, Google incorrectly
3 asserts that the millions of full-size images which Google stores on its servers and
4 links to via Google search results “have *nothing* to do with Google search.” Memo
5 at 6 (emphasis in original). Google’s related contention that Perfect 10 is asserting
6 a completely new theory of copyright liability [*see* Memo at 5-6] is also incorrect.
7 Google avoided a preliminary injunction by falsely asserting that the images that
8 Google’s search engine in-line linked to were not stored on Google’s servers. As
9 explained in the moving papers in support of the Motion, Google’s false assertion
10 led to a finding that Google was not displaying the images under the server test,
11 and that Google did not have control over the images for purposes of vicarious
12 liability. In fact, Google is storing thousands of infringing Perfect 10 copyrighted
13 images on its servers, through Google’s blogger.com and blogspot.com programs –
14 a fact that Google should have revealed in its filings with this Court and the Ninth
15 Circuit and in its discovery responses. Google is displaying those images through
16 in-line linking because they are on Google’s servers, and Google has the right and
17 ability to delete those images from the Internet. Even if Google were correct that
18 Perfect 10 is alleging new claims, Google’s assertion that these claims are time-
19 barred is wrong as a matter of law. In a case of continuing copyright infringement
20 such as this one, “an action may be brought for all acts that accrued within the
21 three years preceding the filing of the suit.” *Kourtis v. Cameron*, 419 F.3d 989,
22 999 (9th Cir. 2005). Therefore, at the very least, Google would be liable for
23 everything it has done during the past three years. Google is also wrong that
24 Perfect 10 knew that Google was storing infringing images on its servers five years
25 ago. Mausner Dec. ¶5. If Perfect 10 had known that, it certainly would have
26 pointed that out to this Court and the Ninth Circuit in connection with its motion
27 for preliminary injunction, something that Google should have done.
28

1 Google has no legitimate basis for opposing the Motion, let alone insisting
2 that the hearing on the Motion be delayed for one month while an attorney who has
3 played almost no part in the case thus far becomes available. Furthermore, when
4 Ms. Herrick asked counsel for Perfect 10 to continue the hearing date until August,
5 she did not state that she needed more time to file the opposition. Rather, Ms.
6 Herrick asserted only that Mr. Zeller was not available until August. See e-mails
7 from Ms. Herrick dated June 16 and June 17, 2008, attached as Exhibit 2 to the
8 Mausner Declaration. Perfect 10 is willing to continue the hearing on the Motion
9 for one week to give Google additional time to file its opposition, but the one-
10 month extension sought by Google is neither necessary nor reasonable.
11 Accordingly, this Court should deny the Application.

12 If this Court does grant the Application and continue the hearing on the
13 Motion for more than one week, Perfect 10 requests that the extra time for briefing
14 be split equally between Google's Opposition and Perfect 10's Reply.

15
16 Dated: June 19, 2008

Respectfully submitted,

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

1 Google having an extra month to prepare a portion of its discovery responses,
2 which this Court had ordered Google to produce by June 16, 2008. Perfect 10
3 agreed to Ms. Herrick's request for the 30-day extension.

4 5. I did not know of Google's misrepresentations and concealments
5 regarding the storing of infringing images on its servers a year and a half ago,
6 when I was contemplating amending the complaint.

7 6. I contemplated filing a Second Amended Complaint around January
8 2007. However, I decided to wait until after the Ninth Circuit issued its opinion in
9 connection with the parties' appeal of this Court's ruling on Perfect 10's motion
10 for a preliminary injunction before seeking leave to amend. I was concerned that
11 filing a Second Amended Complaint while this action was on appeal could affect
12 or delay consideration of the appeal. Second, by waiting to file an amended
13 complaint until after the Ninth Circuit issued its ruling, I would be able to analyze
14 whether the Ninth Circuit's opinion affected the allegations of Perfect 10's
15 proposed Second Amended Complaint.

16 7. Perfect 10 began the meet and confer process for this Motion more
17 than three months ago (*see* Ex Parte Application, page 3 line 14) and it was Google
18 that delayed that process. Attached hereto as Exhibit 1 are true and correct copies
19 of e-mails between me and Google's attorney, Rachel Herrick, showing that there
20 was delay on Google's part.

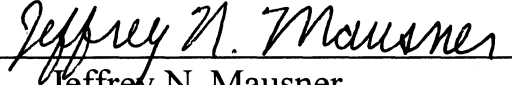
21 8. Attached hereto as Exhibit 2 are true and correct copies of e-mails
22 between me and Ms. Herrick dated June 16 and 17, relating to Google's request for
23 a continuance.

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9. Google did not fax, hand serve, or email the Ex Parte application to me, as required by Judge Matz's Rules. I only obtained the Ex Parte application through the Pacer docket.

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 19, 2008, at Tarzana, California.



Jeffrey N. Mausner

Jeff Mausner

From: Rachel M Herrick [rachelherrick@quinnemanuel.com]
Sent: Friday, April 25, 2008 5:00 PM
To: Jeffrey Mausner
Cc: Thomas Nolan; Michael T Zeller
Subject: RE: Perfect 10 v. Google - Completion of Conference of Counsel regarding Second Amended Complaint

Hi Jeff,

I do owe you a response on this, and will be getting back to you shortly (hopefully this evening, but no later than Monday).

Thanks,

Rachel M. Herrick
Quinn Emanuel Urquhart Oliver & Hedges, LLP
555 Twin Dolphin Drive, Suite 560
Redwood Shores, CA 94065
Direct: (650) 801-5005
Main Phone: (650) 801-5000
Main Fax: (650) 801-5100
E-mail: rachelherrick@quinnemanuel.com
Web: www.quinnemanuel.com

From: Jeffrey Mausner [mailto:jeffmausner@bmlaw.com]
Sent: Friday, April 25, 2008 1:58 PM
To: Rachel M Herrick
Cc: Thomas Nolan; Michael T Zeller
Subject: RE: Perfect 10 v. Google - Completion of Conference of Counsel regarding Second Amended Complaint

Rachel, I need your answer on whether Google will stipulate to our filing the Second Amended Complaint, or if you will require that we file a motion, by the close of business today. This is taking way too long. If I don't hear from you by the close of business today, I will assume that Google is not going to stipulate to our filing the Second Amended Complaint and that our conference of counsel is completed. Jeff.

From: Jeff Mausner [mailto:jeffmausner@bmlaw.com]
Sent: Tuesday, April 22, 2008 9:01 AM
To: 'Rachel M Herrick'
Cc: 'Thomas Nolan'; 'Michael T Zeller'
Subject: RE: Perfect 10 v. Google - Completion of Conference of Counsel regarding Second Amended Complaint

Look at the one with track changes.

Paragraph 66: statutory damages is taken out.

Paragraph 82: Allegations are made for punitive damages.

Prayer for relief, paragraph 8: statutory damages is taken out.

Jeff.

From: Rachel M Herrick [mailto:rachelherrick@quinnemanuel.com]
Sent: Tuesday, April 22, 2008 12:40 AM
To: 'Jeffrey Mausner'
Cc: Thomas Nolan; Michael T Zeller
Subject: RE: Perfect 10 v. Google - Completion of Conference of Counsel regarding Second Amended Complaint

Thanks Jeff. I didn't see any changes based upon the second to last paragraph in my April 4 letter in the redline you attached. Are you sure you sent the right version?

Mike is tied up on another matter at the moment, so we will get back to you by the end of the week regarding whether Google will stipulate to some or all of Perfect 10's proposed amendments. If you did send the wrong version of the SAC, please forward the correct version as soon as possible.

Thanks,
Rachel

From: Jeffrey Mausner [mailto:jeffmausner@bmlaw.com]
Sent: Friday, April 18, 2008 7:24 PM
To: Rachel M Herrick
Cc: Thomas Nolan
Subject: Perfect 10 v. Google - Completion of Conference of Counsel regarding Second Amended Complaint

Hi Rachel. Attached is the Second Amended Complaint which contains the changes we discussed, based upon the second to the last paragraph of your April 4 letter. It also contains some grammatical corrections. The changes from the previous version I sent to you are shown in track changes on the second attachment.

Please let me know by Tuesday, April 22 whether Google will stipulate to our filing the Second Amended Complaint, or if you will require that we file a motion. Jeff.

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Jeff Mausner

From: Rachel M Herrick [rachelherrick@quinnemanuel.com]
Sent: Friday, March 28, 2008 12:59 AM
To: 'Jeff Mausner'; 'Valerie Kincaid'
Cc: Thomas Nolan
Subject: RE: Perfect 10/Google

Jeff,
As I already mentioned, we will be sending you a meet and confer letter about the proposed Second Amended Complaint shortly. We can set up a call thereafter.
Thanks,
Rachel

From: Jeff Mausner [mailto:jeffmausner@bmlaw.com]
Sent: Thursday, March 27, 2008 3:58 PM
To: 'Valerie Kincaid'; Rachel M Herrick
Cc: Thomas Nolan
Subject: RE: Perfect 10/Google

Rachel, tomorrow will be 10 days since I sent you Exhibits 7 and 8, and 26 days since I sent you the Second Amended Complaint and Exhibits 1-6. Why won't you be in a position tomorrow to discuss this? I think the meeting tomorrow should cover all 3 of these topics. Jeff.

From: Valerie Kincaid [mailto:valeriekincaid@yahoo.com]
Sent: Thursday, March 27, 2008 3:01 PM
To: Rachel M Herrick
Cc: Jeff Mausner; Thomas Nolan
Subject: Re: Perfect 10/Google

Hi Rachel,

Are you able to arrange a call-in number?

Thanks, Valerie

Valerie Kincaid
valeriekincaid@yahoo.com

----- Original Message -----

From: Rachel M Herrick <rachelherrick@quinnemanuel.com>
To: Valerie Kincaid <valeriekincaid@yahoo.com>
Cc: Jeff Mausner <jeffmausner@bmlaw.com>; Thomas Nolan <thomasnolan@quinnemanuel.com>
Sent: Thursday, March 27, 2008 1:07:49 PM
Subject: RE: Perfect 10/Google

Hi Valerie,

We are available tomorrow from 11am - 12:30pm to discuss P10's RFAs Sets 1-3, and Google's Interrogatories 3 & 11. We will not be in a position to discuss P10's proposed Second Amended Complaint tomorrow, since we just received all of

Jeff Mausner

From: Rachel M Herrick [rachelherrick@quinnemanuel.com]
Sent: Tuesday, June 17, 2008 9:13 PM
To: Jeffrey Mausner
Cc: Thomas Nolan; Michael T Zeller
Subject: RE: Perfect 10's Motion for Leave to File Second Amended Complaint - E-mail 1

Hi Jeff,

Thanks for getting back to us. Mike Zeller is indeed in trial in the *Mattel* case currently pending before Judge Larson, and that trial is set to conclude at the end of July. We regret that Perfect 10 has refused to grant us this simple extension as a professional courtesy to a colleague currently in trial. Mike is *not* dispensable to the *Mattel* trial team, as you suggest. To the contrary, Mike has been running the *Mattel* case since the moment the complaint was filed in April 2004, and has overseen the case and all of its day-to-day activities during the 4+ years since its filing. As for his involvement in the trial, Mike is in court every single minute of every single day that court is in session, and is one of Mattel's three lead attorneys who are examining witnesses.

Perfect 10's refusal to grant Mike and Google this extension is all the more unreasonable in light of the fact that Perfect 10 has delayed at least *a year and a half* in bringing this motion. Plainly there is no need whatsoever to have this motion heard on July 7 (as opposed to some date in August) -- let alone a need *so pressing* that it warrants severely prejudicing Google by forcing it to prepare and argue its opposition to Perfect 10's motion (a motion which seeks to drastically and improperly expand the scope of its lawsuit against Google) without the involvement of Google's lead counsel.

Please let us know this evening whether Perfect 10 will reconsider its position and agree to continue the hearing on its motion for leave to amend its complaint from July 7 to any Monday in August. We certainly hope the parties can work this out without burdening the Court. If not, please accept this email as notice that tomorrow morning, we will be bringing this matter to Judge Matz's attention by filing an *ex parte* application to continue the hearing on Perfect 10's motion from July 7 to a date in August that is convenient for Google and the Court.

Rachel M. Herrick
Quinn Emanuel Urquhart Oliver & Hedges, LLP
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Main Fax: (650) 801-5100
E-mail: rachelherrick@quinnemanuel.com
Web: www.quinnemanuel.com

From: Jeffrey Mausner [mailto:jeffmausner@bmlaw.com]
Sent: Tuesday, June 17, 2008 4:20 PM
To: Rachel M Herrick
Cc: Thomas Nolan; Michael T Zeller
Subject: RE: Perfect 10's Motion for Leave to File Second Amended Complaint - E-mail 1

Rachel, we can't put off the hearing on the motion for leave to amend for a month because you claim that Mike is unavailable during July. First, you or one of the many other lawyers at Quinn Emanuel can argue the motion. You are much more familiar with the case than Mike is anyway; it seems that he has only been tangentially involved in the case. Second, if the trial that Mike is involved in is the *Mattel v. Bratz* case, he is not the lead attorney for your client – John Quinn is. If it is absolutely essential that he attend the hearing on the motion for leave to amend, I'm sure he could be spared for a couple hours on July 7.

We just agreed to give you an additional one month extension for production of some of the documents responsive to Judge Matz's order. The case has to move forward, and we cannot agree to postpone the hearing. Jeff.

From: Rachel M Herrick [mailto:rachelherrick@quinnemanuel.com]
Sent: Monday, June 16, 2008 7:22 PM
To: Jeffrey Mausner
Cc: Thomas Nolan; Michael T Zeller
Subject: RE: Perfect 10's Motion for Leave to File Second Amended Complaint - E-mail 1

Hi Jeff,

Thanks for this. I'm afraid the July 7 hearing date does not work for us, because Mike is in trial the entire month of July. Mike is available any Monday (Matz's law and motion day) in the month of August. We would appreciate it if you would select an August date that works best for you, and re-notice the hearing on P10's motion for that date.

Thanks,

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Main Phone: (650) 801-5000
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Web: www.quinnemanuel.com

From: Jeffrey Mausner [mailto:jeffmausner@bmrlaw.com]
Sent: Thursday, June 12, 2008 7:14 PM
To: Rachel M Herrick; Thomas Nolan; Michael T Zeller
Subject: Perfect 10's Motion for Leave to File Second Amended Complaint - E-mail 1

Hi Rachel. Attached is Perfect 10's Motion for Leave to File Second Amended Complaint, which was filed today. I will be e-mailing the supporting documents to you in several e-mails. Jeff.

This e-mail may be confidential or may contain information which is protected by the attorney-client privilege and work product doctrine, as well as other privileges. If you are not the intended recipient of this e-mail, any dissemination or copying of this message is strictly prohibited. Anyone who mistakenly receives this e-mail should notify the sender immediately by telephone or return e-mail and delete it from his or her computer.

Jeffrey N. Mausner
Warner Center Towers, Suite 910

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DECLARATION OF DR. NORMAN ZADA


I, Norman Zada, declare as follows:

1. I am the President of Plaintiff Perfect 10, Inc. (“Perfect 10”). I have been very involved in the prosecution of this case and am very familiar with all aspects of it, including the production of documents by Defendant Google Inc. (“Google”). All of the matters stated herein are of my own personal knowledge, except where otherwise stated, and if called as a witness, I could and would testify competently thereto.

2. Google has not produced a DMCA log, as this Court ordered in its Order of May 13, 2008. The Court’s Order defines a DMCA log as “a spreadsheet-type document summarizing DMCA notices received, the identity of the notifying party and the accused infringer, and the actions (if any) taken in response.” Although Google has claimed that it has produced such a log, I have reviewed the documents produced by Google in this action and have been unable to locate a “spreadsheet-type document” that complies with the definition of a DMCA log in the Order.

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 18, 2008, at Los Angeles County, California.



Norman Zada, Ph.D.