[COUNSEL LISTING ON FOLLOWING PAGE]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PERFECT 10, INC., a California corporation,

Plaintiff,

vs.

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

Defendants.

AND COUNTERCLAIM

PERFECT 10, INC., a California corporation,

Plaintiff,

vs.

AMAZON.COM, INC., a corporation; A9.COM, INC., a corporation; and DOES 1 through 100, inclusive,

Defendants.

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

**JOINT STIPULATION ON GOOGLE INC.'S MOTION FOR PARTIAL RECONSIDERATION OF PROTECTIVE ORDER TO DESIGNATE ONE CATEGORY OF DOCUMENTS AS OUTSIDE COUNSEL'S EYES ONLY**

Hon. Stephen J. Hillman

**PUBLIC REDACTED:** PORTIONS FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER

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TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Google Inc. ("Google") hereby moves the Court for partial reconsideration of the Protective Order entered in this case, in order to limit access to one category of documents (those regarding image recognition technology) to outside counsel of record only. Pursuant to the Court's order from the bench on July 14, 2008, Google does not notice a hearing date for this motion, with the understanding that the Court will, at its election, either rule on the motion without hearing or issue an order setting a hearing date.

Google's motion is based on this Notice of Motion and Motion; the Memorandum of Points and Authorities submitted herewith; all other pleadings and matters of record in this case; and such other evidence of which this Court may take judicial notice.

CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 7-3

This motion is made following the conference of counsel (pursuant to Local Rule 7-3) on April 29, 2008 and on dates thereafter.

DATED: August 4, 2008

QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP

By Rachel M. Herrick (TN)
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## JOINT STIPULATION

## INTRODUCTION

### A. Google's Preliminary Statement

On December 27, 2005, the Court entered a Protective Order which allows Perfect 10, Inc.'s CEO, Norman Zada, to access all information and documents produced by Google in the case, including information designated Confidential and/or Highly Confidential. However, the Court also stated that it would permit

> defendants to revisit the issue on a very limited basis, when and if there are business and technological "trade secrets" about to be disclosed, which secrets defendants believe are currently so commercially sensitive that partial reconsideration of the Protective Order is justified.

Minute Order on Google's Motion for Entry of Protective Order, 12/27/05 ("Minute Order") at 3.[1] Google does so now regarding one narrowly category of documents containing confidential and proprietary information of the highest order: Documents regarding Google's efforts to use and develop image recognition technology.[2]

Google has already produced documents of this type to Perfect 10 in this case, subject to temporary "Outside Counsel's Eyes Only" ("OCEO") restrictions.

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[1] Perfect 10 has repeatedly threatened to seek sanctions against Google if Google followed the precise procedure set out by the Court in its December 27, 2005 Order. Perfect 10's threat of sanctions is frivolous.

[2] Google originally sought outside counsel's eyes only status for two categories of documents—image recognition technology documents, and total query count documents. Following the July 14 status conference, Google made a further effort to compromise by agreeing to withdraw its request as to query count documents, if Perfect 10 would agree to an "Outside Counsel's Eyes Only" designation for just one category of documents, those regarding image recognition. Perfect 10 refused Google's offer of compromise. Nevertheless, Google has withdrawn its Motion with respect to search query count documents to demonstrate to this Court (1) Google's good faith in attempting to make every possible concession during the meet and confer process in hopes of avoiding motion practice, and (2) Google's attempt to seek special protection for the narrowest possible universe of documents.

Google originally approached Perfect 10 with its request for an OCEO designation of these documents by letter on April 29, 2008. Perfect 10 agreed to a temporary OCEO designation, until such time as the parties could approach the Court on this issue.[3]

By this Motion, Google is *not* seeking to re-litigate the Court's prior determination giving Dr. Zada access to broad categories of confidential materials. Rather, Google is following the precise procedure this Court established for "commercially sensitive" documents. Google's request is narrowly drawn, and limited to just a single category of documents, amounting to a mere **78 pages** (out of Google's 45,000+ page production). This motion is also based on representations made by Perfect 10 following entry of the Protective Order to the effect that Perfect 10 is a competitor, potential competitor or business associate of a competitor of Google's in the image recognition technology field. In such a situation, special protection is warranted because these documents contain "crown jewel"-type trade secrets of a technology company such as Google. Google guards them fiercely. Public disclosure—even if inadvertent—could be devastating to Google, and could undermine years of work in very short order. These are precisely the types of "business and technological 'trade secrets'" that are "so commercially sensitive" that reconsideration of the Court's Protective Order is justified.

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[3] Pursuant to this agreement, Google produced image recognition technology documents on May 20, 2008. In preparation for its June 16, 2008 production, Google sought Perfect 10's confirmation that the temporary agreement would cover more documents of the types previously agreed upon, and sought to set a briefing schedule for Google's motion. Perfect 10 refused to so agree, and repeated its baseless threat of sanctions. Google then approached the Court for relief. At a July 14, 2008 hearing, the Court granted Google's request for temporary maintenance of the OCEO designation of these documents, and ordered the parties to file this Joint Stipulation today, August 4, 2008. Google now seeks to make that provisional agreement and Order permanent as to documents reflecting image recognition technology.

In its portions of this Joint Stipulation, instead of addressing Google's arguments, Perfect 10 raises a number of irrelevant issues—including how Perfect 10 believes image recognition technology fits into its case, what it believes the contents of Google's image recognition technology documents reflect, and whether Google was candid in its 2005 filings related to Perfect 10's motion for preliminary injunction and in the subsequent appeal. Perfect 10 also makes accusations regarding the sufficiency of various aspects of Google's document production.[4] Not only are Perfect 10's accusations clearly and demonstrably false (as reflected by Perfect 10's failure to offer even a scintilla of evidence to support them), it is *completely irrelevant* to the *only* issue before the Court at this time: Namely, whether Google has demonstrated that a limited set of documents containing its technological trade secrets should be given the utmost protection, when Perfect 10 has admitted that it is *actually using* similar technology from Google's *competitor*, and when Dr. Zada *himself* claims *actual expertise* in that technology. For these reasons alone, Perfect 10's red-herring arguments should be rejected out of hand.

Perfect 10 has raised no compelling arguments as to why Google's motion should not be granted. As Perfect 10 does not and cannot dispute, clearly established governing law entitles Google to the utmost of protections for its trade secrets. ***Google has not located a single reported case where a court granted an officer or employee of the opposing party access to documents containing its opponents trade secrets***—nor does Perfect 10 cite such a case.

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[4] Even assuming these issues are somehow relevant here—which they are not—Perfect 10 is wrong on all counts. Perfect 10's attempt to mischaracterize a discovery ruling by Judge Matz as a ruling on the merits of the issue of contributory infringement pursuant to the standard enunciated by the Ninth Circuit is a non sequitur, and is wholly unsupported by the very Orders Perfect 10 quotes. Perfect 10 is getting ahead of itself, delving into issues not currently before this Court.

Google need only show that (1) Google's image recognition technology documents contain its trade secrets, (2) Perfect 10 uses and claims expertise in similar technology and has an admitted relationship with a Google competitor in this space, and (3) Google would suffer serious harm if its trade secrets were inadvertently disclosed. Having made these showings, Google's motion should be granted.

**B. Perfect 10's Preliminary Statement**

Perfect 10 believes that Google misled both the District Court and Court of Appeals into believing that image recognition technology was not available, at the time of the preliminary injunction motion, to locate infringing images in Google's image search index. That was, and is, a critical aspect of this case. The standard imposed by the Ninth Circuit for contributory liability is the following:

> There is no dispute that Google substantially assists websites to distribute their infringing copies to a worldwide market and assists a worldwide audience of users to access infringing materials. We cannot discount the effect of such a service on copyright owners, even though Google's assistance is available to all websites, not just infringing ones. Applying our test, Google could be held contributorily liable if it had knowledge that infringing Perfect 10 images were available using its search engine, ***could take simple measures to prevent further damage to Perfect 10's copyrighted works***, and failed to take such steps.

*Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007) (emphasis added). Image recognition is a simple measure that Google could take to prevent further damage to Perfect 10's copyrighted works.

The Ninth Circuit also held as follows regarding vicarious liability: "Without image-recognition technology, Google lacks the practical ability to police the infringing activities of third-party websites. This distinguishes Google from the defendants held liable in *Napster* and *Fonovisa*." *Id.* 508 F.3d at 1174.

Judge Matz recognized the importance of image recognition in this case. In the hearing on Google's objections to Judge Hillman's Discovery Order, Judge Matz stated:

> Now, when I was dealing with the motion [for preliminary injunction], I made certain findings, or at least observations, that are related to the existence, if any, of Image Recognition Software, and what I supposedly

> found -- and my gloss on it -- was quoted in the amended opinion of the Ninth Circuit at Page 1174. That's 508 F.3d at Page 1174. The key language which underlies my ruling on this disputed provision of Judge Hillman's order that is the language of the Ninth Circuit said, quote, "Without image recognition technology, Google lacks the practical ability to police the infringing activities of third-party websites," end quote. That language inherently confirms what I think common sense would warrant a finding for, and that is that the existence or non-existence, as the case may be, of image recognition technology is highly relevant. I don't understand how you can argue, as I think you have on this motion, Mr. Zeller, that it's not relevant. It either exists or it doesn't. It may not have existed when I was grappling with this a few years ago. If it exists now or in what manner it exists or in what capacity it can be applied is highly relevant. I think Judge Hillman's order is absolutely appropriate. I see no basis to overrule it.

Reporter's Transcript Of Proceedings, April 14, 2008, hearing before Judge Matz on Objections to Discovery Order, page 25 line 3 to page 26 line 1, attached as Exhibit 3 to Mausner declaration.

Judge Matz therefore ordered Google to produce "documents sufficient to describe Google's attempts to develop or use any image recognition software capable of matching a known still photographic image with another image in Google's search engine index or search engine database. Google is not ordered to produce documents regarding any other types of image recognition technology." May 13, 2008 Order, page 4, lines 12-16 (Pacer No. 294), attached as Exhibit 4 to Mausner declaration.

Google produced 78 pages in response to this Order, documents numbered GGL 033446-033524. A copy of these pages should be submitted to the Court under seal by Google, so that the Court may examine them. [redacted]

However, it is necessary for Dr. Zada to see this document, determine definitively if that is the case, and to assist in litigating this issue. [redacted]

[redacted]

Perfect 10 has one objective, to protect what is left of its business and its intellectual property from Google. The last thing Perfect 10 would want to do is to give Google an excuse for claiming that Perfect 10 misused trade secrets obtained in this case, which would be disastrous for Perfect 10. So that is simply not going to happen. It has not happened, and it will not happen. The last time the protective order was before the Court, Google made the same inapt argument that Perfect 10 is a competitor. When Google steals everything that Perfect 10 owns and uses it to draw users to Google.com and away from perfect10.com, and to make money by placing AdSense ads around the stolen pictures, Perfect 10 is not a competitor -- it is a victim. Perfect 10 is not in the search engine or image recognition business. It is simply a copyright owner trying to protect its copyrights. While Google competes, unfairly, with Perfect 10 in offering adult content, Perfect 10 does not compete with Google in offering search engine services or image recognition technology. The cases cited by Google involve direct competitors. None of those cases involve a situation like this.[5]

Dr. Zada has been participating in lawsuits with protective orders and has had access to the highest level of confidential information for seven years. There has never been a hint that Dr. Zada has breached a protective order. There is simply nothing that would justify a change in the protective order. [redacted] Those instructions were

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[5] Dr. Zada does not have a close business relationship with PicScout. Perfect 10 has simply paid them $5,000 to locate infringing images. An employee of PicScout submitted a declaration for Perfect 10 regarding PicScout's search capability. (footnote continued)

that parties avoid unnecessary motion practice by relitigating issues that have already been decided. (*See Perfect 10 v. Microsoft*, transcript of scheduling conference, pages 6-8, attached as Exhibit 5 to Mausner declaration.) This is an egregious example of that, since the issue was already decided in this very case. Google's motion should be denied.

## GOOGLE'S POSITION REGARDING ITS MOTION FOR PARTIAL RECONSIDERATION OF THE PROTECTIVE ORDER

### I. GOOGLE HAS DEMONSTRATED "GOOD CAUSE" FOR LIMITING ACCESS TO DOCUMENTS REFLECTING IMAGE RECOGNITION TECHNOLOGY TO OUTSIDE COUNSEL'S EYES ONLY

#### A. This Court Should Reconsider its Protective Order With Respect To One Narrow Category of Documents, Now That Perfect 10 Contends That Perfect 10 and Google Are Competitors in Certain Respects.

Under the Court's ruling, Google may seek further protections—including outside counsel's eyes only protection—for "business and technological 'trade secrets' [which are] so commercially sensitive that partial reconsideration of the Protective Order is justified." The Court's analysis will be informed by Fed. R. Civ. P. 26(c)(G), providing that the Court may, "for good cause, issue an order … requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way." As this Court recently found, "[c]ourts commonly issue protective orders limiting access to sensitive information to counsel and their experts." Nutratech, Inc. v. Syntech (SSPF) Intern., Inc., 242 F.R.D. 552, 555 (C.D. Cal. 2007) (citation omitted).

These concerns are only elevated where, as here, a party seeks discovery of confidential and proprietary information when the parties are actual, potential, or

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PicScout is based in Israel and Dr. Zada rarely communicates with them. (Zada (footnote continued)

even arguable competitors in a particular field. See, e.g., Armour of America v. United States, 73 Fed.Cl. 597, 600 (Fed. Cl. 2006); Pepsi-Cola Bottling Co. of Pittsburg, Inc. v. Bottling Group, L.L.C., 2008 WL 234326, at *4 (D. Kan. Jan. 28, 2008) (ordering financial information to be designated as "Attorneys' Eyes Only" for discovery between competitors); Netquote, Inc. v. Byrd, 2007 WL 2438947, at *4 (D. Colo. Aug. 23, 2007) (limiting discovery of financial information and customer lists between competitors to "attorney-eyes-only"); Avocent Redmond Corp. v. Rose Elecs., Inc., 242 F.R.D. 574, 576 (W.D. Wash. 2007); Gaymar Indus., Inc. v. Cloud Nine, LLC, 2007 WL 582948, at *3-4 (D. Utah Feb. 20, 2007) (ordering "Attorneys' Eyes Only" designation for technical and financial information discovery between competitors); Safe Flight Instrument Corp. v. Sundstrand Data Control, Inc., 682 F.Supp. 20, 22 (D. Del. 1988) (restricting access to research and development, production, and sales of certain proprietary technology to "attorney's eyes only").

Here, in persuading the Court to enter the current Protective Order, Perfect 10 previously disclaimed that it was a "competitor" of Google. See Minute Order at 2; see also Declaration of Rachel M. Herrick, dated July 21, 2008 ("Herrick Decl."), at Ex. A, page 25-26 ("Perfect 10 and Google are not competitors in the search engine business"). In fact, however, as Perfect 10 has since made clear, its core theory of copyright liability is that Google **is** a "competitor," because Google's search engines allegedly compete with Perfect 10's content. Perfect 10's recently-allowed Second Amended Complaint alleges this competition in no uncertain terms. See Second Amended Complaint ¶ 73 (Google's "conduct enables Google to **compete directly** and unfairly with Perfect 10....") (emphasis added); id. ¶ 79 ("Google has in effect become the world's largest adult website ....").[6]

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decl.)

[6] Perfect 10 falsely claims that Google has misled the Court regarding image recognition technology. Unfortunately, Perfect 10's baseless accusations of deception (footnote continued)

More specifically, as discussed below, Perfect 10 is currently using image recognition technology in its business—and claims that Dr. Zada has the technical expertise to understand the contents of Google's image recognition technology documents. Perfect 10 also has a close business relationship with a company, PicScout, that also is in the business of image recognition technology. While Perfect 10 may have disclaimed being Google's competitor in the search engine business, that is irrelevant to whether Perfect 10 is an actual or potential competitor in the image recognition space. By Perfect 10's own claims and conduct, Google and Perfect 10 are competitors in this space, and the "competitor" case law regarding protective orders applies here.

Perfect 10's demand to see a competitor's documents regarding technology research and development is simply unprecedented. This is the sort of confidential and proprietary information that courts routinely protect by limiting access to attorney's eyes only. ***Google has not located a single reported case where a court found "good cause" for an attorney's eyes only limitation, but nevertheless permitted an officer or employee of the opposing party to access the information.*** In contrast, many cases have limited access to such information to outside counsel only, explicitly rejecting requests from employees and officers of parties to have such access. See, e.g., Nutratech, 242 F.R.D. at 556 (rejecting claim by a party's president that he needed access to confidential information in order to "assist, advise and direct Nutratech's counsel," noting that attorneys "commonly manage to conduct discovery

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are a constant refrain in this case. Indeed, Judge Matz recently rejected another series of similar accusations as "dubious." Order Granting Perfect 10's Mot. for Leave to File a Sec. Am. Compl., dated July 16, 2008, at 6 n.4. Here, other than a bare allegation from Perfect 10's attorney—who claims he has no expertise in this field—Perfect 10 provides no evidence that Google misled this Court on this or any other matter—because Google has never done so. Plainly, Perfect 10 is seeking to force

(footnote continued)

and litigation strategy without revealing such [confidential] information to their clients."); Vesta Corset Co. v. Carmen Foundations, 1999 WL 13257 (S.D.N.Y. 1999) (denying request of the presidents of both parties to have access to confidential business information, even when discovery of that information was necessary for prosecution of the case).[7]

**B. Documents Regarding Google's Image Recognition Technology Research and Development are So Commercially Sensitive That They Warrant the Highest Level of Protection Available.**

Because Google's efforts to develop and use image recognition technology are extremely sensitive and proprietary and reflect some of Google's most cutting-edge research and development, Google requests that access to these documents be strictly limited to outside counsel of record's eyes only. Google is a technology company, and this information goes to the heart of Google's proprietary and confidential research and development efforts. See Declaration of Chuck Rosenberg, dated July 21, 2008 ("Rosenberg Decl."), at ¶ 3. Image recognition technology remains in its infancy, but it is a rapidly developing space with significant competition in the market. Id. Google closely guards this proprietary information by storing it in secure locations and keeping it under strict terms of non-disclosure—indeed, although it is a matter of public record that Google employees have published papers on certain aspects of image recognition technology, Google *never* discloses

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Google to disclose its proprietary technology secrets in public filings in order to rebut Perfect 10's baseless accusations. which should be rejected out of hand.

[7] Indeed, courts have generally found it unacceptable for in-house counsel—much less actual parties—to have access to AEO materials. See Brown Bag Software v. Symantec Corp., 960 F.2d 1465 (9th Cir. 1992) (restricting access to proprietary source code and developmental plans to "attorney's eyes only," and precluding defendant's in-house counsel from viewing such materials); Intel Corp. v. Via Technologies, 198 F.R.D. 525 (N.D. Cal. 2000) (refusing to modify a protective order to give access to confidential materials to an in-house lawyer).

the engineering details of the operation of the technology outside the company.[8] Id. at ¶ 4. Because such technology in this highly competitive space would be extremely valuable if developed, disclosure of proprietary information could be devastating to Google's efforts to innovate in this field. Id. at ¶ 5. Even the fact that Google is developing technology in a particular area can put Google at a competitive disadvantage if disclosed. Id.

In the face of such a heightened risk of financial and competitive harm, Courts have repeatedly found that such technological information is deserving of special protections. See, e.g., Davis v. AT&T Corp., 1998 WL 912012, at *2 (W.D.N.Y. 1998) ("Courts often afford fuller protection to technical, proprietary information than that extended to ordinary business information.") (citing Safe Flight Instrument Corp., 682 F.Supp.2d at 22).

The primary risk to Google if this information were disclosed (intentionally or inadvertently) is that Google's actual or potential competitors could simply appropriate Google's research and development efforts for their own commercial purposes. Rosenberg Decl. ¶ 5. Another risk, however, is that this information could allow Google users to actually circumvent Google's services that employ image recognition. For example, one potential use of image recognition is to detect and filter out pornography (typically images with a large proportion of flesh

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[8] Perfect 10 submits a declaration from Dr. Zada, attaching two exhibits, in what appears to be an attempt to argue that Google's image recognition technology is public information. Not only is Dr. Zada's declaration incompetent to rebut the sworn declaration of Google employee Chuck Rosenberg, neither of the exhibits actually supports this point. Regarding Exhibit 1, Google is ***not*** seeking OCEO protection for published articles; it is seeking such protection for the actual proprietary technology reflected in the 78 pages of documents at issue. Regarding Exhibit 2, the highlighted portion is merely a statement that Google is capable of matching two identical electronic files. That has nothing to do with image recognition technology, or with this motion—as Dr. Zada would well know if he were indeed an expert in this field.

tones) in its search results. Rosenberg Decl. ¶ 6. Were information about Google's technology to fall into the wrong hands, content providers displaying inappropriate or illicit information could use their knowledge of Google's system to circumvent it in hopes that their content will be displayed in Google search results. Id. at ¶ 6. Indeed, third parties already have tried to work around the filters Google is currently using, including filters for Image Search. Id.

An OCEO limitation is the highest level of protection this Court can confer, and is fully consistent with the Court's prior ruling that Dr. Zada should be permitted to see the majority of documents produced in this case. Although Google has previously sought to create a "tier" of confidentiality to which Dr. Zada would not have access, Perfect 10 objected to that proposed "tier" primarily on the ground that Google allegedly intended to preclude Dr. Zada from accessing virtually every document in the case by "designat[ing] all non-public information as Confidential." Herrick Decl., at Ex. A (Joint Stipulation re. Google's Motion for Entry of Its Protective Order, filed November 22, 2005, at 6). Setting aside the relative merit of Perfect 10's accusation back in 2005, nothing could be further from the truth here and now. Google is ***not*** seeking to preclude Dr. Zada from accessing large quantities of documents, or to create a mechanism whereby Google could freely designate some undefined set of documents as OCEO. Instead, Google has narrowly tailored its request to limit access ***only*** to one clearly-defined category of documents, currently comprised of just 78 pages of documents out of Google's 45,000+ page document production. Those 78 pages contain some of Google's most prized, most confidential, and most protected technological research and development in image recognition technology, and deserve the highest level of protection permitted by this Court.[9]

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[9] Perfect 10 blithely objects that Google's motion is somehow untimely. This is absurd. Google was actively meeting and conferring with Perfect 10 during the last 2 1/2 months in the hopes that it could *avoid* bringing this to the Court. Google's

(footnote continued)

In addition to being consistent with the Court's prior rulings, Google's request is necessary and appropriate. Perfect 10 has and surely will argue that Dr. Zada can be "trusted" with this information, because he has not violated the terms of this (or other) protective orders. That is beside the point. Google's request has nothing to do with Dr. Zada's integrity. Instead, Google's request is based on the *extreme* sensitivity of this information, as is Google's right. The governing legal test has nothing to do with the trustworthiness of the party to whom the documents are to be disclosed. See, e.g., Brown Bag Software, 960 F.2d at 1470-72 (affirming protective order limiting in-house counsel from access to trade secrets, *despite assurances of protection and good faith and absent any reason to doubt those assurances*, because of the risk of inadvertent disclosure). Rather, the test focuses on the sensitivity of the information itself. See, e.g., Nutratech, 242 F.R.D. at 554-55.

While Google has no reason to suspect *intentional* disclosure of its proprietary information by Dr. Zada, Google is rightfully concerned with the possibility of *inadvertent* disclosure of the information—via a mis-addressed email, a document left on a desk and discovered in the course of a social event at the Perfect 10 Mansion, a presentation accidentally left behind in an L.A. coffee shop, or a slip of the tongue during a conversation Dr. Zada might have. This information is so sensitive, so proprietary, and so closely-guarded that Google would be remiss to not make every effort possible to prevent its disclosure. As the 9th Circuit has found, inadvertent disclosure is ***always*** a possibility, and assurances of good faith are ***not*** enough, because an inadvertent disclosure is by its very nature unintended. Brown Bag Software, 960 F.2d at 1470-72.

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document production was also ongoing during this time, and it would have been premature to present this issue for disposition before now. Finally, because Perfect 10 ***agreed*** to temporarily limit access to the documents in question to OCEO, there was no "emergency" requiring the Court's immediate attention.

Moreover, the risk of inadvertent disclosure is particularly high in this case because Perfect 10 is an active user of image recognition technology, and has a business relationship with PicScout Ltd. ("PicScout"), an image recognition company. Specifically, PicScout claims to "use a proprietary high-end image recognition technology that easily detects the image," and further claims to be "responsible for detecting over 90% of all online image infringements." Herrick Decl., Ex. B (picscout.com printout). Perfect 10's document production includes email correspondence between PicScout (including CEO Eyal Gura), Dr. Zada, and Jeffrey Mausner discussing PicScout's services and Google's claims in this case. Herrick Decl., Ex. C (emails). Perfect 10's document production further demonstrates that Perfect 10 has *actually used* PicScout's image recognition services as recently as March 2008 to locate alleged infringements of Perfect 10's copyrighted works. Herrick Decl., Ex. D (dozens of screenshots of "PicScout Report Manager" results). Further, a recent Declaration submitted by Dr. Zada confirms Perfect 10's continued business relationship with PicScout. Herrick Decl. ¶ 9.[10]

In these circumstances, ***where Perfect 10 employs image recognition technology in its own business,[11] and where Perfect 10's CEO Dr. Zada is in regular contact with a competing company offering image recognition services for profit (and is even on a first name basis with the company's CEO)***, the risk of inadvertent disclosure of Google's proprietary information cannot be understated. See Intel Corp. v. VIA Technologies, Inc., 198 F.R.D. 525, 530 (N.D. Cal. 2000) ("It

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[10] PicScout has also been involved in the present litigation. In the preliminary injunction proceedings, Perfect 10 submitted a declaration from Offir Gutelzon, PicScout co-founder and Chief Technology Officer. Herrick Decl., Ex. E; see also id. Ex. F (Reply Decl. of Norman Zada dated March 27, 2006 at ¶ 3).

[11] Again, Perfect 10's prior arguments that it does not compete with Google in the search engine business are irrelevant to whether Perfect 10 competes with Google and/or partners with Google's competitors in the image recognition technology space.

is humanly impossible to control the inadvertent disclosure of some of this information in any prolonged working relationship.") (citation omitted). Google's proprietary image recognition technology documents deserve OCEO protection.

**C. Perfect 10 Will Not Be Unduly Prejudiced By An Outside Counsel's Eyes Only Restriction on Google's 78 Pages of Image Recognition Documents.**

As balanced against the risk of inadvertent disclosure (high) and the potential harm to Google should such disclosure occur (great), Perfect 10 has shown no compelling need for Dr. Zada to have access to this information. Perfect 10 claims that it needs Dr. Zada's "expertise" to understand image recognition software documents, but there is no evidence to support that stand. Perfect 10 is ably represented by counsel, "[r]equiring a party to rely on its competent outside counsel does not create an undue and unnecessary burden," Intel Corp., 198 F.R.D. at 529 (citation omitted), and to the extent Perfect 10's counsel needs expert advice, it is free to retain an expert to give it. Protective Order ¶¶ 2, 5(d), 6, 14. Parties are routinely required to rely on experts to analyze technical information, and Perfect 10 will suffer no undue prejudice if it has to play by those same rules. Tellingly, nowhere in its portions of the Joint Stipulation does Perfect 10 state that it will not hire experts. The reason is obvious: of course, Perfect 10 will hire experts, as is routinely done in cases like these. Perfect 10 is no *pro se* plaintiff in need of special privileges from this Court. To the contrary, Perfect 10 is currently employing multiple attorneys to bring simultaneous lawsuits involving multiple federal and state law claims against no less than Google, Amazon.com, and Microsoft Corporation, among others. Because Perfect 10, like any sophisticated litigant with a large litigation team, will most certainly hire experts in connection with the technical aspects of this case, there is absolutely no reason why Perfect 10's CEO should be granted access to these

proprietary documents.[12] As such, Perfect would not be prejudiced in any way if these documents were restricted to outside counsel's eyes only.

Further, to the extent Dr. Zada *is* an expert in image recognition technology, that is *all the more reason* to preclude him from having access to the information, because such knowledge would dramatically increase the potential for competitive harm. See, e.g., Nutratech, 242 F.R.D. at 555; Vesta Corset Co., 1999 WL 13257, at *3; Safe Flight Instrument Corp., 682 F.Supp. at 22. Perfect 10 is currently using image recognition technology to identify alleged infringements of its works, and claims that Zada "has the technical background to determine whether image recognition technology is available to locate infringing images in Google's image search index." Herrick Decl. ¶ 10. Dr. Zada has also claimed to have spent part of a year, more than 35 years ago, doing "research on search algorithms and [to] have studied various aspects of computer science," and to "have written thousands of lines of computer code to solve a variety of applied mathematical problems." Decl. of Dr. Norman Zada, dated July __, 2008, at ¶ 6. Dr. Zada therefore claims to have the expertise to make use of that technology himself, which would permit him to *compete against* Google in this market. See, e.g., Armour of America, 73 Fed.Cl. at 600; Avocent Redmond Corp., 242 F.R.D. at 576. ***In such circumstances, Google has an absolute right to preclude an officer and employee of its claimed competitor,***

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[12] Dr. Zada's claim, in paragraph 6 of his Declaration, that he is the only person at Perfect 10 who can "analyze complex technical matters," is not only incorrect, it also demonstrates the fundamental injustice in Perfect 10's position. Contrary to Dr. Zada's suggestion, Google does not have "thousands of employees it can rely on" for this purpose, *because the Protective Order in this case affirmatively prevents them from accessing Perfect 10's highly confidential information.* Indeed, not even Google's in-house attorneys can access Perfect 10's highly confidential documents, yet Dr. Zada *is* permitted access to Google's highly confidential documents. And worse, Perfect 10 now seeks to tip the scales even further in its favor by permitting Dr. Zada to access Google's actual trade secrets. This injustice simply cannot stand.

***who professes expertise in this very field, from having access to Google's proprietary research and development in the field of image recognition technology.***

In sum, Perfect 10 may not claim that (1) it needs Dr. Zada's assistance to review and understand these highly proprietary technical documents regarding image recognition technology, while also maintaining that (2) Perfect 10 somehow does ***not*** use Dr. Zada's proclaimed expertise in image recognition technology in Perfect 10's own business activities. If Dr. Zada has such expertise, then Perfect 10's competitive business activities in employing image recognition technology (both alone and in partnership with PicScout) must preclude Dr. Zada from gaining access to Google's proprietary research and development in this field.[13]

**PERFECT 10'S POSITION REGARDING GOOGLE'S MOTION FOR PARTIAL RECONSIDERATION OF THE PROTECTIVE ORDER**

The Court should not modify the protective order, for the following reasons:

1. Dr. Zada is essential to the litigation of the case. Google's suggestion that Dr. Zada should not have access to the documents regarding image recognition would make production of those documents meaningless, since Perfect 10's attorney cannot fully understand or use those documents without Dr. Zada's assistance.

2. Dr. Zada has been participating in lawsuits with protective orders and has

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[13] Perfect 10 claims that Google is obstructing discovery. Not surprisingly, this charge is irrelevant to the present motion. Worse, Perfect 10 is flat wrong. Google has met all of its discovery obligations here—unlike Perfect 10, who is obstructing discovery at every opportunity. For example, a full three and a half years into this case, Perfect 10 has refused to answer basic interrogatories (seeking identification of infringements of specific copyrighted works—that is, the basic facts in any copyright case), refused to answer properly propounded requests for admission, failed to produce critical documents (including the hundreds of new and pending copyright registrations Perfect 10 has added to the case), and refused for three months to inform Google whether it will accept service of subpoenas on behalf of its models. If anyone is stonewalling here, it is Perfect 10. Google is presently meeting and conferring with Perfect 10 on these issues and will bring them before the Court in due course.

had access to the highest level of confidential information for seven years. There has never been a hint that Dr. Zada has breached a protective order.

3. Google's claim that Google is a competitor of Perfect 10 in a way that would allow Perfect 10 to use Google's trade secrets is frivolous. Google made this exact same argument before, and it was rejected by the Court. (See this Court's previous Order regarding the protective order, attached as Exhibit __ to Herrick declaration.) While Google unfairly competes with Perfect 10 in offering adult content, Perfect 10 does not compete with Google in offering search engine services or image recognition technology.

4. Google first raised trying to amend the protective order to prevent Dr. Zada from seeing documents in April. (Letter dated April 29, 2008, attached as Exhibit __ to Herrick declaration.) It was not until 2 ½ months after that that Google first raised this issue with the Court. If this was so important, Google should have raised it months ago, rather than having to do it on an emergency basis now.

There has been no breach of confidentiality by Dr. Zada, or anything else that would justify a change in the protective order.[14] Google's attempt to relitigate this issue with no new evidence goes against the specific instructions of Judge Matz. Those instructions were that parties avoid unnecessary motion practice by relitigating issues that have already been decided.

Throughout this case, Google has vehemently opposed producing documents relating to image recognition, claiming that they are irrelevant, despite their clear

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[14] Google claims that "Perfect 10 also has a close business relationship with a company, PicScout, that also is in the business of image recognition technology." That statement is false. Perfect 10 is merely one of PicScout's customers in its business of finding infringing material on the internet. Perfect 10 paid Picscout $5,000 to locate infringing Perfect 10 images on the internet, and PicScout was able to locate approximately 2,000 infringements using their technology, which obviously works. An employee of PicScout submitted a declaration in connection with the preliminary injunction motion. That company is based in Israel. Perfect 10 rarely communicates with them. (Zada declaration ¶3.)

relevance. Now that it has been ordered to produce those documents by both Judge Hillman and Judge Matz, Google has resorted to trying to keep them from Dr. Zada, who is clearly the person most qualified to determine what they show about Google's capabilities. The fact that Google may have misled both Judge Matz and the Court of Appeals regarding the availability of image recognition to locate infringing images may have something to do with Google's position of not wanting Dr. Zada to see these documents.

In opposition to Perfect 10's preliminary injunction motion, Google submitted a declaration from a third party, John Levine, who admitted that he was not privy to Google's internal technology, but who nevertheless stated that "[t]here is no image recognition technology that would allow Google to create an index or search effectively using characteristics of the images themselves." *See Levine Decl.*, ¶ 22 (PACER No. 44). Google did not submit declarations on image recognition from any *Google* employees, who would have known if image recognition technology was available that could find duplicates of Perfect 10's images and Perfect 10 copyright notices in Google's image search index. Judge Matz relied upon the Declaration of John Levine, holding: "Google's software lacks the ability to analyze every image on the internet, compare each image to all the other copyrighted images that exist in the world (or even to that much smaller subset of images that have been submitted to Google by copyright owners such as P10), and determine whether a certain image on the web infringes someone's copyright. Def.'s Levine Decl. ¶ 22." *See Perfect 10 v. Google,* 416 F. Supp. 2d 828, 858 (C.D. Cal. 2006) (footnote omitted).

The Levine Declaration then became the basis for the Ninth Circuit's conclusion that Google could not use image recognition technology to control infringement:

> Without image-recognition technology, Google lacks the practical ability to police the infringing activities of third-party websites. This distinguishes Google from the defendants held liable in *Napster* and *Fonovisa*. *See Napster*, 239 F.3d at 1023-24 (Napster had the ability to identify and police infringing conduct *by searching its index for song*

*titles*); *Fonovisa*, 76 F.3d at 262 (swap meet operator had the ability to identify and police infringing activity *by patrolling its premises*).

*Perfect 10 v. Amazon.com,* 508 F.3d at 1174 (emphasis added). The Ninth Circuit thereby recognized the relevance of image recognition technology, but erroneously concluded, based on the Levine Declaration, that it could not be used. Had Google informed the Court that it could recognize duplicates of Perfect 10's images using image recognition, the Ninth Circuit might have been willing to impose a requirement that Google search out and remove Perfect 10's images from Google's image search index. Armed with the truth, the Ninth Circuit could have concluded that image recognition is a simple method to reduce the damage to the copyright holder, under the test for contributory infringement it established in this case: "Applying our test, Google could be held contributorily liable if it had knowledge that infringing Perfect 10 images were available using its search engine, **could take simple measures to prevent further damage to Perfect 10's copyrighted works**, and failed to take such steps." *Perfect 10, Inc. v. Amazon.com,* 508 F.3d at 1172 (emphasis added). It is Perfect 10's contention that once it provided Google with its copyrighted images (which it did years ago), Google could use image recognition technology to find duplicates of those pictures *in Google's image search index.* Google could also find images in its image search index that have Perfect 10 copyright notices on them. Links from those images in Google's index to the infringing third-party websites could then be blocked or disabled. These are simple measures to reduce infringement.

Nevertheless, Google continued to disingenuously assert that image recognition technology is irrelevant to Perfect 10's claims and refused to produce documents on that subject. Google's arguments were rejected by both Judge Hillman and Judge Matz, and it was ordered to produce documents related to image recognition. Judge Matz stated:

> [T]he Ninth Circuit said, quote, "Without image recognition technology, Google lacks the practical ability to police the infringing activities of third-party websites," end quote. That language inherently confirms what I think common sense would warrant a finding for, and that is that

> the existence or non-existence, as the case may be, of image recognition technology is highly relevant. I don't understand how you can argue, as I think you have on this motion, Mr. Zeller, that it's not relevant. It either exists or it doesn't.

Reporter's Transcript Of Proceedings, April 14, 2008, hearing before Judge Matz on Objections to Discovery Order, page 25 line 3 to page 26 line 1, attached as Exhibit 3 to Mausner declaration.

[redacted] Dr. Zada needs to look at these documents to make that determination. [redacted] In 2007, three Google employees published a paper entitled "Clustering Billions of Images with Large Scale Nearest Neighbor Search." This paper showed that Google was able to compare 1.5 billion images with one another and organize them into clusters of similar appearing images. See Exhibit 1 to the Zada declaration, ¶5. Google has also allowed a Google employee to publicly answer questions regarding Google's image recognition capability. In May of 2007, this Google employee publicly admitted that "[w]e have the capability to detect exact duplicates (e.g. resolution, same size, same bits)." *See* Exhibit 2 and ¶5 of the Zada Declaration. Google wrongly claims that this document has nothing to

do with Google's image recognition capabilites.; in fact, the question the employee was asked was "Do you detect duplicate images." Google has no problem publicly disclosing this recent research involving image recognition. It seems that Google may be more concerned with covering up its misleading statements regarding availability of image recognition at the time of the preliminary injunction motion than it is with protecting actual current trade secrets.

Perfect 10's motion for preliminary injunction was extremely important to its continued existence. As a result of its failure to obtain an injunction, Perfect 10 has been forced to terminate most of its business, including its print magazine. Zada Decl., ¶ 3. If it turns out that the denial of the injunction was based upon misleading information provided by Google, the consequences would be extremely serious. [redacted][15]

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[15] Google argues that Perfect 10 can hire experts to take Dr. Zada's place, and that Perfect 10 has "multiple attorneys" working on these cases. Perfect 10 has no intention at this time of hiring experts regarding image recognition, but intends to rely on Dr. Zada's expertise. Perfect 10 is financially burdened because of this lawsuit and the fact that Perfect 10 is losing millions of dollars because virtually all of its content is available for free on Google. In contrast, Google is making billions of dollars per year from other people's content, including Perfect 10's. In all of the lawsuits, Perfect 10 is represented only by Mr. Mausner, who is assisted by two part-time contract attorneys. In contrast, Quinn Emanuel, Winston & Strawn, and Townsend Townsend & Crew have virtually unlimited attorneys, support, and resources to try to bury Perfect 10 in discovery disputes such as this. It is essential that Dr. Zada have access to all aspects of this case.

Google tries to deflect attention from its continual obstruction of discovery by falsely claiming that Perfect 10, rather than Google, is doing so. Google claims that "Perfect 10 has refused to answer basic interrogatories (seeking identification of infringements of specific copyrighted works—that is, the basic facts in any copyright case)." The interrogatories which Google refers to, which have been answered to the best of Perfect 10's ability, are very similar to the impossible-to-answer Super-Mega interrogatories that Amazon has propounded which are currently before the Court.

(footnote continued)

Google most likely misled the Court several years ago regarding the availability of image recognition technology, to Perfect 10's detriment. It would be exceedingly unfair now to prohibit Dr. Zada, the only person on Perfect 10's team likely capable of understanding such materials, from viewing them, particularly after winning a motion to compel on the matter and having that affirmed on appeal to Judge Matz. If this Court denies Dr. Zada the right to view these documents, Perfect 10's efforts will have been in vain.[16] Google claims that it did not mislead the courts,

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They are vastly more burdensome than interrogatories that this Court has already determined to be Mega requests in this very case. Perfect 10 has already provided the information Google seeks in the documents Perfect 10 has produced, and it would take ***hundreds of years*** of busy work to provide the charts that Google requests. Google claims that Perfect 10 has "refused to answer properly propounded requests for admission." What Google fails to reveal is that it propounded 962 RFAs, that Perfect 10 answered approximately 472 of them, that Perfect 10 objected to approximately 490 on the basis that Google's requests were completely overburdensome, but offered to respond to 100 additional RFAs of Google's choice. This is another example of Google's attempts to bury Perfect 10 in unnecessary discovery. Perfect 10 has not failed to produce copyright registrations. Regarding the model witnesses that Google complains about, Perfect 10 informed Google that it would accept service on behalf of 2 of the 9 models Google seeks to depose. Perfect 10 is under no obligation to do even that. For the others, Google will have to subpoena them.

[16] Google has very substantially obstructed discovery in this case, to the point where it has made a series of false statements to the court, and has repeatedly ignored court orders. Google tries to claim that it is showing "good faith" by allowing Perfect 10 to see search query results ***that were ordered produced over two years ago*** (Document Requests Nos. 47 and 48 dealing with search frequencies for such terms as sex, nude, Perfect 10, etc.). When Perfect 10 had to relitigate that same issue here and then prevailed on Google's appeal to Judge Matz, Google made the phony claim that it would be overwhelmingly burdensome for Google to produce such numerical data, even though Google was graphing it for its Google Trends program. So that statement turned out to be false as well. Additionally, Google was ordered to produce its DMCA log, appealed that ruling, lost, and has still not produced its DMCA log. Zada Decl. ¶6.

(footnote continued)

to believe that image recognition technology was not available to locate infringing images at the time of the preliminary injunction. Google states that "Google respectfully requests the opportunity to submit further briefing on this issue under seal and to have the matter heard at an in-person hearing in a sealed courtroom." Perfect 10 concurs in this request. Perfect 10 would like to have a full evidentiary hearing on the availability of image recognition at the time of the preliminary injunction, with the ability to cross-examine Google's witnesses. It will be necessary for Dr. Zada to have access to the image recognition documents for that hearing and to attend the hearing. Perfect 10 also requests that Google submit the documents in question regarding image recognition to Judge Hillman, under seal, on August 4, for the Court's consideration.

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Google claims that it is only asking for OCEO designation for about 78 pages out of over 45,000 pages of documents it produced. However, what Google fails to explain is that a significant portion of Google's production consists of multiple copies of the same DMCA notices, produced over and over again, many of which were Perfect 10's own notices to Google. Google has not produced anywhere close to 45,000 unique pages. Many other documents Google produced were completely unreadable. Zada Decl. ¶6. The 78 pages of documents relating to image recognition are documents that Perfect 10 fought hard to get produced. It is simply not true that Perfect 10 is in the image recognition business or competes with Google in that field. Google has no new evidence to justify its attempt to relitigate an issue that was already decided. It would be terribly unfair to deny Dr. Zada the ability to see such essential documents that Perfect 10 has fought so hard to get.

## CONCLUSION

### A. Google's Conclusion

For the foregoing reasons, Google respectfully requests that this Court modify the Protective Order entered in this case to create an "Outside Counsel's Eyes Only" designation, and to permit Google to apply that designation to documents regarding Google's image recognition technology research and development efforts.

### B. Perfect 10's Conclusion

Because Google has provided no new evidence or reason to justify the relitigation of an issue that was already decided two years ago, Perfect 10 respectfully requests that the Court deny Google's motion.

DATED: August 4, 2008

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