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10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA

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

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

DISCOVERY MATTER

**GOOGLE INC.'S SUPPLEMENTAL
 MEMORANDUM IN SUPPORT OF
 GOOGLE'S MOTION TO
 DETERMINE THE SUFFICIENCY
 OF PERFECT 10, INC.'S
 RESPONSES TO GOOGLE'S
 REQUESTS FOR ADMISSION,
 SETS 1 AND 2**

18 AND COUNTERCLAIM

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

Hon. Stephen J. Hillman
 Courtroom.: 550
 Hearing Date: November 17, 2008
 Hearing Time: 2:00 pm
 Discovery Cutoff: None Set
 Pretrial Conference Date: None Set
 Trial Date: None Set

1 **I. P10 SHOULD BE COMPELLED TO ANSWER RFAS IT IGNORED.**

2 **A. P10 Admits It Made No Attempt To Answer 478 Requests.**

3 As P10 concedes, it did not substantively respond to 478 of Google's RFAs. It.
4 Stip., at 5, 6, 348. Nor did it undertake any reasonable inquiry into the matters
5 requested, as Rule 36 requires. P10's misconduct is particularly egregious where, as
6 here, the Requests call for information readily at P10's disposal. For example,
7 Request No. 956 asks P10 to “[a]dmit that more than one thousand IMAGES are
8 currently displayed at perfect10.com.” The October 13, 2008 Zada Declaration, filed
9 in support of P10's motion for partial summary judgment against Alexa, demonstrates
10 that its president could have admitted this Request literally off the top of his head.
11 (See Case No. 05-cv-04753-AHM-SH, Dkt. No. 177, ¶ 4 (“Consumers are provided
12 access to more than 15,000 P10 images and videos on P10’s website...”). Instead,
13 P10 ignored Google's Request and then provided this information only when it served
14 P10's own interests in moving for summary judgment. The Federal Rules are
15 designed to avoid this type of sandbagging. P10's willful disregard of the Requests is
16 inexcusable. The Court need look no further to deem these Requests admitted. See
17 A. Farber & Partners, Inc. v. Garber, 237 F.R.D. 250, 257 (C.D.Cal. 2006) (deeming
18 requests admitted).

19 **B. P10's Excuses Do Not Pass Muster.**

20 **1. There is No Discovery Stay in Place.**

21 P10 posits that it should not have to respond to Google's requests because
22 discovery is stayed. The contention is frivolous. After P10 had made this claim,
23 Google specifically asked Judge Matz at an October 6, 2008 hearing to make clear
24 there is no discovery stay. He expressly confirmed that “[d]iscovery is not stayed.”
25 (Supp. Decl. of Rachel Herrick (“Supp. Decl.”), Ex. 1 [10/6/08 Transcript, p. 57].)

26 **2. P10's Claim of Undue Burden Fails.**

27 P10 claims it should not be required to respond to a “large number” of
28 Requests. The sole case it cites supports Google, however. In McCloud v. Bd. of

1 Geary County Commissioners, 2008 WL 3502436 (D. Kan. 2008), the court *rejected*
2 generalized objections to the number of requests served and ordered responses to
3 more than 425 requests. Id., at *3 (“A party opposing a discovery request cannot
4 make conclusory allegations that a request is irrelevant, immaterial, unduly
5 burdensome, or overly broad. Instead, the party resisting discovery *must show*
6 *specifically how each discovery request* is irrelevant, immaterial, unduly burdensome
7 or overly broad.” (emphasis in original)). Further, P10 does not dispute that this is a
8 complex case or that a large number of alleged DMCA notices, images and alleged
9 infringements are at issue here. As P10 concedes, large numbers of requests are
10 permitted in complex cases to help narrow the issues, as here. Jt. Stip., at 348 (citing
11 Solomon S.A. v. Alpina Sports Corp., 737 F.Supp. 720, 726 (D.N.H. 1990)). Indeed,
12 P10’s burden claim is belied by the number of Requests it served on Google—715, to
13 be exact—which Google answered. Having demanded and received answers to 715
14 of its own requests, P10’s unsubstantiated cries of burden are misplaced.

15 **3. P10’s Relevance Arguments Are Meritless.**

16 P10 tries to excuse its failures by arguing that *some* of the Requests—
17 specifically, the Requests regarding P10’s 2001 communications—are not relevant.
18 At no point during the parties’ weeks of meet and confer discussions did P10 raise
19 this argument. It is thus inappropriate here. Moreover, the Requests are indeed
20 relevant since they go directly to P10’s own claims. P10 inadvertently proves the
21 point by arguing that its 2001 communications comply with the DMCA. Of course,
22 such merits-based contentions cannot serve to defeat this discovery motion. To the
23 contrary, that P10 attempts to argue even here about the validity of those notices
24 shows that they are at issue in this case, and thus the appropriate subject of discovery.

25 As for the remaining Requests directed to P10’s 2004-2008 alleged DMCA
26 notices, P10’s only other relevance argument is that its communications “speak for
27 themselves.” Jt. Stip., at 346. This is a non-starter for two reasons. First, P10 failed
28 to assert this objection in its written responses, and thus waived it. Richmark Corp. v.

1 Timber Falling Consultants, 959 F.2d 1468, 1473 (9th Cir. 1992) ("[F]ailure to object
2 to discovery requests within the time required constitutes a waiver of any objection.")
3 Second, this has nothing to do with relevance. P10's alleged DMCA notices *are*
4 relevant, for the reasons set forth in the Joint Stipulation. Indeed, P10 admits that
5 there may be "justifiable reasons to seek admissions" regarding certain aspects of
6 P10's communications to Google. Jt. Stip., at 346. P10 may not unilaterally decide
7 to answer just some of these Requests—unless P10 withdraws its infringement claims
8 regarding the alleged notices for which it refused to provide responses.

9 **4. P10's excuse that it is "busy" is unavailing.**

10 P10 asks for a pass on its discovery obligations because it is busy, among other
11 tasks, filing its own motions for summary judgment in other cases. The excuse is
12 factually and legally baseless. This is not a situation where P10 is asking for some
13 reasonable extension of time. P10 has had, literally now, months to respond to the
14 Requests. Nor is there any Federal Rule that allows P10 to ignore its obligations and
15 prejudice Google's defense on the grounds that it is "too busy." Quite the opposite.
16 That P10 is proceeding with dispositive motions only serves to underscore that P10
17 should be deemed to have admitted the Requests or be compelled to answer them
18 immediately. P10 chose to sue Google and institute other cases as well. It now must
19 comply with the Rules and its discovery obligations as any plaintiff is expected to do.

20 **5. P10's attempt to point the finger at Google falls short.**

21 P10 asserts its conduct should be excused because Google supposedly delayed
22 in amending Google's own responses. This gets P10 nowhere. Google's responses
23 are not at issue here, and if P10 believes that Google has been remiss in discovery it
24 must send a meet and confer letter as the Rules require and proceed with a motion.¹

25
26 ¹ P10 has never done so for the simple reason that its allegations about Google's
27 responses are also false. Google properly responded to all 715 of P10's RFAs. The
28 very next month after P10 had complained about them, Google (unlike P10 here)
(footnote continued)

1 P10's argument does not justify its refusal to provide the discovery sought here.

2 **II. P10 SHOULD BE ORDERED TO DELETE ITS COMMENTARY.**

3 P10 argues that its insertion of non-responsive commentary was necessary
4 because the Requests in question called for “half-truths.” P10 cites only an
5 inapposite, out-of-circuit district court case from over fifty years ago, Knowlton v.
6 Atchison, T. & S. F. Ry. Co., 11 F.R.D. 62 (D. Mo. 1951), that interpreted the 1946
7 version of Rule 36. It also fails to cite a single example of a Request supposedly
8 calling for a “half-truth” or one that could not be admitted or denied without the
9 additional commentary. Indeed, none of Google’s Requests fit this bill. For
10 example, Request No. 200 asks P10 to “[a]dmit that YOU have used optimization
11 techniques to increase the likelihood that perfect10.com will be indexed against key
12 words used by users of GOOGLE’s search engine.” P10’s response included the
13 following argumentative commentary: “However, because GOOGLE biases its
14 search results to favor infringing advertising affiliates, Perfect 10’s efforts have not
15 been successful.” In addition to being demonstrably false, this statement has nothing
16 to do with the request, which simply asks whether P10 has used certain optimization
17 techniques—P10 either has, or it hasn’t. See also Request Nos. 18, 19, 158, 207, 391.

18 As P10 concedes, courts must test whether “any qualification which has been
19 supplied is a *good faith* qualification.” Jt. Stip., at 450. P10 has failed to show that
20 *any* of its commentary were necessary, good-faith qualifications that addressed the
21 truth of the matter requested. Indeed, they were not, and should be removed.²

22

23 _____
24 agreed in writing to amend specific responses. (Suppl. Decl., ¶ 14.) Google served
25 its amended responses in early August 2008. P10 has never voiced a single
26 complaint about them—until Google served P10 with this motion. (Id.)

27 ² P10 wrongly claims that the portion of Google’s motion regarding its First Set
28 of Requests is premature because, after five months of stonewalling, P10 said that it
might amend *certain* unspecified responses in the Set. Google is well within its rights
to bring this motion after more than five months of diligent but unsuccessful meet and

(footnote continued)

1 **III. P10'S EVASIVE DENIALS ARE IMPROPER.**

2 P10's argument that a denial on the basis of its objections somehow "responds
3 to the substance of the matter requested" is incorrect. P10 cites no authority in
4 support, and in fact, concedes that a denial must "fairly meet the substance of the
5 request." Jt. Stip., at 450. P10's responses to these Requests are evasive as they
6 make no attempt to address the substance of the matter requested.³

7 **IV. P10'S OTHER OBJECTIONS ARE MERITLESS.**

8 P10's argument that Request Nos. 2, 3, 4, and 5 seek a conclusion of law fails
9 because requests referencing specific facts and asking for P10's contention as to how
10 the governing law applies to those facts are proper. See Fed. R. Civ. P. 36(a)(1)(A).
11 These particular requests ask P10 to admit that specific copyrighted works (like the
12 perfect.com website), are compilations as defined by the Copyright Act. As such,
13 these Requests must be answered. Moreover, P10 apparently concedes that Request
14 Nos. 53, 91, 103, 136, 139, and 153 are not objectionable on this basis. Similarly,
15 P10 does not dispute (and thus concedes) that its objection that *Google* has
16 information called for by the Requests is contrary to the clear text of the Rules. Thus,
17 P10's objections are improper and do not excuse its failure to respond.

18 DATED: November 3, 2008

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20 By /s/ Rachel M. Herrick

21 Rachel M. Herrick
22 Attorneys for Defendant Google Inc.

23 confer efforts. Moreover, when P10 made a similar generalized promise to amend
24 the Second Set, it later reneged. (Supp. Decl., ¶ 11.) Even now, P10 still has yet to
25 agree to amend even a single response in the First Set. This motion is ripe.

26 ³ P10 conflates Issues 2 and 3, attempting to extend its argument that non-
27 responsive commentary can be inserted in responses to justify its evasive denials.
28 But P10's only cited authority states that "voluntary statements" and "unresponsive
matter" should *not* be included in responses. Knowlton, 11 F.R.D. at 66.