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11 UNITED STATES DISTRICT COURT  
 12 CENTRAL DISTRICT OF CALIFORNIA

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

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

**DEFENDANT GOOGLE INC'S  
 AMENDED NOTICE OF MOTION  
 AND MOTION FOR AN ORDER  
 SETTING A SCHEDULE FOR THE  
 FILING OF DISPOSITIVE  
 MOTIONS**

**MEMORANDUM OF POINTS AND  
 AUTHORITIES**

19 AND COUNTERCLAIM  
 20  
 21 PERFECT 10, INC., a California  
 corporation,  
 22  
 Plaintiff,  
 23  
 vs.  
 24 AMAZON.COM, INC., a corporation;  
 A9.COM, INC., a corporation; and  
 25 DOES 1 through 100, inclusive,  
 26  
 Defendants.

Hearing Date: June 1, 2009  
 Time: 10:00 a.m.  
 Place: Courtroom 14

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

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on June 1, 2009, at 10:00 a.m., in the  
3 courtroom of the Honorable A. Howard Matz, located at 312 North Spring Street,  
4 Los Angeles, California 90012, Courtroom 14, Defendant Google Inc. (“Google”)  
5 shall and hereby does move this Court for an order setting a schedule for the filing  
6 of dispositive motions in this action. Specifically, Google asks the Court for an  
7 order providing that the parties shall brief and file their cross-motions regarding  
8 Google’s DMCA safe harbor defense prior to briefing and filing their cross-motions  
9 regarding copyright infringement liability, because the former motion will, if  
10 granted, moot the latter motion. Google further shall and hereby moves for relief  
11 from the 20-day hold requirement of Local Rule 7-3. Google has discussed this  
12 motion thoroughly with Perfect 10’s counsel but could not reach any resolution.  
13 Both parties represented that their positions on the issue are final. Further, Perfect  
14 10 represented that it would seek to file its first dispositive motion in the next few  
15 weeks. Accordingly, Google respectfully requests that this Court grant it relief from  
16 the 20-day waiting period under Local Rule 7.3, because if Google waits until the  
17 expiration of that period before filing this motion, Google will have suffered the  
18 harm it seeks to avoid by this motion.

19 This motion is based on this Notice of Motion and Motion, the Memorandum  
20 of Points and Authorities filed concurrently herewith, the Declaration of  
21 Rachel Herrick Kassabian in support thereof, the pleadings and other papers on file  
22 in this action, and such additional evidence as may be presented at or before the  
23 hearing.

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**Statement of Local Rule 7-3 Compliance**

Google’s counsel and Perfect 10’s counsel engaged in a Local Rule 7-3 pre-filing conference regarding the order in which dispositive motions should be filed and who should be the movant on these dispositive motions on May 5, 2009.

DATED: May 8, 2009

QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP

By /s/ \_\_\_\_\_  
Michael Zeller  
Attorneys for Defendant GOOGLE INC.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **Preliminary Statement**

3 Google brings this motion for an order setting a schedule for the filing of  
4 dispositive motions in this action. Google specifically requests that the Court order  
5 that Google’s Motions for Summary Judgment of Entitlement to Safe Harbor Under  
6 17 U.S.C. § 512(b), (c), and (d) of the DMCA, and any opposition filed by Perfect  
7 10, be briefed and resolved prior to any dispositive motion by Perfect 10 regarding  
8 copyright liability. This Court has rightly directed the parties to sequence their  
9 motions so that motions having potentially preclusive effect on other motions be  
10 filed and decided first. Ordering briefing and resolution of Google’s DMCA  
11 motions first is an appropriate and efficient approach to the parties’ motions. If  
12 granted, Google’s DMCA motions will moot the central issue in Perfect 10’s  
13 planned infringement liability motion—that is, whether Google may be held liable  
14 for monetary relief for direct or secondary copyright infringement. Other courts  
15 have elected to resolve DMCA issues before copyright liability issues for this very  
16 reason.

17 Moreover, Perfect 10’s anticipated motion for summary judgment on  
18 copyright liability is premature because relevant discovery is still outstanding.  
19 Thus, resolution of Perfect 10’s motion will be delayed by the fact that Google will  
20 have no choice but to respond with a Rule 56(f) motion. Thus, hearing Google’s  
21 DMCA motions first serves the interests of judicial economy, and comports with  
22 this Court’s guidance regarding the sequence of dispositive motions.

23 Accordingly, Google respectfully requests that this Court issue an order that  
24 Google shall file its motions for summary judgment on entitlement to DMCA safe  
25 harbor within 30 days of the Court’s order on this motion, the briefing on said  
26 motions shall comply with the schedule set forth in the [Proposed] Order filed  
27 concurrently herewith, and that Perfect 10 shall not file its planned motion until after  
28 Google’s DMCA motions are resolved.

1 **Background**

2 **A. The Court Advises the Parties to File Dispositive Motions in an**  
3 **Order That Would Potentially Moot Later-Filed Motions.**

4 On August 18, 2008, counsel for the parties appeared before the Court at a  
5 scheduling conference. (Declaration of Rachel Herrick Kassabian, ¶ 3.) Among the  
6 many issues discussed was the number of dispositive motions Google expects to  
7 file. (Id., Ex. A, at 48:1-5.) During the course of that discussion, the Court  
8 instructed the parties to stipulate to the sequence for filing dispositive motions such  
9 that those that would potentially moot other motions be filed first:

10 Now, what you should do, and what I'm ordering you to do, Mr. Zeller  
11 -- and I don't have a view on how it would shake out -- is *determine*  
12 *which of these motions, if it's meritorious or possibly if it's lacking in*  
13 *merit, would preclude the need the need for any later motion to be*  
14 *filed.*

15 In other words, figure out and work with Mr. Mausner. And I want you  
16 to stipulate to a sequence. And we can figure out the timing, because *if*  
17 *there is some motions which, if I find them to be meritorious, would*  
18 *moot the need for later motions, then the later motions don't get*  
19 *made*, your firm loses a little bit of money, and Google pays a little bit  
20 less in attorneys' fees, and the Court doesn't have to waste time.

21 (Id., 48:9-20; see also id., 49:12-14 (emphasis added)).

22 **B. Google Initiates Meet and Confer Efforts Regarding Its Planned**  
23 **Dispositive Motions on Its DMCA Safe Harbor Defense in**  
24 **November 2008.**

25 Following the Court's instructions at the August 18, 2008 conference, Google  
26 met and conferred with Perfect 10 in November 2008 pursuant to Local Rule 7-3  
27 concerning Google's intention to file motions for summary judgment based on  
28 Google's entitlement to safe harbor under the DMCA, 17 U.S.C. §§ 512(b), (c),

1 and (d). (Id., ¶ 4, Ex. B.) Later that same day, Perfect 10 sent Google  
2 correspondence expressing its intention to file a cross-motion for summary  
3 judgment on this same issue. (Id., ¶ 5, Ex. C.)

4 In December 2008, just before the Court entered a stay of this action, Google  
5 continued its meet and confer efforts, discussing the substantive issues raised in  
6 Google’s planned DMCA motions, Google’s intent to file one motion addressing  
7 each of the relevant subsections of the DMCA implicated here (for a total of three  
8 motions), and the amount of time the parties would need to prepare opposition and  
9 reply papers. (Id., ¶ 6.) The parties discussed a briefing schedule wherein Perfect  
10 10’s opposition and cross-motion would be filed four weeks after Google’s moving  
11 papers, Google’s reply papers would be filed four weeks after Perfect 10’s  
12 opposition papers, and the motions would be heard four weeks later. (Id.) Though  
13 the parties did not reach final agreement on the precise briefing schedule for  
14 Google’s DMCA motion and Perfect 10’s cross-motion before the Court stayed the  
15 litigation on December 22, 2008, Perfect 10 did not dispute Google’s intention to be  
16 the moving party on this affirmative defense. (Id.)

17 **C. Perfect 10 States its Intention to File a Dispositive Motion**  
18 **Regarding Copyright Infringement Liability.**

19 On April 23, 2009, the day the stay expired, Google sent Perfect 10  
20 correspondence seeking to resume and complete the parties’ meet and confer efforts  
21 regarding a stipulated schedule under which Google would file its DMCA summary  
22 judgment motions and Perfect 10 would file its opposition and/or cross-motion.  
23 (Id., ¶ 7, Ex. D.) Later that same day, Perfect 10 responded to Google’s letter by  
24 asking to initiate meet and confer efforts regarding Perfect 10’s plan to file a  
25 summary judgment motion regarding direct, contributory, and vicarious copyright  
26 infringement liability. (Id., ¶ 8, Ex. E.) Perfect 10’s correspondence further  
27 indicated that its planned motion would also address the DMCA issues that the  
28



1 parties had previously discussed would be presented by Google in Google’s DMCA  
2 motion. (Id.)

3 On May 5, 2009, the parties met and conferred telephonically regarding, *inter*  
4 *alia*, their planned dispositive motions. (Id., ¶ 9.) During that call, Google  
5 explained that because Google’s DMCA motions could, if granted, moot Perfect  
6 10’s planned infringement liability motion, it would be more efficient for the parties  
7 to brief (and the Court to decide) the DMCA motions first. Nevertheless, Perfect 10  
8 refused to agree that Google’s DMCA motions be filed and resolved first. Indeed,  
9 Perfect 10 confirmed that (1) its liability motion would include a section addressing  
10 the DMCA (despite the parties’ earlier discussions that Google would be the moving  
11 party on this affirmative defense), and (2) Perfect 10 also intended to file a cross-  
12 motion to Google’s DMCA motion (thereby consuming the Court’s time and the  
13 parties’ resources by briefing the same issue twice). (Id.)

14 In an attempt to compromise, Google offered that Perfect 10 could be the  
15 moving party regarding infringement liability (consistent with Perfect 10’s burden  
16 of proof), but that Google should remain the moving party regarding its DMCA  
17 affirmative defense (consistent with Google’s burden of proof), as the parties had  
18 previously discussed. (Id.) Perfect 10 refused Google’s offer, insisting that it be the  
19 moving party on both issues. (Id.)

20 Thus, the parties did not reach agreement regarding the order in which their  
21 dispositive motions should be filed and heard by the Court, or which party should be  
22 the moving party for each set of motions. (Id., ¶ 10.) Both parties confirmed during  
23 the May 5 call that their positions on this issue are final. (Id.) Perfect 10 indicated  
24 it would file its planned infringement liability motion soon, likely in the next few  
25 weeks. (Id.) Google asked Perfect 10 if it would agree to jointly submit these  
26 scheduling questions to the Court, but Perfect 10 refused this as well, thereby  
27 necessitating this Motion. (Id.) Perfect 10 did, however, reiterate its agreement to  
28 Google’s proposal that the parties have four weeks to file opposition and reply

1 papers regarding Google’s DMCA motion, and that the motions be heard four weeks  
2 after reply briefs are filed. (Id.)

3 **Argument**

4 **I. GOOGLE’S DMCA SUMMARY JUDGMENT MOTIONS SHOULD**  
5 **BE HEARD FIRST, SINCE THEY WOULD POTENTIALLY MOOT**  
6 **PERFECT 10’S LIABILITY MOTION.**

7 Google’s motions for summary judgment regarding entitlement to safe harbor  
8 under subsections 512(b), (c), and (d) of the DMCA should be heard before Perfect  
9 10’s planned infringement liability motion. Google has asserted the DMCA safe  
10 harbor as one of its affirmative defenses. (Answer to Second Amended Complaint  
11 and Counterclaims, docket no. 324)

12 The DMCA limits the liability of service providers for copyright infringement  
13 in various circumstances, if the service providers meet certain criteria. See 17  
14 U.S.C. § 512(b), (c), (d); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1175  
15 (9th Cir. 2007) (limiting liability “for infringement of copyright by reason of the  
16 intermediate and temporary storage of material on a system or network controlled or  
17 operated by or for the service provider,” “for infringement of copyright by reason of  
18 the storage at the direction of a user of material that resides on a system or network  
19 controlled or operated by or for the service provider,” and “for infringement of  
20 copyright by reason of the provider referring or linking users to an online location  
21 containing infringing material or infringing activity, by using information location  
22 tools, including a directory, index, reference, pointer, or hypertext link,”) More  
23 specifically, the DMCA safe harbors protect qualifying service providers from  
24 liability for all monetary relief for direct, vicarious and contributory infringement  
25 claims. Io Group, Inc. v. Veoh Networks, Inc., 586 F.Supp.2d 1132, 1141 (N.D.  
26 Cal. 2008). Thus, if a court grants a service provider’s summary judgment motion  
27 regarding DMCA safe harbor, it need not reach the issue of whether the service  
28

1 provider is liable for monetary relief for direct or secondary copyright infringement.  
2 See 17 U.S.C. § 512(b), (c), (d).

3 Other courts have elected to resolve DMCA issues before copyright liability  
4 issues. See generally Io Group, 586 F.Supp.2d at 1141 (deciding that it was more  
5 efficient to address defendant’s motion for summary judgment as to the applicability  
6 of safe harbor under the DMCA before plaintiff’s motion for summary judgment on  
7 liability); Corbis Corp. v. Amazon.com, Inc., 351 F.Supp.2d 1090, 1098 (W.D.  
8 Wash. 2004) (“[E]ven if [plaintiff’s] copyright infringement claims can [bear] fruit,  
9 [defendant’s] liability protection ensures that the claims will wither on the vine”).  
10 Indeed, one court in this district has described the DMCA safe harbor defense as a  
11 “preliminary issue” to be addressed *before* the ultimate question of infringement  
12 liability is reached. See Hendrickson v. EBay Inc., 165 F.Supp.2d 1082, 1087-88  
13 (C.D. Cal. 2001) (“Before the Court reaches the merits of that [secondary copyright  
14 liability] question, the Court must address a preliminary issue: whether the DMCA  
15 shields eBay from liability for copyright infringement.”)

16 Here, Google has met and conferred with Perfect 10 regarding Google’s  
17 intention to file summary judgment motions regarding Google’s entitlement to  
18 DMCA safe harbor. Google’s DMCA motion should be heard first, before Perfect  
19 10’s planned infringement liability motion, because this Court has rightly ordered  
20 the parties to sequence their motions so that motions having potentially preclusive  
21 effect on other motions be filed and decided first. Google’s DMCA motion, if  
22 granted, will moot the central issue in Perfect 10’s planned infringement liability  
23 motion—namely, whether Google may be held liable for monetary relief for direct  
24 or secondary copyright infringement. Thus, hearing Google’s DMCA motions first  
25 serves the interests of judicial economy, and comports with this Court’s directives  
26 regarding the sequence of dispositive motions.

27 By contrast, even if Perfect 10 were to succeed on its copyright liability  
28 motion, the Court would still need to reach Google’s DMCA motion. Nothing

1 would be gained, and no motions would be eliminated, by addressing Perfect 10's  
2 liability motion first. Indeed, judicial and party resources may well be wasted by  
3 proceeding in this fashion. This is precisely what the Court has indicated it wants to  
4 avoid. (Kassabian Dec., ¶ 3, Ex. A, 48:9-20.)

5 Perfect 10 likely will argue that it can resolve this problem by including  
6 DMCA issues in its liability motion. This would not resolve anything. The DMCA  
7 is a complete defense to Perfect 10's copyright infringement claims. If Google  
8 prevails under the DMCA, the Court and the parties will have wasted time and  
9 resources on numerous issues that Perfect 10's liability motion necessarily must  
10 raise, such as ownership and other prima facie elements of an infringement claim.  
11 Having Perfect 10's motion proceed before or simultaneously with briefing on the  
12 DMCA cannot avoid that problem. Furthermore, Google informed Perfect 10 many  
13 months ago that Google intended to file a DMCA summary judgment motion. (Joint  
14 Rule 16(b) Report, Docket No. 334, at 21; Kassabian Dec., ¶ 4, Ex. B.) Perfect 10  
15 never contested that Google should be the moving party on this affirmative defense.  
16 (Kassabian Dec., ¶ 5, Ex. C.) Indeed, as the party asserting (and bearing the burden  
17 of proof on) the DMCA affirmative defense, Google should have the right to be the  
18 moving party on this important issue. Limiting Google to just a single opposition  
19 brief/cross-motion on this critical defense would deny Google the opportunity to  
20 fully and fairly defend itself against Perfect 10's copyright claims. Accordingly,  
21 Google's DMCA motions should be heard before Perfect 10's liability motion, and  
22 Google should be deemed the moving party on the DMCA issue.<sup>1</sup>

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24 <sup>1</sup> Of course, Perfect 10's plan to address the DMCA in both its anticipated  
25 copyright liability motion and its cross-motion to Google's DMCA motion flies  
26 even more directly in the face of this Court's Scheduling and Case Management  
27 Order, which holds that:

28 The parties shall avoid filing cross-motions for summary judgment on  
identical issues of law, such that the papers would be unnecessarily  
(footnote continued)

1 **II. PERFECT 10'S SUMMARY JUDGMENT MOTION ON LIABILITY IS**  
2 **PREMATURE BECAUSE DISCOVERY IS OUTSTANDING.**

3 Google's DMCA motions should be heard first for the additional reason that  
4 Perfect 10's anticipated motion for summary judgment on copyright liability is  
5 premature. At the October 6, 2008 conference, this Court warned Perfect 10 in no  
6 uncertain terms that it may not reach dispositive motion practice on its copyright  
7 infringement claims without first providing the necessary discovery:

8 Don't lose sight of the point, Mr. Mausner. I am trying to get you,  
9 without being hostile to you at all, to understand what evidence is and  
10 what you're going to have to prove at trial. And that's my premise  
11 here. *If you are going to have to prove something at trial, you are*  
12 *going to have to prove it on summary judgment, even as to just*  
13 *liability, okay?*

14 \* \* \*

15 *I'm not going to let you get to summary judgment and prevail on*  
16 *anything unless the evidence of all of the elements you have to prove*  
17 *for contributory liability . . . has been established.*

18 (Kassabian Dec., ¶ 12, Ex. G, 27:1-7, and 36:16-20) (emphasis added).

19 As of this writing, Google has three discovery motions pending before  
20 Magistrate Judge Hillman and is currently meeting and conferring with Perfect 10

21 \_\_\_\_\_  
22 cumulative. (E.g., a party's moving and reply papers on its own motion  
23 would advance the same arguments as its opposition papers to the other  
party's cross-motion").

(Kassabian Dec., ¶ 11, Ex. F - Scheduling and Case Management Order, ¶ 5.)

24 This is precisely what Perfect 10 plans to do: advance arguments regarding Google's  
25 DMCA safe harbor defense in its moving and reply papers on its own copyright  
26 liability motion, and also address that same issue in its opposition/ cross-motion to  
27 Google's DMCA motions. Perfect 10 should not be permitted to waste this Court's  
(footnote continued)

1 regarding a number of additional discovery disputes.<sup>2</sup> Perhaps in hopes of avoiding  
2 these discovery obligations, Perfect 10 now wants to put the proverbial cart before  
3 the horse and file its dispositive motion without first giving Google even the most  
4 basic discovery it has requested regarding Perfect 10's copyright infringement  
5 claims, including:

- 6 • Evidence of copyright ownership and registration of the images at issue—a  
7 necessary predicate for maintaining Perfect 10's copyright infringement  
8 claims. (See Motion to Compel Perfect 10 to Produce Documents, Comply  
9 with the Protective Order, and Affix Document Control Numbers to its  
10 Document Productions, filed May 7, 2009, now pending (Docket No. 407)).
- 11 • An identification of the alleged infringements Perfect 10 is asserting here,  
12 including evidence of the date and location of infringement, publication date  
13 of the infringed image and registration date. (See Google Inc.'s Motion to  
14 Compel Further Responses to Interrogatory Nos. 3 and 11, filed August 15,  
15 2008, still pending (Docket No. 336)).
- 16 • Evidence regarding the alleged market (if any) for Perfect 10's cell phone  
17 download images—relevant to Google's fair use defense. (See Motion to  
18 Compel Perfect 10, Inc. to Produce Documents, Comply with the Protective  
19 Order, and Affix Document Control Numbers to its Document Productions,  
20 filed May 7, 2009, now pending (Docket No. 407)).

21 All of this discovery is directly relevant to Perfect 10's planned liability  
22 motion, and Google is entitled to it before it must defend against such a motion.  
23 Thus, Google will have no choice but to file a Rule 56(f) motion in response to

24 \_\_\_\_\_  
25 resources by filing cumulative documents addressing the very same issue in three  
26 different briefs.

1 Perfect 10's presently contemplated summary judgment motion on liability. See  
2 Fed. R. Civ. P. 56(f). Rule 56(f) protects parties from being "railroaded" by  
3 premature motions such as Perfect 10's. Celotex Corp. v. Catrett, 477 U.S. 317, 326  
4 (1986). Indeed, "summary judgment should 'be refused where the nonmoving party  
5 has not had the opportunity to discover information that is essential to [its]  
6 opposition.'" Burnside-Ott Aviation Training Center, Inc. v. United States, 985 F.2d  
7 1574, 1582 (Fed. Cir. 1993)(quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242,  
8 250 n.5 (1986)).

9 Accordingly, Perfect 10's failure to provide this basic discovery, and the  
10 corresponding pendency of Google's outstanding discovery motions regarding that  
11 discovery, provides a further basis for ordering that Perfect 10's infringement  
12 liability motion is not ripe for adjudication now. Hearing Google's DMCA motion  
13 first will allow time for the Court's resolution of Google's outstanding discovery  
14 motions, and Perfect 10's compliance with the resulting orders.

### 15 Conclusion

16 For the foregoing reasons, Google respectfully requests that this Court order  
17 that Google's Motions for Summary Judgment of Entitlement to Safe Harbor Under  
18 17 U.S.C. § 512(b), (c), and (d) of the DMCA, and any cross-motions filed by  
19 Perfect 10, be briefed and resolved prior to the filing of any dispositive motion by  
20 Perfect 10 regarding copyright liability. Google further requests that the briefing on  
21 said motions follow the schedule set forth in the [Proposed] Order filed concurrently  
22  
23  
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26 <sup>2</sup> Two of Google's discovery motions were pending at the time the court entered  
27 the stay on December 22, 2008, and the third motion was filed on May 7, 2009.  
28 (See Docket Nos. 336, 371, and 407.)

1 herewith. Google further requests that it be relieved of the 20-day hold requirement  
2 of Local Rule 7-3 with respect to this motion.<sup>3</sup>  
3

4 DATED: May 8, 2009

QUINN EMANUEL URQUHART OLIVER &  
HEDGES, LLP

6 By /s/ \_\_\_\_\_  
7 Michael Zeller  
8 Attorneys for Defendant GOOGLE INC.  
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18 <sup>3</sup> Under the Local Rules, parties are required to wait 20 days after engaging in  
19 the pre-filing conference in advance of an anticipated motion. There is good cause  
20 to grant Google relief from this 20-day requirement. First, the parties confirmed  
21 during their pre-filing conference that their respective positions regarding the  
22 sequence for these dispositive motions were final. (Kassabian Dec., ¶ 10.) As such,  
23 nothing would be accomplished by further delay of resolution of these issues.  
24 Second, Perfect 10 represented that it would file its motion soon, likely in the next  
25 few weeks. (Id.) Without relief from the 20-day requirement, Perfect 10 is likely to  
26 file its liability motion before the Court has the opportunity to consider the present  
27 motion. The spirit of the Court’s prior directive and efficiency therefore support  
28 relieving Google of the 20-day requirement so that the Court can resolve the  
sequence of the motions before they are filed. Otherwise, both the parties and the  
Court may be burdened by and waste resources on motions that have been filed in a  
less-than-optimal sequence that has not been approved by the Court.