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UNITED STATES DISTRICT COURT

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CENTRAL DISTRICT OF CALIFORNIA

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PERFECT 10, INC., a California corporation,

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Plaintiff,

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vs.

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

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Defendants.

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19

AND COUNTERCLAIM

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PERFECT 10, INC., a California corporation,

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Plaintiff,

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vs.

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

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Defendants.

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

GOOGLE INC.'S NOTICE OF MOTION AND MOTION FOR LEAVE TO TAKE ADDITIONAL DEPOSITIONS; MEMORANDUM OF POINTS AND AUTHORITIES

[Declaration of Rachel Herrick Kassabian filed concurrently herewith]

Hon. A. Howard Matz

Date: August 17, 2009

Time: 10:00 a.m.

Crtrm.: 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 August 17, 2009, at 10:00 a.m., in the
3 courtroom of the Honorable A. Howard Matz, located at 312 N. Spring Street, Los
4 Angeles, CA 90012, Courtroom 14, Defendant Google Inc. (“Google”) shall and
5 hereby does move this Court for an order granting leave to take additional
6 depositions beyond Rule 30’s default limit of ten (10). The ground for this motion
7 is that Perfect 10 has brought wide-ranging claims against Google, including federal
8 claims of copyright and trademark infringement and state law claims of publicity
9 violations, unfair competition, misappropriation, and unjust enrichment. As one
10 example, Perfect 10 is relying on rights purportedly assigned by or otherwise on
11 behalf of nine models¹ in connection with its right of publicity and other claims.
12 Google will need at least 10 depositions regarding Perfect 10’s alleged copyrights,
13 trademarks, and other property or assets (among other things). In addition, Google
14 should be permitted to depose these nine models.

15 This motion is based on this Notice of Motion and Motion, the Memorandum
16 of Points and Authorities and Declaration of Rachel Herrick Kassabian in support
17 thereof, the pleadings and other papers on file in this action, and such additional
18 evidence as may be presented at or before the hearing.

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¹ More specifically, these models are Amy Weber, Amber Smith, Aria Giovanni, Irina Voronina, Monika Zsibrita, Nataskia Maren, Sasha Brinkova, Shannon Hobbs and Talia Harvalik.

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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 Google’s request for leave to take additional depositions telephonically on May 22, 2009, and in writing at various times before and thereafter.

DATED: July 27, 2009

QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP

By /s/ Michael T. Zeller
Michael T. Zeller
Attorneys for Defendant GOOGLE INC.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **Preliminary Statement**

3 The default limit under Fed. R. Civ. P. 30(a)(1) & (2) is ten (10) depositions.
4 Google seeks leave to conduct, beyond the ten provided by Rule 30, the depositions
5 of nine models on whose behalf Perfect 10 seeks to enforce alleged publicity and
6 other rights. Google needs to take these depositions in order to adequately prepare
7 its defenses to Perfect 10’s claims.²

8 Google sought to obtain Perfect 10’s stipulation to exceed this limit, and had
9 every reason to hope Perfect 10 would accommodate this request (at least in part)
10 given that Perfect 10 is squarely relying on these models and that, indeed, Perfect 10
11 itself has previously indicated that it may need in excess of ten depositions as well.
12 Perfect 10, however, has refused to stipulate to even one single deposition beyond
13 Rule 30’s default limit of ten.

14 Google respectfully submits that its motion should be granted and that it
15 should be granted leave to take the depositions of the nine models.

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23 ² As the Court is aware, Google’s motions for summary judgment re. Google’s
24 entitlement to safe harbors under the Digital Millennium Copyright Act are
25 currently pending. If these DMCA Motions are successful, they will resolve the
26 copyright aspects of the case and will accordingly narrow the scope of required
27 discovery. However, because Perfect 10 has also alleged trademark, publicity and
28 other non-copyright claims, Google will need these additional depositions of the
models even if the Court grants its pending DMCA Motions. Accordingly, the
instant motion is ripe for resolution at this time.

1 Argument

2 **I. APPLICABLE LEGAL STANDARDS**

3 Fed. R. Civ. Proc. 30(a)(2)(A)(i) sets the default limit on the number of
4 depositions a party may take at ten. However, “[l]eave to take additional
5 depositions should be granted when consistent with the principles of Rule 26(b)(2).”
6 Notes of the Advisory Committee (1993) to Fed. R. Civ. Proc. 30. Rule 26(b)
7 allows the court to put limits on discovery in order to “maintain a ‘tighter rein’ on
8 the extent of discovery and to minimize the potential cost of [w]ide ranging
9 discovery.” Rx USA Wholesale, Inc. v. McKesson Corp., 2007 WL 1827335, at *2-
10 3 (E.D.N.Y. June 25, 2007) (quoting Whittingham v. Amherst Coll., 163 F.R.D.
11 170, 171-72 (D. Mass. 1995)). The limits, however, are not intended to prevent
12 necessary discovery, and courts have “broad[] discretion” to allow additional
13 discovery based on the complexity of the case at hand. See Notes of the Advisory
14 Committee (1993) to Fed. R. Civ. P. 26(b) & 30. Indeed, Rule 30 provides that “the
15 court *must* grant leave [to take additional depositions] to the extent consistent with
16 Rule 26(b)(2).” Fed. R. Civ. P. 30(a)(2) (emphasis added).

17 Under Rules 30 and 26(b), courts permit additional depositions after
18 considering whether:

- 19 (1) the discovery sought is unreasonably cumulative or duplicative, or
20 is obtainable from some other source that is more convenient, less
21 burdensome, or less expensive; (2) the party seeking discovery has
22 [had] ample opportunity obtain the information sought; or (3) the
23 burden or expense of the proposed discovery outweighs its likely
24 benefit, taking into account the needs of the case, the amount in
25 controversy, the party's resources, and the importance of the proposed
26 discovery in resolving the issues.

27 Andamiro v. Konami Amusement of Am., 2001 WL 535667, at *2 (C.D. Cal. April
28 26, 2001) (granting leave to take additional depositions). Courts have found

1 additional depositions warranted in complex disputes involving large damages
2 claims. See, e.g., Rx USA, 2007 WL 1827335, at *2-3 (granting leave to take
3 additional depositions because, in part, “[t]his is not a ‘simple’ breach of
4 contract/specific performance case”); Martinez v. California, 2008 WL 5101359, at
5 *2 (E.D. Cal. Dec. 3, 2008) (“[G]iven the complex nature of Plaintiff’s medical
6 condition and the number of individuals involved in his care, leave to go beyond the
7 number of depositions permitted by the rule is warranted.”). See also McPeck v.
8 Ashcroft, 202 F.R.D. 332 (D.D.C. 2001) (referencing prior order granting leave to
9 take additional depositions).

10 **II. GOOGLE SHOULD BE GRANTED LEAVE**

11 **A. Perfect 10’s Claims Are Complex And Have Put The Models At** 12 **Issue**

13 As the Court has recognized, Perfect 10 has brought varied and far-ranging
14 claims against Google. Its copyright claims alone include allegations of literally
15 *millions* of direct and secondary infringements. Perfect 10 asserts copyrights in at
16 least 30,000 distinct images that span over 1,000 separate registrations and/or
17 recordations. See Kassabian Decl., at Ex. A (Perfect 10, Inc.’s Statement for
18 October 6, 2008 Case Management Conference (Docket. No. 364) at 5:21-22
19 (claiming 30,000 images are at issue)); id. at Ex. B (Perfect 10’s (Proposed) Second
20 Amended Complaint, at Exhibit 7 (Docket No. 303-9) (listing over 1,000 separate
21 alleged registrations and recordations of copyrights). Some of these copyrights were
22 allegedly works-for-hire for Perfect 10. Others were acquired by assignment from
23 at least a dozen separate assignors (several of whom are located overseas). Perfect
24 10’s copyright claims also implicate complicated technical issues in several
25 respects.

26 Further, Perfect 10 alleges direct and secondary infringement of multiple
27 claimed trademarks, publicity claims brought on behalf of at least nine separate
28 individuals (the “nine models”), and state law claims including unfair competition,

1 misappropriation, and unjust enrichment. All of these claims will require separate
2 discovery of separate facts.

3 For example, the publicity claims will require individual investigation for
4 each of the nine models—each of these models is a separate individual with separate
5 alleged publicity rights and a separate (alleged) assignment of those rights to Perfect
6 10, and any violation of publicity rights of one model is by no means probative of
7 any violation of publicity rights of any other model. The unfair competition claim
8 will require investigation into precisely who Perfect 10 believes is competing
9 unfairly with it, and how. The misappropriation and unjust enrichment claims will
10 require investigation into what property Perfect 10 believes it owns and how that
11 property was harmed (among other things). Perfect 10’s trademark claims will
12 require investigation into Perfect 10’s purported marks and any efforts they may
13 have made to strengthen or defend those marks (for example, through marketing or
14 litigation). Accordingly, the discovery sought from these nine additional individual
15 models is non-cumulative and necessary for Google’s defense against Perfect 10’s
16 trademark, publicity, and other state law claims.

17 Given the breadth and depth of Perfect 10’s claims, Google must exceed the
18 ten deposition limit to gather information sufficient to adequately defend itself
19 against them. At a minimum, Google will need to depose the following individuals
20 or entities:

- 21 • Perfect 10, Inc. (via Rule 30(b)(6)) and Dr. Norman Zada regarding all
22 issues in the case;
- 23 • The employees, contractors, and other personnel named in Perfect 10’s
24 Rule 26(a) disclosures (including Sean Chumura, J. Stephen Hicks,
25 Barry Rosen, Jennifer Snow, Rebecca Chaney, Sheena Chou, Wendy
26 Augustine, and Naureen Zaim) regarding the vast majority of issues in
27 the case;

- 1 • The major alleged assignors of copyrights to Perfect 10 (including
2 Petter Hegre, Arpad Productions & Co. S.R.L., Alexandria Karlsen,
3 Joanna Krupa, and Marketa Belonoha) regarding the validity and
4 enforceability of Perfect 10’s alleged copyrights, and their chain of
5 title;
- 6 • Alleged cell phone download partners (including FoneStarz Media
7 Ltd., Waat Media, and 3GMuse Ltd.) regarding Perfect 10’s alleged
8 business of cell phone downloads;
- 9 • Perfect 10’s accountant (Bruce Hersh) regarding Perfect 10’s financial
10 condition and its claims of actual damages; and
- 11 • The “nine models” on whose behalf Perfect 10 seeks to enforce alleged
12 publicity rights, namely, Amy Weber, Amber Smith, Aria Giovanni,
13 Irina Voronina, Monika Zsibrita, Nataskia Maren, Sasha Brinkova,
14 Shannon Hobbs, and Talia Harvalik. See Kassabian Decl., at Ex. C
15 (Perfect 10, Inc.’s (Proposed) Second Amended Complaint, at Exhibit 8
16 (Docket No. 303-10)).

17 See Kassabian Decl., at Ex. D (Letter from R. Kassabian to J. Mausner dated May 1,
18 2009); id at Ex. E (Email from J. Mausner to R. Kassabian, dated May 18, 2009).
19 Even this limited list contains 28 separate individuals or entities, each of which is
20 likely to have particular relevant information which the others do not.

21 **B. Depositions Of The Models Are Warranted**

22 When a deponent possesses unique information, courts generally grant leave
23 for additional depositions because they do not undermine the key purpose of the
24 limits – preventing duplicative discovery. See, e.g., Bromgard v. Montana, 2007
25 WL 1101179, at *1-2 (D. Mont. April 11, 2007) (granting leave for additional
26 depositions in part because each proposed deponent “has information or opinions
27 bearing in a unique way on some issue or issues involved in the case”). Perfect 10
28 does not contest that the proposed deponents (including the models) are likely to

1 possess significant information relevant to the claims and defenses in this case. Nor
2 has Perfect 10 claimed that they possess entirely duplicative or overlapping
3 information. Indeed, it is exceedingly unlikely that, for example, Waat Media (a
4 third-party licensor) has information that is duplicative of Bruce Hersh (Perfect 10's
5 accountant) or that the models will have information that is duplicative of Perfect 10
6 or its licensors.³

7 Depositions of the nine models are particularly warranted because each model
8 has information unique to herself and crucial to the alleged publicity rights Perfect
9 10 purports to assert on each of their behalf. Although none of the nine models is a
10 party to this case, Perfect 10 relies on their alleged publicity rights, claiming that
11 each assigned exclusive rights to Perfect 10 for this purpose. Google is entitled to
12 question each model regarding all the circumstances of the purported assignment,
13 including the business (or other) context, any representations made, the scope and
14 meaning of the agreements, the understanding and intent of the models in entering
15 into any such arrangement, any amendments to the agreements and the
16 communications and course of dealings between the models and Perfect 10. And
17 furthermore, although Perfect 10 alleges in its (Proposed) Second Amended
18 Complaint that it is the "exclusive assignee of publicity rights" for certain models,
19 several of the models are public figures and appear to engage in promotional
20 activities that belie Perfect 10's allegations of exclusivity (including, for example,
21 on the websites <http://www.amyweber.net/> and <http://www.ambersmith.com/>).

22
23 ³ Yet, in the course of Google's meet-and-confer efforts, Perfect 10 has refused
24 to stipulate that Google may take even one deposition more than Rule 30's default
25 number of ten. Kassabian Decl. ¶¶ 6-8. As a basis for this refusal, Perfect 10 has
26 argued that the Court has somehow ordered that discovery in this case be
27 "circumscribed." Kassabian Decl., at Ex. E (Email from J. Mausner to R.
28 Kassabian, dated May 18, 2009). Google is unaware of any such order, nor has
Perfect 10 yet identified one.

1 Accordingly, Google is entitled to examine the models to determine whether they
2 have entered into other (conflicting) assignments of publicity rights with other
3 entities or otherwise been engaging in publicity that would refute Perfect 10’s
4 exclusivity, and to ascertain which uses of their name and likeness are with their
5 consent (or are otherwise unobjectionable to each of them) and which are not. Only
6 the models are likely to have complete information on these subjects. Indeed,
7 without a full understanding of all these circumstances, Google cannot properly
8 evaluate whether the uses that Perfect 10 claims are unlawful were in fact done with
9 permission of the models and whether Perfect 10 even has standing to assert these
10 publicity rights in this case. See, e.g., Upper Deck Authenticated, Ltd. v. CPG
11 Direct, 971 F. Supp. 1337, 1349 (S.D. Cal. 1997) (“Even if the right to publicity
12 could be assigned under California law, it is unlikely that a non-exclusive licensee
13 could assert it.”).

14 Depending on the manner in which these depositions are conducted, and
15 depending on future progress of this case (which Google cannot reasonably predict
16 at this time), Google reserves the right to seek leave to take depositions beyond the
17 additional nine it currently seeks. See, e.g., General Elec. Co. v. Indemnity Ins. Co.
18 of North America, 2006 WL 1525970, at * 2 (D. Conn. 2006) (granting leave to take
19 additional depositions and also noting that the “ruling does not prohibit either party
20 from moving to expand the number of depositions at a future point in this
21 litigation”); Rx USA, 2007 WL 1827335, at *6 (same). However, in order to limit
22 motion practice to only the most current, pressing and necessary issues, Google’s
23 present request is limited to those additional nine depositions of the models since
24 those depositions are and will remain unquestionably necessary.

25
26 **Conclusion**

27 For the foregoing reasons, Google respectfully requests that the Court grant
28 Google leave to take nine depositions in addition to the ten provided by Rule 30—

1 one additional deposition for each of the “nine models” on whose behalf Perfect 10
2 asserts violations of alleged publicity rights.

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DATED: July 27, 2009

QUINN EMANUEL URQUHART OLIVER &
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By /s/ Michael T. Zeller
Michael T. Zeller
Attorneys for Defendant GOOGLE INC.