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11 UNITED STATES DISTRICT COURT
 12 CENTRAL DISTRICT OF CALIFORNIA

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

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

19 AND COUNTERCLAIM

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

**GOOGLE INC.'S JOINDER IN
 DEFENDANTS AMAZON.COM,
 INC. AND ALEXA INTERNET'S EX
 PARTE APPLICATION FOR AN
 ORDER COMPELLING PERFECT
 10, INC. TO AFFIX PRODUCTION
 NUMBERS TO ITS PRODUCTION
 AND TO REIMBURSE
 DEFENDANTS FOR COSTS AND
 REQUEST FOR A TELEPHONIC
 CONFERENCE, AND
 RESPONSE TO PERFECT 10'S
 OPPOSITION THERETO**

[Declaration of Thomas Nolan filed
 concurrently herewith]

Hon. Stephen J. Hillman

Date: None Set
 Time: None Set
 Place: Courtroom 550

Discovery Cut-off: None Set
 Pre-trial Conference: None Set
 Trial Date: None Set

1 Pursuant to Local Rule 7-19, and for all the reasons identified by
2 Amazon.com, Inc. and Alexa Internet, Google Inc. hereby joins in Amazon.com,
3 Inc. and Alexa Internet's *Ex Parte* Application for an Order Compelling Perfect 10,
4 Inc. ("P10") to Affix Production Numbers to its Production and to Reimburse
5 Defendants for Costs and Request for a Telephonic Conference, filed October 29,
6 2009 (Docket No. 355 in the *Amazon* case) (the "*Ex Parte* Application"). To avoid
7 burdening the Court with unnecessarily repetitive briefing, Google incorporates by
8 reference all arguments and evidence in the *Ex Parte* Application (and supporting
9 papers) as though fully set forth herein.¹ The *Ex Parte* Application should be
10 granted, because P10's Opposition fails to address (let alone refute) the merits of the
11 Application.

12 Google writes separately here to respond to various inaccuracies in P10's
13 opposition brief, and to address P10's effort to use the *Ex Parte* Application as a
14 vehicle to interject various of its own new and unrelated discovery issues before this
15 Court. P10's arguments are both irrelevant and meritless and should be rejected.
16 Indeed, because P10 failed to meet and confer with Defendants before presenting
17 these issues to the Court, P10 should be sanctioned.

18 **I. CONTRARY TO P10'S PROTESTATIONS, THE MATTERS**
19 **PRESENTED IN THE EX PARTE APPLICATION ARE URGENT.**

20 As the Court is aware, Google's motion to compel P10 to bates stamp the
21 entirety of its past document production remains pending. However, P10 continues
22 to produce documents to Defendants, including two productions on October 15 and
23 22, 2009 pertaining to the Court's October 6, 2009 Order compelling P10 to produce
24 various financial and damages-related documents. See Declaration of Anthony
25

26 ¹ Google informed Perfect 10 of its intention to file this Joinder and Response
27 on a *ex parte* basis via email at 2:24 p.m. on October 30, 2009. Declaration of
28 Thomas Nolan ("Nolan Decl.") filed concurrently herewith, at ¶ 3.

1 Malutta in Support of the *Ex Parte* Application (Docket No. 355-3), at ¶¶ 3 & 5.
2 P10 also has been ordered to produce additional financial materials on or before
3 November 9, 2009. *See* October 6, 2009 Order at ¶ 3. All of these document
4 productions are relevant to the upcoming deposition of P10 accountant Bruce Hersh,
5 currently set for **November 19 and 20**. By the *Ex Parte* Application, Amazon (and
6 Google) have asked this Court to, among other things, require Perfect 10 to affix
7 control numbers to these particular document productions, which will be critical to
8 Mr. Hersh's deposition taking place in just over two weeks. Prompt court
9 intervention is now required to (1) ensure that Defendants are able to locate and
10 utilize P10's recently-produced financial documents in time for the Hersh
11 deposition, and (2) put an end to the control-numbering issue on a going-forward
12 basis.

13 **II. P10 HAS FAILED TO IDENTIFY ANY REASON WHY IT CANNOT**
14 **USE THE ADOBE BATES STAMPING FEATURE ON A GOING-**
15 **FORWARD BASIS.**

16 Contrary to P10's assertions, this is not simply a rehash of Google's pending
17 motion to compel. Applying control numbers to documents on a going-forward
18 basis is not the same issue as applying control numbers to (and re-producing) P10's
19 entire past production. Perfect 10 has proffered no basis for its refusal to apply
20 control numbers to its document productions on a going-forward basis, using the
21 Adobe bates-stamping feature Google has identified for P10. Indeed, P10 did use
22 the Adobe bates-stamping feature to apply control numbers to a recent production
23 on behalf of one of its employees (the Sheena Chou documents), but not to its other
24 recent productions—and has insisted that it will *not* bates stamp any future
25 productions absent a court order. Nolan Decl., at Ex. A (10/25/09 Email from J.
26 Mausner to T. Nolan). Unfortunately, P10 has made clear that it will not consent to
27 a resolution of this issue, so a court order will be necessary.

28

1 Further, the Garcia Declaration P10 submits in opposition to the *Ex Parte*
2 Application does not even mention P10's October 15 and 22 productions, or future
3 P10 productions, which are the subject of the *Ex Parte* Application. Instead, the
4 Garcia Declaration concerns the entirety of P10's past production. And even as to
5 that subject, Mr. Garcia *does not address* the issue of how much it would cost P10
6 to employ the Adobe bates stamping feature. Instead, Mr. Garcia declares to what
7 his company would charge P10 to convert its entire document production to TIFF
8 format, and then bates stamp the TIFF'ed documents.² Because P10 has *not*
9 submitted a declaration regarding the cost of using the Adobe bates stamping feature
10 on its past or future productions, P10 and its expert Mr. Garcia implicitly confirm
11 that using Adobe would be inexpensive.

12 **III. P10'S LATEST HARD DRIVE PRODUCTION IS INDECIPHERABLE**
13 **AND ANY FINANCIAL DOCUMENTS PRODUCED THEREON ARE**
14 **BURIED WITHIN THOUSANDS OF PAGES OF SCREENSHOTS.**

15 Moreover, Perfect 10's October 22 document production, which purportedly
16 contains the financial and damages-related documents P10 was ordered to produce
17 (*see* October 6, 2009 Order) is in fact an 18.2 Gigabyte hard drive containing P10's
18 now-familiar assortment of screenshots of purported search results from various
19 _____

20 ² Declaration of Carlos Garcia re: Cost of Bates Numbering Perfect 10's
21 Document Production (Docket No. 356-2), at ¶ 4 ("Our company does such jobs by
22 first converting the entire production to TIFF format to make sure the Bates
23 numbers are the same size, and then converting to Adobe."). Of course, the size of
24 the font of the control numbers being applied to P10's documents is irrelevant, and
25 is merely a new excuse by P10 to avoid using the Adobe Bates stamping feature
26 after Google demonstrated that Perfect 10's cost excuse lacked merit. If affixing
27 larger bates stamps by TIFF'ing its production will cost P10 \$250,000 (according to
28 P10's witness Mr. Garcia), and affixing smaller bates stamps using Adobe will cost
P10 nothing besides some paralegal processing time, then P10 should opt for (or be
ordered to employ) the Adobe method. What matters is that some control numbers
(of any size) be affixed to P10's massive and undifferentiated production.

1 search engines, purported DMCA notices, screenshots of “whois” results, non-
2 searchable scans of certain contracts, a handful of emails, and various other
3 documents spread over dozens of folders and sub-folders. Nolan Decl. ¶ 7. P10
4 claims it produced these documents as it maintains them in the “usual course of
5 business” (Opposition at 3), but that cannot be true—the lion’s share of documents
6 in this production are related to litigation, not any of P10’s core businesses. And
7 most importantly, there is no labeled folder indicating that it contains the documents
8 responsive to the October 6 Order (such as “October 6, 2009 Order,” “financial
9 documents,” “damages-related documents,” or something of that nature). *Id.* As a
10 result, Google and Amazon are simply left to search for and guess at which of the
11 thousands of documents produced are, in P10’s opinion, responsive to which of the
12 compelled Requests. Since P10 elected to produce the court-ordered financial
13 documents scattered amongst tens of thousands of pages of other documents
14 apparently unrelated to the October 6, 2009 Order, P10 should be required to
15 identify the location of the documents responsive to each Request in that Order.

16 **IV. A COURT ORDER IS NECESSARY BECAUSE P10 HAS**
17 **EFFECTIVELY KILLED THE SECOND PROPOSAL BY**
18 **DEMANDING MODIFICATIONS THAT WOULD EVISCERATE IT.**

19 In briefing following the September 22, 2009 hearing on Google’s pending
20 discovery motions, and in response to concerns expressed by the Court (and by
21 P10), Google proposed a compromise resolution of Google’s Motion to Compel
22 Bates-numbering: namely, that in lieu of bates-numbering its document
23 productions, P10 be required to identify any of its non-bates numbered documents
24 used in this litigation by providing a declaration containing their file path(s) and
25 production date(s) (the “Second Proposal”). Following the Court’s expression of a
26 preference for the Second Proposal at the October 9 telephonic conference, Google
27 initiated meet and confer efforts to address P10’s only stated concern with it—that
28 P10 not have to provide this information for proposed deposition exhibits five days

1 in advance of the scheduled depositions.³ Despite this modification, P10 refused to
2 agree to the Second Proposal, instead raising a host of new excuses and proposing
3 modifications that would render the Second Proposal essentially useless.

4 First, Perfect 10 insists that the Second Proposal should apply to *all* parties,
5 including Defendants. This demand is illogical and unnecessary, since of course
6 Defendants *have* affixed control numbers to their productions. Nor may P10 shift
7 the burden of identifying P10's own documents onto Defendants—because P10 has
8 steadfastly refused to bates-stamp its production, it must live with the consequences
9 of that election, including the fact that when Defendants use P10's documents in
10 court proceedings, they necessarily will be unstamped.⁴

13 ³ See Declaration of Jeffrey Mausner dated October 30, 2009 (Docket No. 356-
14 3) (“Mausner Decl.”), Ex. 1 at p.6 (10/9/09 email from Kassabian to Mausner).
15 Specifically, with regard to depositions, Google proposed that Perfect 10 identify
16 non-bates numbered documents at the time they are offered to the witness, either via
17 written declaration containing the file path and production date, or by reading that
information into the record. *Id.*

18 ⁴ Contrary to P10's insinuations, in this litigation Google has never used a
19 Google-produced document that was not bates-numbered. P10's accusation that
20 Google submitted evidence in support of its DMCA Motions for Summary
21 Judgment that it did not bates-number is in fact a reference to P10's own purported
22 DMCA notices (comprising massive DVDs and hard drives which Perfect 10 sent to
23 Google under the DMCA). Given their volume and the fact that Perfect 10 plainly
24 already had these materials, Google did not re-produce them back to Perfect 10
25 during discovery (*see* Nolan Decl., at Ex. B (6/3/09 Letter from A. Roberts to J.
26 Mausner)), but Google of course submitted these documents as they were
27 transmitted by P10—without bates stamps. Since these were P10 documents, P10—
28 not Google—is to blame for that lack of bates-stamping. Similarly, Google showed
certain P10-produced documents to Perfect 10 employee Sheena Chou during her
deposition. Nolan Decl. ¶ 8. These did not bear bates numbers because P10 never
affixed them. *Id.* And during its deposition of On Line Creations, Google used
certain printouts from On Line Creations' own public website. Again, these were
not Google-produced documents.

1 Second, P10 proposes to modify the Second Proposal to exclude any files
2 included on an “external disk.” This would eviscerate the entire point of the Second
3 Proposal, which seeks to provide Defendants and the Court with proof that any
4 proffered P10 documents were indeed produced. The need for identification of
5 documents only *increases* with the number of documents P10 submits in court
6 proceedings. P10’s proposed exclusion of “external disks” would be an exception
7 that completely swallows the rule.

8 Third, Perfect 10 refuses to agree to identify the file path and production date
9 in declaration form. P10 has never given a reason why it could not provide this
10 information in a declaration, and the only apparent reason to resist declaring to this
11 information is to dodge responsibility for its accuracy. Without a sworn statement,
12 neither the Court nor Google can be sure that the documents are properly identified.⁵

13 Because P10 has made clear that it will not agree to the Second Proposal, a
14 Court order will be necessary in the event the Court maintains its preference to
15 proceed with the Second Proposal.

16 **V. P10’S ATTEMPT TO INTERJECT NEW DISCOVERY ISSUES**
17 **ABOUT WHICH IT HAS NOT COMPLETED MEET AND CONFER**
18 **SHOULD BE REJECTED, AND SANCTIONS SHOULD BE IMPOSED.**

19 In its opposition to the *Ex Parte* Application concerning the issue of P10’s
20 recent discovery failures, P10 makes several unsubstantiated accusations regarding
21 Google’s discovery conduct in this case. In addition to being inappropriate in the
22 context of opposing an *ex parte* application in a different case, these accusations (1)
23 have not been the subject of proper meet and confer efforts, and (2) are false.

24
25 ⁵ Perfect 10 claims that a portion of Google’s document production it refers to
26 as Google’s “DMCA log” is “unsearchable.” This is false. Google’s electronic
27 document production, including the documents P10 appears to be referring to as
28 DMCA logs, have been produced in a text-searchable format. Nolan Decl. ¶ 6.

1 First, P10 submits a meet and confer letter it sent Google just over a week
2 ago, in which it makes conclusory, unsubstantiated claims that Google has not
3 produced unspecified documents. *See* Mausner Decl., Ex. 2. As can be seen, P10’s
4 letter fails to identify even a single allegedly “missing” document or provide any
5 information Google could use to investigate P10’s unsupported accusations. Google
6 is in the process of meeting and conferring with P10 to seek the factual basis for
7 P10’s accusations, so that Google may investigate and respond to them. Nolan
8 Decl. ¶ 4. Until that process is complete, P10’s attempt to raise these purported
9 issues now, in this context, is premature and should be rejected out of hand.

10 Second, P10’s opposition references six of its Document Requests (Nos. 342-
11 47) and claims that Google’s document production was insufficient. *Opp.* at 6. P10
12 has never even *mentioned* these particular document requests to Google, much less
13 requested to meet-and-confer under Local Rule 37-1 regarding Google’s responses
14 thereto. Nolan Decl. ¶ 5.

15 P10 takes the position that these and other of its purported discovery issues
16 are so important that P10 should not be required to engage in “unnecessary motion
17 practice” to obtain an order on them. *Opp.* at 8. What P10 describes as
18 “unnecessary motion practice” might fairly also be called “compliance with Local
19 Rules and court orders.” P10 may not jettison the Local Rules governing discovery
20 disputes by interjecting these new (and wholly distinct) issues into its opposition to
21 the *Ex Parte* Application. Indeed, it was P10’s inclusion of extraneous discovery
22 issues from the *Google* case in its opposition to Amazon’s *Ex Parte* Application that
23 forced Google to have to submit this brief in order to respond to them.

24 Unfortunately, this is not the first time P10 has attempted to sandbag
25 Defendants and waste the Court’s time with new discovery issues that were not
26 previously the subject of meet and confer. For example, at the September 22, 2009
27 hearing on Google’s motions to compel, P10 attempted to raise and argue certain of
28 its own new discovery issues it had not first raised with Google. Nolan Decl., Ex. C

1 (9/22/09 Hearing Transcript, at 147:22-148:15). The Court rightfully declined to
2 hear P10’s improperly-raised issues at that time. *Id.* Similarly, on November 14,
3 2008, P10 sought to place significant limits on Google’s discovery efforts via a
4 purported “Joint Letter” faxed to the Court. Nolan Decl., Ex. D. Further, in its
5 opposition to an earlier *Ex Parte* application submitted by the Amazon Defendants,
6 Perfect 10 improperly requested a complete stay on discovery in both the *Google*
7 and *Amazon* cases, pending a ruling on its own summary judgment motion in the
8 *Amazon* case, without first meeting and conferring with Google on the issue. Nolan
9 Decl., at Ex. E (Perfect 10’s Response to Defendants Amazon.com and Alexa
10 Internet’s Ex Parte Application to Continue Summary Judgment Filing Deadline, at
11 p.6). Indeed, P10 has even used this improper tactic as a litigation threat. For
12 example, in its rejection of Google’s Second Proposal discussed above, P10
13 threatened to use a further telephone conference with this Court regarding the bates
14 stamping issue as a pretext to “bring up other discovery issues at that time, including
15 Google’s refusal to identify its AdSense and hosting clients,” again without properly
16 identifying or seeking to meet-and-confer with Google about such “issues” in
17 advance. Mausner Decl, Ex. 1 at p.1 (10/25/09 Email from J. Mausner to T. Nolan).


18 P10’s failure to comply with its meet and confer obligations not only dooms
19 its “requests” from the start, it also can—and should—be the basis for sanctions
20 against P10 and/or its counsel. *See Local Rule 37-4* (“The failure of any counsel to
21 comply with or cooperate in the foregoing procedures may result in the imposition
22 of sanctions.”). P10’s pattern of disregard for the Rules shows no signs of abating.
23 P10 should be sanctioned in the amount of \$1,000, to be paid to the Court, to put an
24 end to these abuses of the Court’s time and resources.

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DATED: November 2, 2009

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By 
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