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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 v.

16 GOOGLE, INC., a corporation,
17 Defendant.

18
19 AND CONSOLIDATED CASE.

Case No. CV04-9484 AHM (SHx)
Consolidated with Case No. CV 05-4753
AHM (SHx)

Before Judge A. Howard Matz

**NOTICE OF MOTION AND MOTION
OF PLAINTIFF PERFECT 10, INC.
FOR EVIDENTIARY AND OTHER
SANCTIONS AGAINST DEFENDANT
GOOGLE, INC. AND/OR FOR THE
APPOINTMENT OF A SPECIAL
MASTER**

**[Memorandum Of Points and
Authorities and Declarations of Dr.
Norman Zada, Jeffrey N. Mausner, and
Sheena Chou In Support Thereof and
[Proposed] Order Filed Concurrently
Herewith]**

Date: December 21, 2009

Time: 10:00 a.m.

Place: Courtroom 14, Courtroom of the
Honorable A. Howard Matz

Discovery Cut-Off Date: None Set

Pretrial Conference Date: None Set

Trial Date: None Set

1 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that on December 21, 2009 at 10:00 a.m., or as soon
3 thereafter as the matter may be heard, in the Courtroom of the Honorable A. Howard
4 Matz, Courtroom 14 of United States District Court for the Central District of
5 California, located at 312 North Spring Street, Los Angeles, California, Plaintiff
6 Perfect 10, Inc. (“Perfect 10”) will and hereby does move this Court for an Order
7 imposing evidentiary and other sanctions against Defendant Google Inc. (“Google”), as
8 set forth in the Memorandum of Points and Authorities In Support of Plaintiff Perfect
9 10, Inc.’s Motion For Evidentiary and Other Sanctions Against Defendant Google, Inc.
10 and/or for the Appointment of a Special Master, filed separately herewith (the
11 “Memorandum of Points and Authorities”). The sanctions that Perfect 10 seeks against
12 Google include, but are not limited to, the following:

13 1. That Google be found ineligible for the safe harbor provisions of the Digital
14 Millennium Copyright Act (the “DMCA”) set forth in 17 U.S.C. §512;

15 2. That Google’s three pending summary judgment motions, filed in this action
16 on July 2, 2009 (the “Summary Judgment Motions”), be denied or dismissed;

17 3. That Google be compelled to produce the documents which it has failed to
18 produce, as set forth in the Memorandum of Points and Authorities, within 10 days
19 after this Court rules on this Motion. These documents include, but are not limited to,
20 the following: (a) the “spreadsheet-type” DMCA log “summarizing DMCA notices
21 received, the identity of the notifying party and the accused infringer, and the actions
22 (if any) taken in response,” which Google has failed to produce in violation of this
23 Court’s May 13, 2008 Order and earlier orders of Magistrate Judge Hillman; (b) the
24 DMCA notices and other documents that Google has failed to produce in violation of
25 the Court’s orders and Google’s representations that such documents have been
26 produced. Perfect 10 should then be given an opportunity to file a sur-reply in
27 connection with the Summary Judgment Motions and seek monetary sanctions before
28 this Court rules on those motions;

1 4. Other sanctions that the Court deems appropriate.

2 This Motion is made on the grounds that Google has committed multiple
3 violations of Court Orders by concealing and suppressing documents it was obligated
4 to produce to Perfect 10. Google has obstructed discovery and deceived the Court and
5 Perfect 10. Google's improper conduct has adversely affected Perfect 10's ability to
6 litigate the case, and prevented Perfect 10 from being able to fully and fairly oppose
7 the Summary Judgment Motions. Accordingly, this Court should grant the Motion and
8 impose the sanctions sought by Perfect 10, both under Federal Rule of Civil Procedure
9 37 and under this Court's inherent power to impose sanctions in response to abusive
10 litigation practices.

11 PLEASE TAKE FURTHER NOTICE that, if this Court does not impose the
12 evidentiary and other sanctions sought by Perfect 10, Perfect 10 moves this Court,
13 under Federal Rule of Civil Procedure 53, for the appointment of a Special Master to
14 investigate the issues raised by this Motion and/or Google's Summary Judgment
15 Motions. The Special Master would investigate such issues as: (i) Google's alleged
16 failure to comply with Court-ordered discovery; (ii) the impact of Google's conduct
17 upon the Summary Judgment Motions; (iii) whether Google has complied with 17
18 U.S.C. §512(i), the repeat infringer provision of the DMCA; and (iv) if Google is
19 determined to have complied with §512(i), whether Google has appropriately and
20 timely responded to each of Perfect 10's DMCA notices. The Special Master would
21 then report back to the Court.

22 This Motion is made on the grounds set forth in Federal Rule of Civil
23 Procedure 53(a)(1)(C). Requiring this Court to determine the numerous issues
24 raised by this Motion and Google's Summary Judgment Motions may impose a
25 substantial burden upon the Court at this time. In order to rule upon this Motion
26 and the Summary Judgment Motions, this Court will need to address such issues as
27 whether Google has violated Court Orders concerning discovery, the impact of
28 Google's alleged violations on Perfect 10's ability to fairly litigate this case,

1 whether Google has suitably implemented a policy against repeat infringers, and, if
2 so, whether Google has appropriately and timely responded to each of Perfect 10's
3 DMCA notices. This Court may not be able to effectively and timely address the
4 issues raised by this Motion and the Summary Judgment Motions, since the Court
5 still needs to rule on Perfect 10's Motion for Partial Summary Judgment Against
6 Defendants Alexa Internet, Inc. and Amazon.com, Inc., filed on October 13, 2008
7 in *Perfect 10 v. Amazon.com, Inc.*, the case consolidated with this action. (See
8 Docket Nos. 172-185, 189-191, 210-217, 230-244, and 248-264 in the *Amazon*
9 case.) Accordingly, if the Court believes that it cannot effectively and timely
10 address the issues raised by the Motion and Google's Summary Judgment Motions
11 at this time, it is appropriate and necessary under Federal Rule of Civil Procedure
12 53 for this Court to appoint a Special Master to address these issues.

13 This Motion is based upon this Notice of Motion, the Memorandum of Points
14 and Authorities, and the Declarations of Dr. Norman Zada, Jeffrey N. Mausner, and
15 Sheena Chou in support of the Motion, submitted separately herewith, the complete
16 files and records in this action, all matters of which this Court properly may take
17 judicial notice, and any additional matters that may be submitted to the Court at or
18 before any hearing on the Motion, including in any reply papers.

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

20 This Motion is made following the conference of counsel pursuant to Local Rule
21 7-3 which took place starting on October 22, 2009. The parties exchanged extensive
22 correspondence regarding the issues raised in this Motion, which is attached as Exhibit
23 O to the Declaration of Jeffrey N. Mausner.

24 Dated: November 29, 2009

LAW OFFICES OF JEFFREY N. MAUSNER

26 By: *Jeffrey N. Mausner*

Jeffrey N. Mausner

Attorney for Plaintiff Perfect 10, Inc.