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10
 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
 DOES 1 through 100, inclusive,

18 Defendants.

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

**DECLARATION OF RACHEL
 HERRICK KASSABIAN IN
 SUPPORT OF GOOGLE INC.'S
 MOTION FOR A DOCUMENT
 PRESERVATION ORDER TO
 PREVENT FURTHER
 SPOILIATION OF EVIDENCE BY
 PERFECT 10, INC.**

19 AND COUNTERCLAIM

Hon. Stephen J. Hillman

20 PERFECT 10, INC., a California
 21 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.

Courtroom.: 550
 Hearing Date: January 11, 2010
 Hearing Time: 2:00 pm

Discovery Cutoff: None Set
 Pretrial Conference Date: None Set
 Trial Date: None Set

PUBLIC REDACTED

1 I, Rachel Herrick Kassabian, declare as follows:

2 1. I am a member of the bar of the State of California and a partner with
3 Quinn Emanuel Urquhart Oliver & Hedges, LLP, counsel for Defendant Google Inc.
4 ("Google") in this action. I make this declaration of my personal and firsthand
5 knowledge and, if called and sworn as a witness, could and would competently
6 testify thereto.

7 2. On August 18, 2009, I took the deposition of Perfect 10 ("P10")
8 employee Wendy Augustine.

9 3. Attached as Exhibit A is a true and correct copy of a letter I sent to
10 P10's counsel Jeff Mausner dated August 25, 2009, initiating meet and confer
11 regarding P10's deletion of emails during the pendency of this litigation [REDACTED]
12 [REDACTED]. Among other things, my letter asks P10 to
13 immediately stop deleting employee emails, and to provide information regarding
14 the scope and extent of P10's email destruction activities.

15 4. Attached as Exhibit B is a true and correct copy of P10's September 8,
16 2009 letter responding to my August 25, 2009 correspondence. Among other things,
17 Mr. Mausner states, [REDACTED]
18 [REDACTED] but otherwise did not provide the
19 information I had asked for regarding the scope and extent of P10's email
20 destruction. Mr. Mausner's letter also declined to confirm that P10 would
21 immediately [REDACTED] prevent any
22 further deletion of emails.

23 5. Attached as Exhibit C is a true and correct copy of a letter I sent to Mr.
24 Mausner dated September 18, 2009, repeating Google's request that P10 stop
25 deleting employee emails and provide information regarding the scope and extent of
26 P10's email destruction activities.

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01980.51320/3240091.1

1 6. On October 7, 2009, Mr. Mausner responded to my September 18, 2009
2 letter by email, stating, "I don't have time to respond to this right now." Attached as
3 Exhibit D is a true and correct copy of Mr. Mausner's October 7 email.

4 7. Another month passed with no word from P10 regarding the document
5 destruction issues first raised in my August 25, 2009 letter. On November 24, 2009,
6 my colleague Tom Nolan sent P10 an email (with a copy to me) again asking for a
7 substantive response to my August 25 and September 18 letters. Mr. Nolan's email
8 is attached hereto as Exhibit E.

9 8. On December 1, 2009 Mr. Mausner responded, disagreeing with my
10 earlier letters but still refusing to confirm that P10 would stop deleting employee
11 emails, and refusing to provide answers to any of the questions my letters posed
12 regarding the scope and extent of P10's email deletion activities. Mr. Mausner's
13 December 1 email is attached hereto as Exhibit F.

14 9. On December 2, 2009, I responded to Mr. Mausner's December 1
15 email, explaining that P10 has had nearly 3 ½ months to respond to the document
16 destruction issues we raised [REDACTED], and that Google could
17 wait no longer to raise these issues with the Court, especially given the ongoing
18 nature of the document destruction.

19 10. As of the date of this declaration, P10 has not confirmed that P10 has
20 changed the settings on its employees' computers to prevent the automatic deletion
21 of emails, nor has P10 answered any of the questions about P10's document
22 destruction activities contained in my August 25 and September 18, 2009
23 correspondence.

24 11. Attached as Exhibit G is a true and correct copy of the signature page
25 and "errata" submitted by Wendy Augustine in reviewing the transcript of her
26 August 18, 2009 deposition, dated November 6, 2009.

1 12. Attached as Exhibit H is a true and correct copy of excerpts of the
2 transcript of the August 18, 2009 deposition of P10 employee Wendy Augustine.

3 13. Attached as Exhibit I is a true and correct copy of excerpts of the
4 transcript of the September 9, 2009 deposition of part-time P10 employee Sheena
5 Chou.

6 14. Under my direction, paralegals working at my firm have attempted to
7 locate all of the emails produced by P10 that were sent or received by P10
8 employees. In order to locate these documents, we searched P10's document
9 production for the names of all known P10 employees and all email addresses for
10 those employees that could be ascertained from P10's document production. These
11 searches disclosed approximately 1000 emails sent or received by P10 employees.
12 Approximately 680 of the emails sent or received by P10 employees were [REDACTED]

13 [REDACTED]
14 [REDACTED]. Attached as Exhibit J is a true and correct copy of two
15 such [REDACTED] emails [REDACTED]. An
16 additional approximately 100 of the emails sent or received by P10 employees were
17 either purported DMCA notices sent to Google or emails between Norm Zada and
18 Google regarding Google's processing of P10's notices. Our searches of P10's
19 document production turned up no emails between P10 employee Sheena Chou and
20 any other P10 employee.

21 15. Google has served dozens of document requests to which various P10
22 employee emails would be responsive. For instance, in Google's First Set of
23 Requests for Production of Documents dated March 3, 2005, Google requested "[a]ll
24 documents concerning any communications between you and any government
25 agency concerning copyrighted works claimed by you in this action" (Document
26 Request No. 2), "[a]ll documents evidencing assignments or licenses of copyrights
27 claimed by you in this action" (Document Request No. 3), "[a]ll documents

1 concerning communications to persons or entities other than Google in which you
2 have made allegations (against any person or entity) of trademark infringement"
3 (Document Request No. 41), "[a]ll documents concerning the publicity rights
4 claimed by you in this action, including, but not limited to, all licenses, releases, or
5 assignments and all communications relating to such licenses, releases or
6 assignments" (Document Request No. 42), and "[a]ll communications with persons
7 whose publicity rights you claim to own or exercise, other than those
8 communications requested in request number 42" (Document Request No. 50).
9 Similarly, in Google's Fifth Set of Document Requests served April 23, 2007,
10 Google requested "[a]ll documents constituting, comprising, evidencing, or
11 reflecting communications concerning the transfer or acquisition of copyright rights
12 for all copyrights claimed by you in this action" (Document Request No. 148), "[a]ll
13 documents constituting, comprising, evidencing, or reflecting communications with
14 Amber Smith, Amy Weber, Aria Giovanni, Irina Voronina, Monika Zsibrita,
15 Nataskia Maren, Sasha Brinkova, Shannon Hobbs, and Talia Harvalik" (Document
16 Request No. 153), "[a]ll documents concerning communications disputing your
17 claim of ownership of any copyright or trademark rights" (Document Request No.
18 160), and "[a]ll documents concerning communications regarding rights claimed by
19 others in names, likenesses, photographs, or other works claimed by you"
20 (Document Request No. 161). Google's Third Set of Document Requests served
21 March 31, 2006 also request "[a]ll documents constituting, comprising, evidencing,
22 reflecting, or referring to communications to, from, or with Offir Gutelzon or
23 persons or entities acting on his behalf" (Document Request No. 123) and "[a]ll
24 documents constituting, comprising, evidencing, reflecting, or referring to
25 communications to, from, or with PicScout Ltd. or persons or entities acting on its
26 behalf" (Document Request No. 125). Attached hereto as Exhibit K are true and
27 correct copies of excerpts of these document requests.

1 16. Google has also served document subpoenas on P10 employees Wendy
2 Augustine and Sheena Chou. Attached as Exhibit L is a true and correct copy of
3 Google's Subpoena for Documents and Testimony to Wendy Augustine dated May
4 22, 2009. The subpoena requested that Ms. Augustine produce various relevant
5 communications, including "All communications between you and Perfect 10
6 regarding or relating to any of the Perfect 10 images in suit" and "all
7 communications between you and Perfect 10 regarding or relating to Google or
8 Google services." Attached as Exhibit M is a true and correct copy of Google's
9 Subpoena for the Production of Documents to Sheena Chou dated September 29,
10 2009. The subpoena requested that Ms. Chou produce various relevant
11 communications, including "[a]ll communications between you and Perfect 10
12 regarding or relating to Perfect 10 images being asserted in this action," "[a]ll
13 communications between you and Perfect 10 regarding or relating to Google or
14 Google services," and "[a]ll communications between you and Perfect 10 regarding
15 or relating to Usenet access providers or password-protected websites."

16 17. Under my direction, paralegals at my firm also attempted to locate all
17 of the emails sent or received by Wendy Augustine that P10 has produced to
18 Google. In order to locate these documents, we searched for the name: "Wendy
19 Augustine" and her P10 email address: "wendy@perfect10.com" in P10's document
20 production. These searches disclosed approximately 71 emails sent or received by
21 Wendy Augustine. Approximately 54 of those emails were [REDACTED]
22 [REDACTED]. Attached as Exhibit N are true and correct copies of all
23 17 of the remaining emails sent or received by Wendy Augustine that we were able
24 to locate in P10's document production.

25 18. Attached as Exhibit O is a true and correct copy of an email produced
26 by On Line Creations, Inc. (an adult entertainment company that allegedly assigned
27 certain images to P10) in response to Google's May 21, 2009 subpoena. [REDACTED]

1 [REDACTED]
2 [REDACTED] Under my direction, paralegals at my firm
3 attempted to locate a copy of this document in P10's document production, but did
4 not find it. This email is responsive to multiple document requests Google served
5 on P10, including Request Nos. 3 ("All documents evidencing assignments or
6 licenses of copyrights claimed by you in this action"), 148 ("All documents
7 constituting, comprising, evidencing, or reflecting communications concerning the
8 transfer or acquisition of copyright rights for all copyrights claimed by you in this
9 action"), and 161 ("All documents concerning communications regarding rights
10 claimed by others in names, likenesses, photographs, or other works claimed by
11 you"). These document requests are included in Exhibit K.

12 19. Attached as Exhibit P are true and correct copies of emails produced by
13 Nadine Schoenweitz A/K/A Nataskia Maren (a former P10 model whose publicity
14 rights P10 claims to be asserting in this case) in response to Google's August 5, 2009
15 subpoena. [REDACTED]

16 [REDACTED]
17 [REDACTED] Under my direction, paralegals at my
18 firm attempted to locate these documents in P10's document production but did not
19 find them. These emails are responsive to multiple document requests Google
20 served on P10, including Request Nos. 42 ("All documents concerning the publicity
21 rights claimed by you in this action, including, but not limited to, all licenses,
22 releases, or assignments and all communications relating to such licenses, releases
23 or assignments"), 50 ("All communications with persons whose publicity rights you
24 claim to own or exercise, other than those communications requested in request
25 number 42"), 53 ("All documents concerning communications regarding ownership
26 or control, by others, of publicity rights claimed by you in this case"), 54 ("All
27 documents concerning your compliance with 18 U.S.C. § 2257 with respect to all

1 persons whose names or photographs underlie any of your claims in this action"),
2 and 153 ("All documents constituting, comprising, evidencing, or reflecting
3 communications with Amber Smith, Amy Weber, Aria Giovanni, Irina Voronina,
4 Monika Zsibrita, Nataskia Maren, Sasha Brinkova, Shannon Hobbs, and Talia
5 Harvalik"). These document requests are included in Exhibit K.

6 20. Attached as Exhibit Q are true and correct copies of emails produced by
7 PicScout Inc. (an image recognition company that has done work for P10) in
8 response to Google's October 30, 2008 subpoena. [REDACTED]
9 [REDACTED]
10 [REDACTED]

11 [REDACTED] Under my direction, paralegals at my firm attempted to locate copies of
12 these documents in P10's document production but did not find them. These emails
13 are responsive to multiple document requests Google served on P10, including
14 Request Nos. 123 ("All documents constituting, comprising, evidencing, reflecting,
15 or referring to communications to, from, or with Offir Gutelzon or persons or
16 entities acting on his behalf"), 125 ("All documents constituting, comprising,
17 evidencing, reflecting, or referring to communications to, from, or with PicScout
18 Ltd. or persons or entities acting on its behalf"), and 159 ("All documents
19 concerning use of image recognition technology to identify potential or actual
20 infringements of your rights on or via the Internet or search engines"). These
21 document requests are included in Exhibit K.

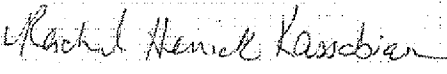
22 21. Attached as Exhibit R is a true and correct copy of P10's Updated and
23 Supplemental Disclosures Pursuant to Federal Rule of Civil Procedure 26(a), dated
24 August 15, 2008, in which P10 identifies Ms. Augustine as a witness with
25 knowledge of various subjects relevant to this case.

26 22. Attached as Exhibit S is a true and correct copy of a letter from P10's
27 counsel Jeff Mausner to Amazon.com's counsel Tim Cahn dated September 22,

1 2009 that I received from Amazon.com's counsel, regarding P10's intention to use
2 Ms. Augustine as a trial witness.

3 23. Attached as Exhibit T is a true and correct copy of P10's Updated
4 Response to Google's Fourth Set of Interrogatories dated May 29, 2009, in which
5 P10 identifies Ms. Augustine as a witness with knowledge of a variety of subjects
6 relevant to this action.

7 I declare under penalty of perjury under the laws of the United States of
8 America that the foregoing is true and correct. Executed December 2, 2009 at San
9 Francisco, California.

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11 Rachel Herrick Kassabian

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