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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
 STATEMENT IN RESPONSE TO
 THE COURT'S DECEMBER 15,
 2009 ORDER REGARDING
 PLAINTIFF PERFECT 10, INC.'S
 MOTION FOR EVIDENTIARY
 AND OTHER SANCTIONS
 AND/OR FOR THE
 APPOINTMENT OF A SPECIAL
 MASTER**

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.

Hon. A. Howard Matz
 Date: December 21, 2009
 Time: 10:00 a.m.
 Place: Courtroom 14
 Discovery Cut-off: None Set
 Pre-trial Conference: None Set
 Trial Date: None Set

1 In its December 15, 2009 Order (Dkt. No. 675), the Court asks two questions
2 about Perfect 10, Inc.'s ("P10") purported "Motion for Evidentiary and Other
3 Sanctions" (Dkt. Nos. 617-630) ("Sanctions Motion"): (1) what bearing the
4 Sanctions Motion has on other pending motions in the case, and (2) why it was not
5 brought before Magistrate Judge Hillman.

6 Google respectfully submits that the answers are (1) none and (2) it should
7 have been. P10's Sanctions Motion rehashes arguments P10 already made in its
8 oppositions to Google's DMCA Motions and raises a bevy of meritless discovery
9 disputes. Neither is properly raised before this Court, and neither impacts Google's
10 pending DMCA Motions.

11 **I. P10'S SANCTIONS MOTION HAS NO BEARING ON GOOGLE'S**
12 **PENDING MOTIONS FOR DMCA SAFE HARBOR.**

13 As Google has explained in its Opposition papers (Dkt. No. 647), P10's
14 Sanctions Motion is a discovery motion that improperly retraces old arguments P10
15 already made in opposition to Google's DMCA Motions. Generally speaking, to
16 obtain safe harbor under the DMCA, Google must establish that it meets the relevant
17 statutory prerequisites (e.g., that it established and reasonably implemented a repeat
18 infringer policy) and that it expeditiously processed statutorily compliant notices
19 received from P10 (if any). Google has already made this showing in its DMCA
20 Motions. P10 had a full and fair opportunity to make whatever arguments it wanted
21 in opposition to Google's Motions—and it did, submitting 75 pages of briefing, 11
22 declarations and several hundred pages of exhibits. Briefing on Google's DMCA
23 Motions is closed.

24 Nevertheless, apparently unsatisfied with its DMCA opposition papers filed
25 months ago, P10 now burdens the Court with its Sanctions Motion. Therein, P10
26 rehashes arguments it already made in its DMCA opposition briefs and speculates
27 that there *might* be other documents that *might* have been requested and/or
28 compelled that *might* somehow be relevant to DMCA issues. E.g., Sanctions Mot.

1 at 22 ("One can only speculate as to the damning evidence that might be contained
2 in such [unidentified] documents."). Even if dressed up with "new" speculation,
3 P10's reiteration of old arguments in supplemental briefing is in fact an improper
4 sur-reply, filed in derogation of this Court's prior admonishments that P10 refrain
5 from filing sur-replies without leave. See Opp. to Sanctions Mot. at 13 (listing re-
6 hashed arguments) & n. 14 (summarizing Court's prior admonishments to P10).
7 P10's vitriol and speculation notwithstanding, there is no realistic prospect that the
8 Sanctions Motion will affect the pending DMCA Motions in any meaningful way.

9 **II. P10 SHOULD HAVE RAISED ITS DISCOVERY ISSUES WITH**
10 **MAGISTRATE JUDGE HILLMAN, AND IN FACT HAS RAISED**
11 **THEM WITH JUDGE HILLMAN IN RECENT FILINGS.**

12 Much of P10's Sanctions Motion raises purported discovery issues and thus
13 should have been brought before Magistrate Judge Hillman. For instance, P10
14 complains about the propriety of Google's responses to document requests, the
15 scope of Judge Hillman's prior discovery orders in 2006 and 2008, redactions in
16 Google's production, and even the format of Google's document production.
17 Sanctions Mot. at 6-15. Indeed, many of its arguments concern recently-served
18 discovery requests on which P10 has not yet even met and conferred or moved to
19 compel. Opp. to Sanctions Mot. at 11:18-24.

20 As Google has shown in its Opposition papers, P10's purported discovery
21 disputes are meritless, because they pertain to documents that were (a) produced
22 (e.g., Google's "DMCA log"), (b) not compelled by any discovery order (e.g., emails
23 related to third-party notices), or (c) never even requested by P10 (e.g., Google's
24 Blogger logs). Id. at 3-11. Regardless, though P10's Sanctions Motion fails to
25 identify any legitimate discovery dispute nor any violation of any discovery order,
26 these matters should have been brought before Judge Hillman in the first instance.

27 In fact, in recent filings P10 actually *has* raised these same issues with Judge
28 Hillman. See P10's Notice of Mot. and Mot. for a Doc. Preservation Order (Dkt.

1 No. 670) at 2 ("Google has failed to produce critical documents, including emails,
2 which have been *ordered* produced by both Judge Hillman and Judge Matz.").
3 Plainly, P10 should not be asking two Judges to consider and rule on the same
4 discovery issues at the same time. This Court has delegated discovery matters to
5 Judge Hillman in this case, and he is in the best position to determine initially
6 whether he has ordered something produced, and whether Google has produced it.

7 P10 may argue that it filed its Sanctions Motion with this Court because
8 Magistrate Judge Hillman cannot impose the drastic remedy P10 seeks—namely,
9 evidentiary sanctions that would effectively grant P10 summary judgment on
10 Google's DMCA defense. Setting aside the fact that P10's Sanctions Motion does
11 not even address—let alone satisfy—the standard for awarding evidentiary
12 sanctions, the fact remains that P10 must first resolve all discovery matters with
13 Judge Hillman. If Judge Hillman were to determine that a discovery order violation
14 occurred, Judge Hillman has the power to issue discovery sanctions as appropriate.
15 See, e.g., Grimes v. City and County San Francisco, 951 F.2d 236, 240 (9th Cir.
16 1991) (upholding monetary sanctions award by magistrate judge for discovery
17 violation). Alternatively P10 could use Judge Hillman's determination to pursue
18 whatever dispositive relief it desired with this Court. What P10 cannot do is force
19 this Court to preside over garden-variety discovery disputes merely by dressing up
20 its discovery motion as one for evidentiary sanctions. P10's Sanctions Motion
21 should either be denied outright or referred to Magistrate Judge Hillman and, as
22 discussed in Google's Opposition, P10 should be sanctioned for bringing it.

23 DATED: December 16, 2009

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