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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 Defendants.

18 Case No. CV 04-9484 AHM (SHx)

19 **Before Judge A. Howard Matz**

20 **OPPOSITION OF PLAINTIFF  
 21 PERFECT 10. INC. TO DEFENDANT  
 22 GOOGLE INC.'S *EX PARTE*  
 23 APPLICATION TO STRIKE PERFECT  
 24 10'S MOTION FOR PRELIMINARY  
 25 INJUNCTION AGAINST DEFENDANT  
 26 GOOGLE INC.; DECLARATION OF  
 27 JEFFREY N. MAUSNER IN SUPPORT  
 28 THEREOF**

Date: Opposition to Ex Parte  
 Time: Opposition to Ex Parte  
 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

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1     **I. THIS COURT SHOULD DENY GOOGLE’S EX PARTE**  
2     **APPLICATION, WHICH IMPROPERLY SEEKS TO AVOID A**  
3     **RULING ON GOOGLE’S UNLAWFUL CONDUCT.**

4     Defendant Google Inc. (“Google”) has filed a misleading and overreaching  
5     *ex parte* application (the “Application”) to strike Plaintiff Perfect 10, Inc.’s  
6     Motion for Preliminary Injunction against Google, which was filed on March 3,  
7     2010 and is set for hearing on April 5, 2010 (the “PI Motion”). Google’s  
8     Application asks this Court to strike Perfect 10’s PI Motion without ever  
9     reviewing Perfect 10’s moving papers or considering the merits of Perfect 10’s  
10    claim that it is entitled to injunctive relief – a claim that the Ninth Circuit  
11    specifically invited Perfect 10 to bring in its initial ruling in this case. *See*  
12    *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1176-77 (9th Cir. 2007)  
13    (reversing this Court’s ruling that Perfect 10 was unlikely to succeed on the merits  
14    of its secondary liability claims and stating that “the district court will need to  
15    reconsider the appropriate scope of injunctive relief after addressing these secondary  
16    liability issues”).

17     The Application is based almost entirely upon two mistaken assertions. First,  
18     Google incorrectly contends that Perfect 10 has not suffered new harm that requires  
19     injunctive relief. Application at 1. In fact, as explained below, Perfect 10 has  
20     suffered significant new harm because, in the last few months, Google has begun to  
21     copy Perfect 10’s confidential DMCA notices, containing full-size copyrighted  
22     Perfect 10 images (“P10 Images”) and live links, and send them to its partner,  
23     *chillingeffects.org*, for publication on the Internet. Google has also provided in-line  
24     links to such images, thus making thousands of full-size P10 Images from Perfect  
25     10’s DMCA notices, which Google was supposed to remove, available to Google  
26     users. Google’s new outrageous conduct, which has made it impossible for Perfect  
27     10 to send further DMCA notices to Google, compels Perfect 10 to seek injunctive  
28

1 relief (*see* Section II, below).

2 Second, Google mistakenly asserts that Perfect 10's filing of the PI Motion  
3 violates this Court's July 8, 2009 Order (the July 8 Order"). Application at 1, 3,  
4 That Order, which specifically holds that Google "exhibited gamesmanship" by  
5 filing its three summary judgment motions (the "DMCA Motions") in July 2009,  
6 ***contains absolutely no language whatsoever that prevents Perfect 10 from filing a***  
7 ***preliminary injunction motion.*** See Declaration of Rachel Herrick Kassabian in  
8 support of the Application ("Kassabian Decl."), Exh. A.<sup>1</sup> Moreover, the July 8  
9 Order cannot possibly bar this Court's consideration of the PI Motion, because the  
10 PI Motion is based largely on developments that took place *after July 8, 2009*. Such  
11 developments include, but are not limited to, Google's incredible new conduct of  
12 forwarding Perfect 10's confidential DMCA notices to *chillingeffects.org*, thereby  
13 making thousands of full-size infringing P10 Images contained in these notices  
14 available to Google's users.

15 Google's Application improperly seeks to prevent this Court from considering  
16 Perfect 10's PI Motion on the merits. Any ruling granting the Application and  
17 striking or staying the PI Motion constitutes a denial of the motion, which will be  
18 immediately appealed by Perfect 10 to the Ninth Circuit. See 28 U.S.C. §  
19 1292(a)(1) (courts of appeals have jurisdiction of appeals from orders refusing  
20 injunctions). This Court should deny the Application and hear Perfect 10's PI  
21 Motion on its merits for at least the following seven reasons:

22 <sup>1</sup> The language of the Order also undermines Google's repeated reference to Perfect  
23 10's summary judgment motion as "reactive." See, e.g., Application at 1. To the  
24 contrary, Perfect 10 would have filed its summary judgment motion before Google's  
25 three DMCA Motions if Google had not filed its Motion for Order for Schedule for  
26 Filing Dispositive Motions and then filed its DMCA Motions without waiting for the  
27 Court's ruling on its own prior motion. As the Court noted in the July 8 Order,  
28 "The Court is aware that Google decided to file its three DMCA motions, noticed  
for August 17, 2009, without awaiting the Court's order on its motion. Although  
Google's filing of the DMCA motions before the Court's order exhibited  
gamesmanship – i.e., it gives the appearance of Google racing to the courthouse at  
the same time it was purporting to seek the Court's guidance on an orderly sequence  
of the filing of motions – Google did not violate any Court order." See July 8, 2009  
Order, Docket No. 453, found at Kassabian Decl. Exh. A.

1 First, Perfect 10's PI Motion is based on several new developments, including  
2 matters such as Google's forwarding of DMCA notices to *chillingeffects.org*, that  
3 took place after July 8, 2009. These new developments, including Google's refusal  
4 to respond to notices alleging violations of Perfect 10's rights of publicity and its  
5 incomplete processing of 95 recent Perfect 10 DMCA notices, are not addressed  
6 either by Google's three DMCA Motions or by Perfect 10's summary judgment  
7 motion (*see* Section II, below).

8 Second, the terms of the July 8 Order simply do not prevent Perfect 10 from  
9 filing a PI Motion. Nor does the July 8 Order bar Perfect 10 from seeking injunctive  
10 relief, notwithstanding the fact that Google's DMCA Motions are pending. The July  
11 8 Order merely stayed further briefing on Perfect 10's summary judgment motion.  
12 It provides no basis to grant the Application or to prevent this Court from  
13 considering Perfect 10's PI Motion on the merits (*see* Section III, below).<sup>2</sup>

14 Third, the Ninth Circuit's 2007 ruling on Perfect 10's initial motion for  
15 preliminary injunction specifically contemplates Perfect 10's filing of a subsequent  
16 preliminary injunction motion following further fact finding. Under these  
17 circumstances, this Court cannot properly strike or stay Perfect 10's PI Motion (*see*  
18 Section IV, below).

19 Fourth, there simply is no authority for the key proposition of law advanced  
20 by Google in support of the Application: that this Court may strike the PI Motion on  
21 an *ex parte* basis, without considering the merits of the PI Motion. None of the  
22 cases upon which Google mistakenly seeks to rely supports this proposition (*see*  
23

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24 <sup>2</sup> Google also claims that the PI Motion should be stricken because it is an "improper  
25 surreply to Google's DMCA Motions." Application at 6 n.2. This assertion is  
26 obviously incorrect – Perfect 10's PI Motion is a separate motion alleging new  
27 unlawful conduct by Google and seeking different relief than the relief at issue in the  
28 DMCA Motions, and Google has an opportunity to oppose the PI Motion.  
Moreover, Google's incorrect assertion that Perfect 10 "has been admonished not to  
file improper sur-replies before" in orders issued in the *Amazon* case completely  
mischaracterizes the language of those orders, *See* Docket Nos. 220 and 284.

1 Section V, below).

2 Fifth, Google spends a significant portion of the Application asserting that  
3 Perfect 10 allegedly has failed to establish the irreparable harm necessary for it to  
4 obtain injunctive relief. Application at 9-12. The question of irreparable harm  
5 cannot properly be addressed on an *ex parte* basis and cannot support the granting of  
6 the Application. Rather, this issue may only be addressed by the Court in  
7 connection with a ruling on the merits of the PI Motion (*see* Section VI, below).<sup>3</sup>

8 Sixth, Google asserts that the PI Motion is improper because Perfect 10 asks  
9 this Court to revisit the “server test” in ruling on the PI Motion. Application at 12-  
10 13. As Google well knows, in order for the Ninth Circuit to revisit the “server test”  
11 in connection with any appeal, Perfect 10 must first raise the issue before this Court.  
12 In fact, this Court has stated that the Ninth Circuit may want to review the server

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14 <sup>3</sup> Google is seeking to use the Application to obtain a final determination on the PI  
15 Motion, while giving Perfect 10 only 24 hours to respond to its arguments and  
16 without even allowing the Court the opportunity to read the PI Motion. The first  
17 time that Google ever mentioned that it would file an *ex parte* application to strike  
18 the PI Motion was in an email to Perfect 10’s counsel sent on March 8, 2010 at  
19 12:02 a.m. Before that time, Google had only asked for additional time to file its  
20 opposition to the PI Motion, and the parties were discussing a briefing schedule. *See*  
21 Declaration of Jeffrey N. Mausner in opposition to the Application, submitted  
22 herewith, Exh. 1, pages 28-31. This Court should not be forced to decide the PI  
23 Motion based on Google’s Application and this Opposition, written in less than 24  
24 hours. Rather, the PI Motion should be fully briefed and decided on the merits.

25 For example, Google asserts that Perfect 10’s claim that that it is near  
26 bankruptcy and must have immediate relief to survive is contrary to “blackletter law  
27 that alleged monetary damages cannot constitute irreparable harm for purposes of  
28 imposition of a preliminary injunction.” Application at 9. In fact, a leading treatise  
specifically states that “[a] ‘substantial loss of business and perhaps even  
bankruptcy’ absent preliminary injunctive relief shows ‘irreparable injury.’” *See* 13  
*Rutter Group Practice Guide: Federal Civil Procedure Before Trial* (TRG 2010)  
§13:58, *citing* *Doran v. Salem Inn, Inc.* 422 US 922, 932, 95 S.Ct. 2561, 2568  
(1975) and *Grand River Enterprise Six Nations, Ltd. v. Pryor*, 481 F3d 60, 67 (2nd  
Cir. 2007)—(loss of current or future market share may constitute irreparable harm).

Clearly, this issue should not be decided in response to an *ex parte* application  
to strike a motion for preliminary injunction, but in a hearing on the merits of the PI  
Motion.

1 test, at least in certain contexts. Furthermore, Perfect 10's request to revisit the  
2 "server test" is explicitly based on new evidence that was not before this Court or  
3 the Ninth Circuit in connection with Perfect 10's initial preliminary injunction  
4 motion. Memorandum of Points and Authorities in Support of PI Motion ("Memo")  
5 at 24-25. For these reasons, Perfect 10's discussion of the server test likewise  
6 provides no grounds for this Court to grant the Application and strike the PI Motion  
7 without a hearing on the merits (*see* Section VII, below). Seventh, this Court cannot  
8 properly rule upon Google's three DMCA Motions before it considers Perfect 10's  
9 PI Motion because Google still has not produced documents that are highly relevant  
10 to Google's DMCA Motions. In fact, Judge Hillman specifically stated in his  
11 January 27, 2010 Order that "the court may ultimately decide that the documents  
12 sought could be material to Perfect 10's opposition to the pending Motions for  
13 Summary Judgment." Because Judge Hillman has yet to rule upon this issue, which  
14 was raised in connection with Perfect 10's Motion for Evidentiary and Other  
15 Sanctions, the DMCA Motions are not ripe for disposition and the relief sought by  
16 the Application is inappropriate (*see* Section VIII, below).<sup>4</sup>

17 **II. GOOGLE'S EX PARTE APPLICATION DISREGARDS RECENT**  
18 **OUTRAGEOUS GOOGLE CONDUCT THAT NECESSITATES**  
19 **INJUNCTIVE RELIEF.**

20 Google's ex-parte application substantially mischaracterizes Perfect 10's PI  
21 Motion. In particular, it completely disregards recent new and extraordinarily  
22 damaging Google conduct that consists, among other things, of Google taking  
23 thousands of Perfect 10 copyrighted Images, including full-size P10 Images,  
24 contained in Perfect 10's confidential DMCA notices, and making them available to

25 <sup>4</sup> Google's assertion that Perfect 10 has purposefully delayed this case is ludicrous.  
26 *See* Application at 12. There have been times when Perfect 10 has had trouble  
27 keeping up with discovery being propounded by Google and Amazon, with their  
28 limitless resources and hordes of attorneys, but Perfect 10 has always sought to  
move the case as quickly as possible, given its limited resources. Furthermore, the  
stay of discovery sought by Perfect 10, discussed at page 11, lines 26-27 of the  
Application, was denied, and Google has taken very extensive discovery in the case.



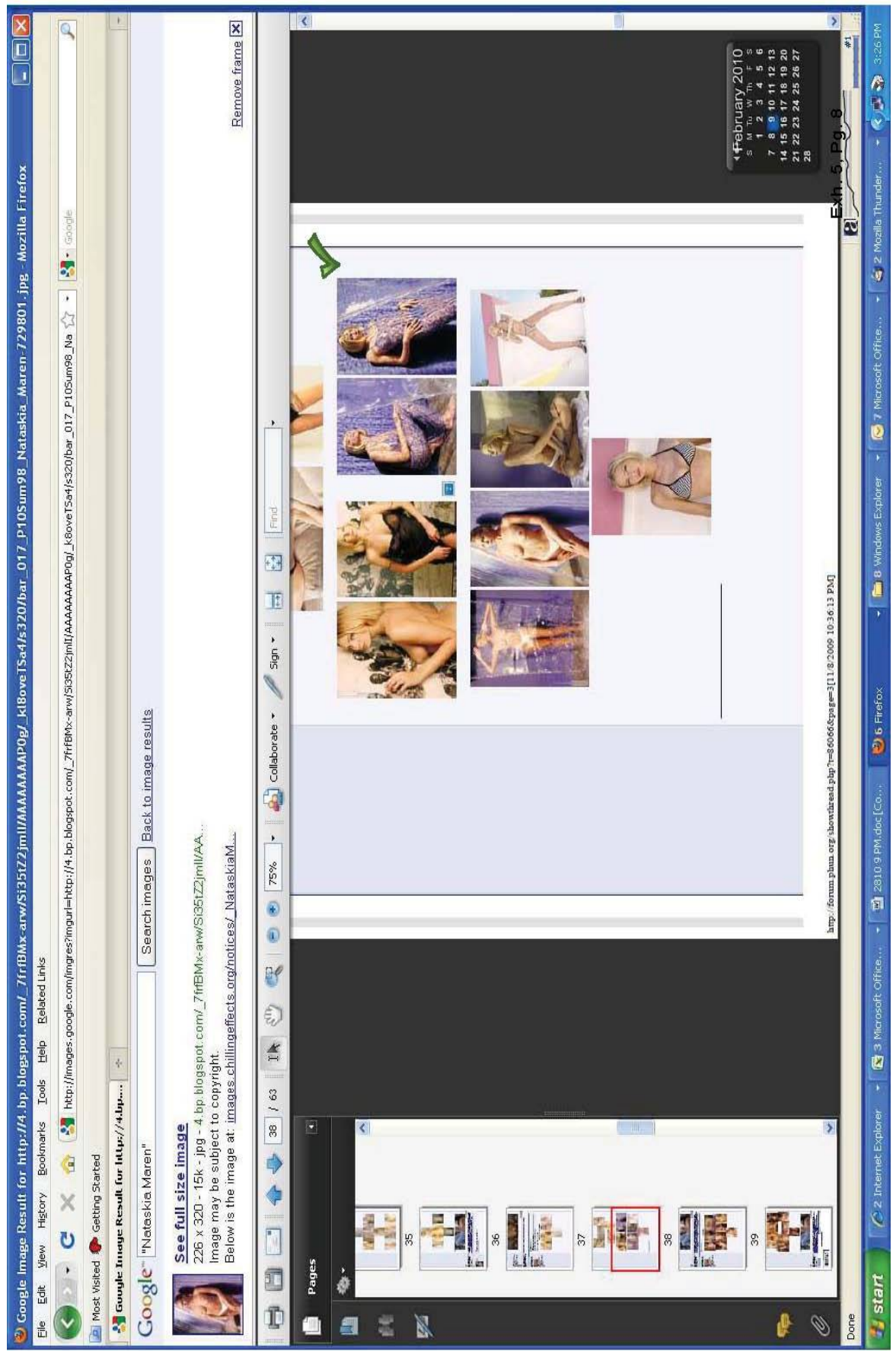
1 Google users on a massive scale. This new and extraordinarily damaging Google  
2 conduct, which started only a few months ago, is a key element of the PI Motion.

3 **A. Google’s Forwarding Of Perfect 10’s DMCA Notices To Its Partner**  
4 **Website, *Chillingeffects.org*.**

5 *In December 2009*, in response to 95 recent Perfect 10 DMCA notices,  
6 Google began forwarding full-size Perfect 10 Images contained in those notices to  
7 its partner website, *chillingeffects.org*, for publication on the Internet. Google also  
8 provided an in-line link to those images, at the location where they were placed on  
9 the servers of *chillingeffects.org*. As a result, P10 Images and links that Perfect 10  
10 has asked Google to remove are instead being *reinstated* on *chillingeffects.org*.  
11 Because Google provides a direct in-line link to those images, Google users can now  
12 search for a Perfect 10 model and download all of the images of that model in  
13 Perfect 10’s confidential DMCA notices, as well as *thousands of other P10 Images*,  
14 all while remaining at *google.com*. Memo at 3, 9-10; Declaration of Dr. Norman  
15 Zada in support of the PI Motion (“Zada Decl.”) ¶¶13-15, Exhs. 5-7. Perfect 10 has  
16 repeatedly complained to Google about this recent conduct, but Google refuses to  
17 stop. Google’s unwillingness to cease this conduct prevents Perfect 10 from sending  
18 further DMCA notices to Google, which effectively precludes Perfect 10 from  
19 protecting its copyrighted works.

20 Google’s recent unlawful conduct, which basically places back on the Internet  
21 the very images and links which Perfect 10 asked Google to remove, is illustrated by  
22 the following example, which is page 8 of Exhibit 5 to the Zada Declaration (“Page  
23 8”).

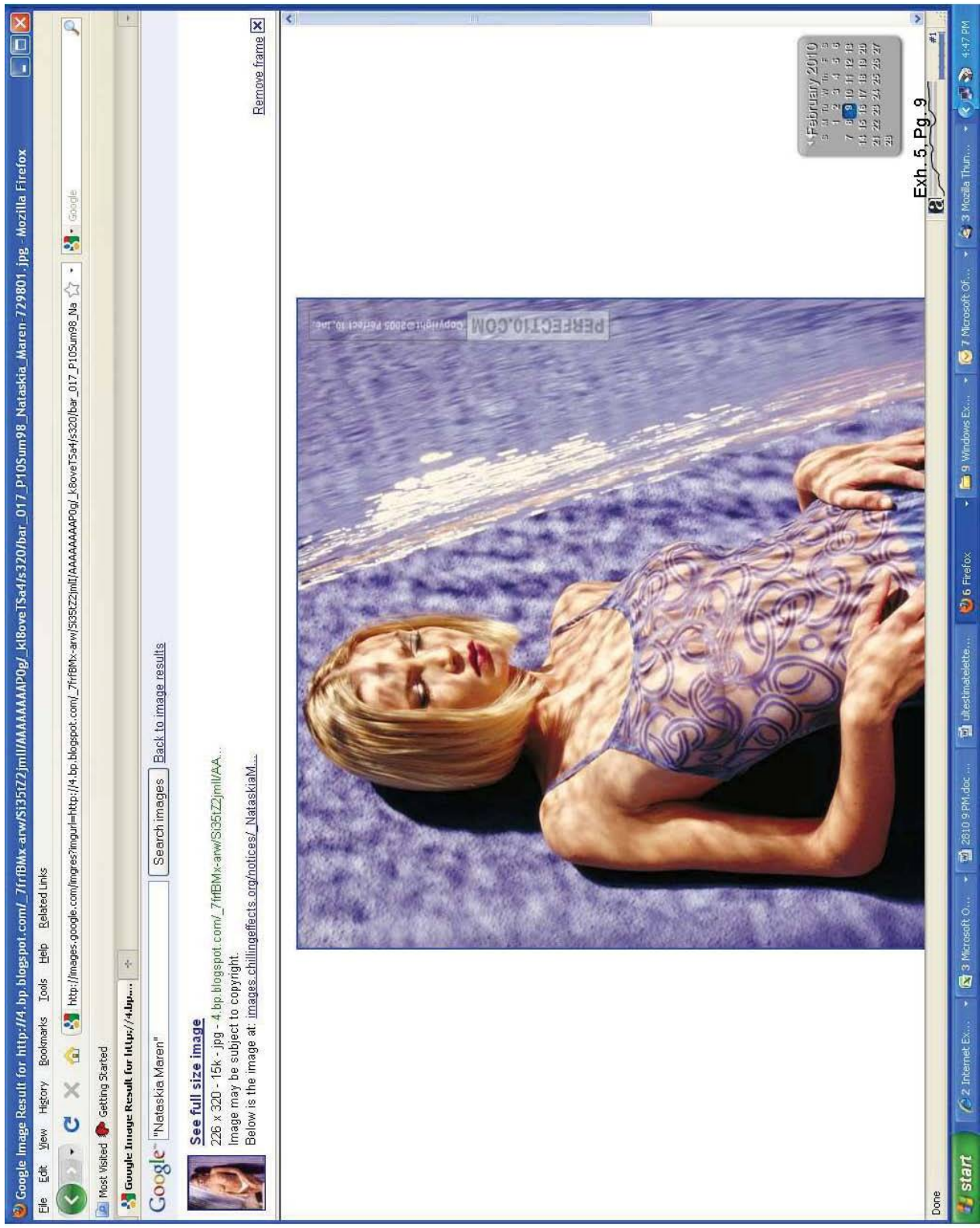
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1           The thumbnail on the upper left of Page 8 was identified by Perfect 10 as an  
2 infringing image in the confidential 63-page DMCA notice it sent to Google on  
3 November 8, 2009. Although Google at one point removed that thumbnail from its  
4 Image Search results, it reinstated that very same thumbnail in its Image Search  
5 results and in-line linked that thumbnail to a URL at *images.chillingeffects.org*  
6 where Perfect 10's entire confidential DMCA notice was copied and stored. By  
7 clicking on the reinstated P10 thumbnail shown at the upper left of the above page,  
8 Google users were able to access Perfect 10's entire DMCA notice, consisting of  
9 thousands of live images and links. One page of this notice is shown on the right  
10 side of Page 8. Google users could click on any of those images, such as the  
11 checked image shown on Page 8 above and download a full-size version of that  
12 same P10 Image, as shown below.

13           As the above discussion indicates, Google is willfully reinstating known  
14 infringing P10 Images onto the Internet and then providing direct links to those  
15 images. Such conduct, which began in December 2009, is not the subject of either  
16 Google's DMCA Motions or Perfect 10's summary judgment motion. It clearly  
17 constitutes both direct and contributory copyright infringement, because Google is  
18 both copying and distributing full-size P10 Images, and because Google is providing  
19 access to known infringing material. Because the PI Motion specifically seeks to  
20 enjoin such newly infringing conduct, Google's attempt to strike the PI Motion fails.  
21 At the very minimum, this Court needs to address whether such newly infringing  
22 conduct should be enjoined on the merits, based upon a full briefing by the parties.  
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The above page is page 9 of Exhibit 5 to the Zada Declaration. The full-size P10 Image found on this page was obtained by clicking on the checked thumbnail shown on Page 8.

1           **B.     The PI Motion Seeks Injunctive Relief Based On Other New**  
2                           **Unlawful Conduct Engaged In By Google.**

3           Perfect 10's PI Motion also seeks to enjoin other recent unlawful conduct by  
4 Google, which is not at issue either in Google's DMCA Motions or Perfect 10's  
5 summary judgment motion.

6           First, Google has recently confirmed that it will not take any action against  
7 violations of Perfect 10's assigned rights of publicity, including violations by  
8 Google's advertising affiliates on websites that Google hosts. In January 2010,  
9 Google advised Perfect 10: "It appears that your email also concerns rights of  
10 publicity violations. Rights of publicity are not covered by the DMCA, and  
11 pursuant to Google's content policies, we will be unable to take further action on  
12 your complaint." Zada Decl. ¶¶15, 101, Exhs. 7, 73. This issue is not covered by  
13 Google's DMCA Motions or Perfect 10's summary judgment motion.

14           Consequently, there is no basis to stay or deny Perfect 10's request for injunctive  
15 relief concerning this issue.

16           Second, Google's DMCA Motions do not even mention the following  
17 Google programs, which have infringed, in total, hundreds of full-size P10  
18 Images stored on Google's servers: Google Groups, Google Sites, Google  
19 Picasa, and infringements on other Google owned URLs, such as *ggpht.com* and  
20 *googlepages.com*. Google has not responded to most of Perfect 10's DMCA  
21 notices regarding such infringements, which provided Google with a copy of  
22 Google's own infringing webpage, showing the infringing P10 Image along with  
23 the full URL of that web page. Zada Decl. ¶¶65-66, 77, Exhs. 45-46, 57. Perfect  
24 10's motion seeks to enjoin such ongoing infringement. Because this issue is not  
25 even mentioned in Google's DMCA motions, there is no basis for this Court to  
26 strike or stay that portion of Perfect 10's PI Motion.

27           **C.     Google's Summary Judgment Motions Do Not Cover New And**  
28                           **More Massive Infringement And Other Google Misconduct**

1 Google continues to incorrectly argue that its three DMCA summary  
2 judgment motions will decide the case, which is simply not correct, for the  
3 following reasons, among others:

4 In addition to the infringement mentioned above, which is not covered by  
5 Google's DMCA Motions, infringement on Google's system has increased  
6 dramatically since July 2009, when Google filed its three motions. In spite of 95  
7 new DMCA notices sent by Perfect 10 to Google between October and November  
8 2009, Google is now offering at least **22,000 P10** thumbnails in its Image Search  
9 results, and is linking those images to websites that, on average, infringe at least  
10 9,000 additional full-size P10 Images. Google is also offering **222 million links** to  
11 massive infringers, which it is refusing to remove. Furthermore, Google has stated  
12 that it will not take any action against its massive infringing paysite advertisers,  
13 regardless of the notice. Google is also continuing to place ads next to full-size  
14 identified P10 Images on websites that it hosts. Zada Decl. ¶¶6, 16, 17, 45, 2 Exhs.  
15 1, 8, 10, 30, 9. None of these Google activities is covered by the DMCA. As a  
16 result, Google's DMCA Motions will not resolve these issues. Moreover, Google  
17 cannot receive a DMCA safe harbor for *its failure to act* as discussed above.  
18 Because these issues are addressed by the Perfect 10's PI Motion, but not Google's  
19 DMCA Motions, there is no basis for this Court to strike the PI Motion.

20 In addition, Google's DMCA Motions do not cover any of the 95 recent  
21 Perfect 10 DMCA notices sent to Google in October and November of 2009,  
22 whether those notices were compliant, and whether or not Google suitably  
23 responded to those notices. For example, Google has recently demonstrated that it  
24 can process notices that it previously claimed it could not process. This contradicts  
25 Google's contention in its pending DMCA Motions, that all such notices were  
26 deficient. An example of such a notice as it now appears on chillingeffects.org  
27 servers, and Google's in-line linking to it, is shown below. This example is page 1 of  
28 Exhibit 6 to the Zada Declaration ("Page 1"):



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The screenshot shows a Mozilla Firefox browser window with the address bar containing the URL: [http://82.208.64.6/dm/eroart/046\\_DeathsCPX\\_Kristel\\_Kama\\_01.jpg](http://82.208.64.6/dm/eroart/046_DeathsCPX_Kristel_Kama_01.jpg). The search results for "kristel kama" are displayed, showing 39 results. The first result is a thumbnail image of a woman in a white bikini. Below the thumbnail, the search string is "kristel kama", the image URL is [http://82.208.64.6/dm/eroart/046\\_DeathsCPX\\_Kristel\\_Kama\\_01.jpg](http://82.208.64.6/dm/eroart/046_DeathsCPX_Kristel_Kama_01.jpg), the site is <http://82.208.64.6/dm/eroart/>, and the image info is 755x1070 Size: 348Kb. A red box highlights the text "Image URL required by Google" and another red box highlights "Thumbnail URL".

The second result is a thumbnail image of a woman in a white bikini. Below the thumbnail, the search string is "kristel kama", the image URL is [http://www.thefamous.org/galeri/kristel/kristel%20kama/kristel\\_kama-78019wallpaper.jpg](http://www.thefamous.org/galeri/kristel/kristel%20kama/kristel_kama-78019wallpaper.jpg), the site is [http://www.thefamous.org/kristel\\_kama.html](http://www.thefamous.org/kristel_kama.html), and the image info is 1152x864 Size: 99Kb.

The third result is a thumbnail image of a woman in a white bikini. Below the thumbnail, the search string is "kristel kama", the image URL is <http://www.forgetoo.com/images/blog/kristelkama.jpg>, the site is <http://www.forgetoo.com/?blogid=2024>, and the image info is 500x495 Size: 23Kb.

The browser's taskbar shows the Start button, several open applications including Mozilla Thunderbird, Microsoft Office, Firefox, Microsoft Office, and Microsoft Excel, and the system clock showing 9:14 AM on 6/22/2009.

1           The image at the upper left of Page 1 is taken from a Perfect 10 DMCA  
2 notice, which Perfect 10 refers to as a “check the box” or “check the infringing  
3 image” notice. A portion of the notice is shown on the right side of Page 1. Perfect  
4 10 included copies of the infringing P10 thumbnails, along with three links provided  
5 by Google, the “See full-size image” link, which Google requires for its Image  
6 Search notice, the Web page link, which Google requires for its web search and  
7 AdSense notices, and a thumbnail link. Google had refused to process these notices  
8 for years, but recently began to process them. However, because Google is re-  
9 instating the infringing images and links identified by Perfect 10 back on the  
10 Internet, Perfect 10 cannot provide Google with any additional notices. Zada Decl.  
11 ¶¶13-15, Exhs. 5-7.

12           As another example of Google’s misconduct, which is not covered by  
13 Google’s DMCA Motions, Google has recently claimed that it has removed or  
14 suppressed identified images and links when it has not in fact done so.

15           The following two pages, taken from pages 22 and 23 of Exhibit 7 to the Zada  
16 Declaration, set forth a January 7, 2010 email from Google’s DMCA agent to Dr.  
17 Norman Zada of Perfect 10. This email demonstrates that Google claimed that it  
18 removed images that it did not actually remove. In the email, “DNR” stands for  
19 “did not remove.” Although Google states in the email that it removed certain links  
20 and/or images listed in its email, which Perfect 10 had identified in a November 8,  
21 2009 notice to Google, Google actually did not remove many of the infringing links  
22 and/or images which it claimed it removed. This failure on Google’s part to  
23 suppress known infringing links after July of 2009 should subject it to contributory  
24 liability. The resolution of Google’s pending three summary judgment motions will  
25 not resolve such issues. However, they are addressed in the PI Motion, and for this  
26 reason as well, there is no basis to stay or strike that Motion.



1 Re: [#539539536] Perfect 10 DMCA/Rights of Publicity Notice 11.08.09

2 **Subject:** Re: [#539539536] Perfect 10 DMCA/Rights of Publicity Notice 11.08.09  
3 **From:** "DMCA Agent" <dmca-agent@google.com>  
4 **Date:** Thu, 07 Jan 2010 23:04:31 -0000  
5 **To:** normanz@earthlink.net

6 Dear Dr. Zada,

7 We are in receipt of your eighth email dated November 8, 2009. As you know, and as we have  
8 previously informed you, sending us screenshots is insufficient and fails to comply with Google's  
9 DMCA notice policies and procedures. Additionally, Google requests that you submit the written  
10 communication to the address or fax number provided in Google's published DMCA policy for the  
11 product at issue. If you wish to submit a DMCA notice regarding Image Search, please follow  
12 Google's requirements for processing such notices, as set forth in Google's published DMCA policy  
13 for Image Search, located at [http://www.google.com/images\\_dmca.html](http://www.google.com/images_dmca.html). In particular, please provide  
14 the information set forth in Google's DMCA policy with respect to each specific copyrighted work  
15 being infringed at each specific allegedly infringing image URL.

16 If you wish to submit a DMCA Notice regarding Blogger, please follow Google's requirements for  
17 processing such notices, as set forth in Google's published DMCA policy for Blogger, located at  
18 [http://www.google.com/blogger\\_dmca.html](http://www.google.com/blogger_dmca.html). In particular, please provide the information set forth in  
19 Google's DMCA policy with respect to each specific copyrighted work being infringed at each specific  
20 allegedly infringing Blogger post. Please identify each post associated with the allegedly  
21 infringing material by providing the permalink (post URL) or date of the blog post. When Google  
22 takes down a post URL, an automated process also takes down all images which are displayed at that  
23 post URL, even though those images may be hosted at different (image) URLs.

24 Please note that you can file a DMCA notice regarding Blogger via Blogger's online DMCA form,  
25 located at [http://help.blogger.com/bin/request.py?contact\\_type=blogger\\_dmca\\_infringement](http://help.blogger.com/bin/request.py?contact_type=blogger_dmca_infringement), or you can  
26 mail or fax a communication containing the required information to:

27 Google, Inc.

28 Attn: Google Legal Support, Blogger DMCA Complaints

1600 Amphitheatre Parkway

Mountain View, CA 94043

Fax: (650) 618-2680, Attn: Blogger Legal Support, DMCA Complaints

29 If you wish to submit a DMCA notice regarding any other Google product or service, please follow the  
30 requirements for processing such notices as set forth in Google's published DMCA policy for that  
31 product or service, viewable at <http://www.google.com/dmca.html> by clicking on the links on the  
32 left-hand side of the screen. Also, as Google's DMCA policy states, and as we have previously  
33 informed you, if you are sending a large number of URLs in a single removal request, please also  
34 send an electronic soft copy of the notice (with the URLs listed in spreadsheet format, for example)  
35 to [removals@google.com](mailto:removals@google.com).

36 Google's published DMCA policy provides the information Google needs to process DMCA removal  
37 requests. Please follow that policy. If you have any specific questions regarding Google's  
38 published DMCA policies, we would be happy to answer them for you.

39 Notwithstanding the defects in your notice, we have processed it to the greatest extent possible,  
40 and have removed links to the following web pages and/or images from Google search results:

41 [http://www.aoyama.com.mx/wp-content/uploads/2007/10/amy\\_weber6.jpg](http://www.aoyama.com.mx/wp-content/uploads/2007/10/amy_weber6.jpg) **Did not remove anything**

42 [http://theseriousalliance.free.fr/Amy\\_Weber\\_810200244316PM142.jpg.jpeg](http://theseriousalliance.free.fr/Amy_Weber_810200244316PM142.jpg.jpeg)

43 <http://www.universalwe.es/wp-content/amy-weber.jpg> **DNR direct Web search link or ads**

44 [http://www.nettekeyif.net/gir/data/media/785/amy\\_weber11024x768\\_Nettekeyif.net\\_9.jpg](http://www.nettekeyif.net/gir/data/media/785/amy_weber11024x768_Nettekeyif.net_9.jpg)

45 <http://img.flash-screen.com/uploads/200605/thus/1148561646.jpg> **DNR Web search link** **Did not remove**

46 <http://www.perfectpeople.net/photo-picture-image-media/Amy-Weber-374x574-38kb-media-161-media-0081.jpg>

47 [http://www.clublez.com/movies/lesbian\\_movie\\_scenes/actresses/a/amy\\_weber/amy\\_weber\\_03.jpg](http://www.clublez.com/movies/lesbian_movie_scenes/actresses/a/amy_weber/amy_weber_03.jpg) **DNR Web link**

48 <http://www.grandesestrellas.com/imgcontent/galleries/STAR2899/amy-weber-41682.jpg>

[http://img.brothersoft.com/screenshots/softimage/f/free\\_amy\\_weber\\_screensaver-133883-1.jpeg](http://img.brothersoft.com/screenshots/softimage/f/free_amy_weber_screensaver-133883-1.jpeg)

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1 of 2

1/7/2010 10:51 PM

1 Re: [#539539536] Perfect 10 DMCA/Rights of Publicity Notice 11.08.09

2 **Did not remove smaller thumbnail or direct link to infringing web page**

3 [http://www.clublez.com/movies/lesbian movie scenes/actresses/a/amy weber/amy weber 01.jpg](http://www.clublez.com/movies/lesbian%20movie%20scenes/actresses/a/amy%20weber/amy%20weber%2001.jpg)

4 <http://www.celebritiesmix.com/nude-celebrities/amy-weber-nude/2-amy-weber-nude.jpg>

**DNR Web link**

5 <http://www.pourtoi.biz/115/115109/5.jpg>

6 <http://www.beyondhollywood.com/gallery/stills/amyweber.jpg>

7 [http://www.rumela.com/albums/amy weber/amy weber08.jpg](http://www.rumela.com/albums/amy%20weber/amy%20weber08.jpg)

**Did not remove anything**

8 [http://big.dada.net/gallery/modelle straniere/amy weber/amy weber 0086.jpg](http://big.dada.net/gallery/modelle%20straniere/amy%20weber/amy%20weber%200086.jpg)

9 theseriousalliance.free.fr/

10 gallery.oneindia.in/main.php?q2\_itemId=503548 (re-instated pursuant to counter-notification received on December 22, 2009).

11 [www.topstars.biz/Amy-Weber.htm](http://www.topstars.biz/Amy-Weber.htm) (re-instated pursuant to counter-notification received on December 19, 2009)

12 We also have taken down the content located at the following URLs:

**Did not remove anything**

13 [http://1.bp.blogspot.com/ 4QbiUz Rqgc/SCcpJFMHhUI/AAAAAAAAAD4U/v6iyTjQ2Y9E/s400/amy weber photo 9c.jpg](http://1.bp.blogspot.com/_4QbiUzRqgc/SCcpJFMHhUI/AAAAAAAAAD4U/v6iyTjQ2Y9E/s400/amy%20weber%20photo%209c.jpg)

14 [http://1.bp.blogspot.com/ 4QbiUz Rqgc/SCco8FMHhSI/AAAAAAAAAD4E/dLANdpryNgY/s400/amy weber photo 5c.jpg](http://1.bp.blogspot.com/_4QbiUzRqgc/SCco8FMHhSI/AAAAAAAAAD4E/dLANdpryNgY/s400/amy%20weber%20photo%205c.jpg)

**Did not remove anything**

15 Upon review of the following URLs mentioned in your complaint, we were unable to locate the allegedly infringing content in question:

16 [www.grandesestrellas.com/a/amy-weber-photo-6.html](http://www.grandesestrellas.com/a/amy-weber-photo-6.html)

17 [himanek.hi.funpic.de/wallpapers/girls\\_sexy/](http://himanek.hi.funpic.de/wallpapers/girls_sexy/)

18 [www.beyondhollywood.com/gallery/page/299/](http://www.beyondhollywood.com/gallery/page/299/)

19 [http://himanek.hi.funpic.de/wallpapers/girls sexy/amy weber- 06.jpg](http://himanek.hi.funpic.de/wallpapers/girls%20sexy/amy%20weber-06.jpg)

20 [http://big.dada.net/gallery/Modelle Straniere/Amy Weber/Amy Weber 0126.jpg](http://big.dada.net/gallery/Modelle%20Straniere/Amy%20Weber/Amy%20Weber%200126.jpg)

21 [http://gallery.oneindia.in/main.php?q2\\_view=core.DownloadItem&q2\\_itemId=503548&q2\\_serialNumber=1](http://gallery.oneindia.in/main.php?q2_view=core.DownloadItem&q2_itemId=503548&q2_serialNumber=1)

22 If this matter is still a concern, please send Google a notice that complies with Google's DMCA notice policies and procedures (as referenced above), and that includes detailed information to enable us to locate the allegedly infringing content.

23 It appears that your email also concerns rights of publicity violations. Rights of publicity are not covered by the DMCA, and pursuant to Google's content removal policies we will be unable to take further action on your complaint. As always, we encourage you to resolve any disputes directly with the author of the websites in question. If a contact email address is listed on the Blogger website, we recommend you work directly with the author to have the information in question removed or modified. If you pursue legal action against the author of the blog and obtain a court order establishing that the individual's publicity rights have been violated, please provide Google with a copy of that order so that Google can take any and all action necessary pursuant to Blogger's Terms of Service. If you pursue legal action against the non-Blogger websites that results in the removal of the offending material, our search results will display this change after we next crawl the sites. If a webmaster makes these changes and you need us to expedite the removal of the cached copy, please submit your request using our webpage removal request tool at <http://www.google.com/webmasters/tools/removals>.

24 Regards,

25 The Google Team

26 Exh. 7, Pg. 23

27 2 of 2

28 1/7/2010 10:51 PM

1 **III. PERFECT 10’S FILING OF THE PI MOTION DOES NOT VIOLATE**  
2 **THE JULY 8 ORDER.**

3 By its very terms, the July 8 Order does not bar Perfect 10 from filing the PI  
4 Motion. Nor does the July 8 Order contain any language that prevents Perfect 10  
5 from seeking injunctive relief. Rather, the July 8 Order merely “STAYS further  
6 briefing on Perfect 10’s just-filed motion for summary judgment (Docket No. 436)  
7 until further order of the Court.” Kassabian Decl. Exh. A.

8 Google has failed to identify, and indeed cannot identify, any language in the  
9 July 8 Order that supports the granting of its Application or the striking of the PI  
10 Motion. On the contrary, Google’s Application seeks relief that is significantly  
11 broader and more oppressive than that set forth in the July 8 Order. The July 8  
12 Order simply stayed Perfect 10’s summary judgment motion, which remains  
13 pending. By contrast, the Application asks this Court to strike the PI Motion  
14 entirely, thereby effectively denying the PI Motion without the Court ever  
15 considering the motion on its merits. Because the July 8 Order does not support the  
16 relief sought by Google, this Court should deny the Application in its entirety.

17 **IV. THE NINTH CIRCUIT’S OPINION SUPPORTS THIS COURT’S**  
18 **CONSIDERATION OF PERFECT 10’S PI MOTION.**

19 In its ruling on Perfect 10’s initial motion for preliminary injunction, the  
20 Ninth Circuit reversed this Court’s denial of Perfect 10’s right to injunctive relief on  
21 its secondary liability claims, holding as follows: “Because the district court will  
22 need to reconsider the appropriate scope of injunctive relief after addressing these  
23 secondary liability issues, we do not address the parties’ arguments regarding the  
24 scope of the injunction issued by the district court.” *Perfect 10 v. Amazon*, 508 F.3d  
25 at 1177. Perfect 10 has now filed a PI Motion which once again seeks injunctive  
26 relief on its secondary liability claims, among other relief, based upon the guidelines  
27 set forth in the Ninth Circuit’s opinion. Under these circumstances, this Court may  
28 not grant the Application and strike Perfect 10’s PI Motion.

1 **V. THE AUTHORITIES CITED BY GOOGLE DO NOT SUPPORT THIS**  
2 **COURT’S GRANTING OF THE APPLICATION.**

3 Google’s primary contention in support of the Application is that this Court  
4 may strike the PI Motion because Perfect 10’s filing of the motion violates the July  
5 8 Order. Application at 1-2. As explained in Section III, above, this contention is  
6 wrong as a matter of fact. Moreover, none of the cases cited by Google even  
7 supports the contention advanced by Google: that this Court has the inherent  
8 authority to strike the PI Motion on an *ex parte* basis. On the contrary, none of the  
9 cases upon which Google mistakenly seeks to rely (*id.*) involves an *ex parte*  
10 application to strike a motion, let alone a motion seeking injunctive relief. For this  
11 reason as well, this Court has no basis to grant the Application.

12 **VI. GOOGLE’S CONTENTIONS REGARDING IRREPARABLE HARM**  
13 **PROVIDE NO BASIS TO STRIKE THE PI MOTION.**

14 Google also asserts that this Court should strike the PI Motion because  
15 Perfect 10 allegedly has failed to establish the irreparable harm necessary for it to  
16 obtain injunctive relief. Application at 9-12. This misplaced contention provides no  
17 basis for this Court to grant the Application or strike the PI Motion. This Court  
18 properly may consider whether Perfect 10 has suffered irreparable harm in  
19 connection with its ruling on the merits of Perfect 10’s PI Motion. It may not use  
20 Google’s assertion to strike the PI Motion, however, and thereby avoid ruling on the  
21 merits of Perfect 10’s right to injunctive relief.

22 Google fails to cite a single authority supporting its assertion that this Court  
23 can rely upon Google’s claims regarding irreparable harm to strike the entire PI  
24 Motion, because no such authority exists. For this reason as well, this Court should  
25 deny the Application and instead address the merits of Perfect 10’s PI Motion.  
26  
27  
28

1 **VII. PERFECT 10’S REQUEST THAT THIS COURT RECONSIDER THE**  
2 **SERVER TEST LIKEWISE PROVIDES NO BASIS TO GRANT THE**  
3 **APPLICATION.**

4 Google further contends that this Court should strike the PI Motion because  
5 Perfect 10 has improperly asked the Court to violate Ninth Circuit law by seeking  
6 reconsideration of the server test. Application at 12-13. This assertion fails for at  
7 least two reasons.

8 First, Perfect 10’s request that this Court revisit the viability of the server test  
9 is a necessary prerequisite to raising this issue in connection with any appeal to the  
10 Ninth Circuit. Perfect 10 does not expect this Court to ignore currently binding  
11 Ninth Circuit precedent when ruling upon the PI Motion. Nevertheless, Perfect 10  
12 must raise this issue in its PI Motion in order to preserve its right to seek a  
13 reconsideration of the server test before the Ninth Circuit.

14 Second, Perfect 10’s request to reconsider the server test is explicitly based  
15 upon new evidence that was not before this Court or the Ninth Circuit in connection  
16 with Perfect 10’s initial preliminary injunction motion. *See* Memo at 24-25. For  
17 this reason as well, Google’s assertion that Perfect 10’s request to reconsider the  
18 server test establishes that the PI Motion was brought in bad faith and should be  
19 stricken has no basis whatsoever, and fails to provide any grounds for this Court to  
20 grant the Application.<sup>5</sup>

21 \_\_\_\_\_  
22 <sup>5</sup> In one of its many irrelevant attacks on Perfect 10, Google criticizes Perfect 10 and  
23 accuses it of “forum-shopping,” for suing Google in Canada. However, Google  
24 raised the following affirmative defense in its Answer to the Second Amended  
25 Complaint (Docket No. 324):

26 **NINETEENTH AFFIRMATIVE DEFENSE**

27 Plaintiff’s claims for damages, including for disgorgement of Google’s  
28 alleged profits, attributable to sales or other activities outside the United  
States are barred by reason of the Copyright Act’s territorial limitations  
and by the lack of subject matter jurisdiction over such extra-territorial  
claims in proceedings under the U.S. Copyright Act.

1 **VIII. JUDGE HILLMAN’S RECENT RULING IN CONNECTION WITH**  
2 **PERFECT 10’S SANCTIONS MOTION FURTHER COMPELS THIS**  
3 **COURT TO DENY THE APPLICATION.**

4 Finally, this Court may not stay the PI Motion until it rules upon Google’s  
5 three DMCA Motions, because these motions are not yet ripe for adjudication.

6 After filing its oppositions to Google’s DMCA Motions, Perfect 10 learned  
7 that Google had failed to produce thousands of documents that were relevant to  
8 these three motions. Accordingly, on November 29, 2009, Perfect 10 filed a Motion  
9 for Evidentiary and Other Sanctions against Google (Docket No. 617 *et seq.*), which  
10 was referred by this Court for hearing before Magistrate Judge Hillman (the  
11 “Sanctions Motion”).

12 In an Order dated January 27, 2010, Magistrate Judge Hillman ruled that “the  
13 court may ultimately decide that the documents sought could be material to Perfect  
14 10’s opposition to the pending Motions for Summary Judgment.” (*See* Order dated  
15 January 27, 2010; Docket No. 759.) Since then, however, Google has stonewalled  
16 the meet-and-confer process which Magistrate Judge Hillman ordered the parties to  
17 engage in so that Perfect 10 could obtain the needed documents. *See* emails  
18 attached as Exhibit 1 to the Declaration of Jeffrey N. Mausner in Opposition to the  
19 Application, submitted herewith; *see also* Docket Nos. 764, 764-2, 756.

20 Because of Google’s conduct, it is unclear when the needed documents will  
21 be made available to Perfect 10 or when Magistrate Judge Hillman will rule on  
22 Perfect 10’s Sanctions Motion. Until these issues are resolved, this Court cannot  
23 properly adjudicate Google’s three DMCA Motions. Under these circumstances,  
24 where the DMCA Motions are not yet ripe for determination, Perfect 10’s request  
25 for preliminary injunction should not be delayed.

1 **IX. THE DISCOVERY SOUGHT BY GOOGLE IS NOT NECESSARY**  
2 **FOR THIS COURT TO DETERMINE PERFECT 10'S PRELIMINARY**  
3 **INJUNCTION MOTION.**

4 Google also asks this Court for expedited discovery it asserts is necessary to  
5 oppose the PI Motion. Application at 16. The discovery that Google requests,  
6 however, relates to details regarding damages, not the issues raised by the PI  
7 Motion. Whether or not Google has direct liability for forwarding Perfect 10's  
8 confidential DMCA notices containing thousands of P10 Images to  
9 *chillingeffects.org* for publication on the Internet is a legal issue that may be  
10 resolved without the need for additional discovery.

11 **X. CONCLUSION.**

12 For all of the foregoing reasons, Perfect 10 respectfully requests that this  
13 Court deny Google's *Ex Parte* Application in its entirety and allow Perfect 10's  
14 Motion for Preliminary Injunction to proceed to a hearing on the merits.

15 Dated: March 9, 2010

LAW OFFICES OF JEFFREY N. MAUSNER

16 By: Jeffrey N. Mausner  
17 Jeffrey N. Mausner  
18 Attorney for Plaintiff Perfect 10, Inc.  
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