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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)]

**GOOGLE INC.'S RESPONSE TO
 PERFECT 10, INC.'S STATEMENT
 OF CLARIFICATION OF
 PERFECT 10'S POSITION
 REGARDING APPLICABILITY OF
 RULE 56(F) TO PENDING
 MOTIONS FOR SUMMARY
 JUDGMENT AND MOTION FOR
 EVIDENTIARY AND OTHER
 SANCTIONS**

20 AND COUNTERCLAIM

21 PERFECT 10, INC., a California
 22 corporation,

23 Plaintiff,

24 vs.

25 AMAZON.COM, INC., a corporation;
 26 A9.COM, INC., a corporation; and
 27 DOES 1 through 100, inclusive,

28 Defendants.

Hon. Stephen J. Hillman

Date: None set
 Time: None set
 Crtrm.: 550

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

1 Google Inc. respectfully submits the following Response to Perfect 10, Inc.’s
2 (“P10”) Statement of Clarification of Perfect 10’s Position Regarding Applicability of
3 Rule 56(f) to Pending Motions for Summary Judgment and Motion for Evidentiary
4 and Other Sanctions (Dkt. No. 787).

5 P10’s “Statement” is legally irrelevant and factually incorrect. Specifically,
6 P10 claims that it “reserves the right to seek relief under Rule 56(f), to the extent that
7 such relief is necessary or proper, whether under any ruling by this Court or
8 otherwise, or in connection with any of the pending motions.” In fact, P10 has
9 clearly and unequivocally waived any ability it may once have had to bring a motion
10 before Judge Matz for additional discovery under Rule 56(f) in connection with
11 Google’s pending motions for summary judgment regarding its entitlement to safe
12 harbor under 17 U.S.C. § 512 (Dkt. Nos. 456-458) (the “DMCA Motions”).

13 **First**, P10 waived Rule 56(f) relief by filing its own motion for summary
14 judgment on DMCA safe harbor in 2009, confirming that this issue was ripe for
15 disposition by the Court (Dkt. No. 436). Sullivan v. City of Springfield, 561 F.3d 7,
16 16 (1st Cir. 2009) (plaintiffs could not argue that summary judgment was premature
17 when “they affirmatively requested that the court resolve the case on the existing
18 evidence”); Filiatrault v. Converse Tech., Inc., 275 F.3d 131, 138 (1st Cir. 2001)
19 (filing a cross-motion for summary judgment “almost invariably indicates that the
20 moving party was not prejudiced by a lack of discovery.”).

21 **Second**, P10 *again* waived Rule 56(f) relief by electing to oppose Google’s
22 DMCA Motions on their merits, rather than file a Rule 56(f) motion requesting that
23 the DMCA Motions not be heard or decided until specific additional discovery was
24 completed (Dkt. Nos. 495, 497, 498, filed under seal). Rodriguez-Cuervos v. Wal-
25 Mart Stores, Inc., 181 F.3d 15, 23 (1st Cir. 1999) (“Ordinarily, a party may not
26 attempt to meet a summary judgment challenge head-on but fall back on Rule 56(f) if
27 its first effort is unsuccessful.”) (citation omitted); Access Telecom, Inc. v. MCI
28 Telecommunications Corp., 197 F.3d 694, 719 (5th Cir. 1999) (plaintiff “waived the

1 issue of inadequate discovery” by failing to file a Rule 56(f) motion).


2 **Third**, P10 *expressly disclaimed* Rule 56(f) relief in the briefing on its Motion
3 for Evidentiary Sanctions. See P10’s Reply in Support of Its Motion For Evidentiary
4 and Other Sanctions (Dkt. No. 683, filed under seal), at 24.

5 **Fourth**, even had P10 not repeatedly waived any entitlement to Rule 56(f)
6 relief, Rule 56(f) cannot be used to compensate for a party’s failure to diligently
7 pursue discovery. See, e.g., Mackey v. Pioneer Nat’l Bank, 867 F.2d 520, 524 (9th
8 Cir. 1989) (“A movant cannot complain if it fails diligently to pursue discovery
9 before summary judgment”). P10 has had nearly *six years* to pursue whatever
10 discovery it deemed relevant to the case. And, far from pursuing discovery
11 diligently, it has repeatedly sought and in some instances obtained stays of the
12 litigation. P10 cannot now use its own discovery failings and lack of diligence as a
13 means to delay resolution of Google’s DMCA Motions.

14 In sum, Google’s DMCA Motions are fully briefed, under submission, and ripe
15 for ruling, and P10 has long-since waived any claim to Rule 56(f) relief. P10’s
16 misdirected¹ “position” lacks merit and should be disregarded.

17 DATED: April 2, 2010

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18
19 By 
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21 Attorneys for Defendant GOOGLE INC.
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23

24 ¹ Google’s DMCA Motions are fully briefed and under submission with Judge
25 Matz. Any “position” P10 wishes to assert regarding the DMCA Motions would be
26 properly directed to Judge Matz. Cf. Church of Scientology of San Francisco v.
27 I.R.S., 991 F.2d 560, 562-63 (9th Cir. 1993), *vacated in part on other grounds*, 30
28 F.3d 101 (1994) (“... Rule 56(f) leaves the decision to grant discovery wholly within
the discretion of the district judge.”).