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11 Attorneys for Plaintiff PERFECT 10, INC.

12 UNITED STATES DISTRICT COURT

13 NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION

15 PERFECT 10, INC., a California
 16 corporation,

17 Plaintiff,

18 v.

19 VISA INTERNATIONAL SERVICE)
 ASSOCIATION; FIRST DATA)
 20 CORP, a corporation; CARDSERVICE)
 INTERNATIONAL, INC., a)
 21 corporation; MASTERCARD)
 INTERNATIONAL)
 22 INCORPORATED, a corporation;)
 HUMBOLDT BANK, a national)
 23 banking association; and DOES 1)
 through 100, inclusive,)

24 Defendants.

) Case No. C04-00371 JW (PVT)
) [Assigned for all purposes to
) Judge James Ware]

25 **FIRST AMENDED COMPLAINT**
 26 **FOR:**

- 27 (1) COPYRIGHT INFRINGEMENT;
- (2) TRADEMARK INFRINGEMENT;
- (3) TRADEMARK
- DISPARAGEMENT;
- (4) WRONGFUL USE OF A
- REGISTERED MARK;
- (5) VIOLATION OF RIGHT OF
- PUBLICITY;
- (6) UNFAIR COMPETITION;
- (7) FALSE AND MISLEADING
- ADVERTISING

28 DEMAND FOR JURY TRIAL

FIRST AMENDED COMPLAINT

1
2 Plaintiff Perfect 10, Inc. (“Perfect 10” or “plaintiff”), alleges as follows against
3 defendants Visa International Service Association (“Visa”); First Data Corp (“FDC”);
4 Cardservice International, Inc. (“CSI”); MasterCard International Incorporated
5 (“MasterCard”); Humboldt Bank (“Humboldt”); and Does 1-100 (collectively,
6 “Defendants”).

7 **JURISDICTION, VENUE, and INTRADISTRICT ASSIGNMENT**

8 1. Jurisdiction. This action arises under the Copyright Act of the United
9 States, 17 U.S.C. §§ 501 *et seq.*, and the Lanham Act, 15 U.S.C. §§ 1051, *et seq.*
10 This Court has jurisdiction over the subject matter of this action pursuant to
11 28 U.S.C. §§ 1331, 1338(a) and (b), and principles of pendent jurisdiction.

12 2. Venue. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2),
13 (c), and § 1400(a).

14 3. Personal jurisdiction. Personal jurisdiction is proper over the Defendants
15 because they either reside in California or the wrongful activity at issue in this case
16 concerns Defendants’ operation of commercial businesses through which
17 Defendants’ knowingly transact business, share information and files, and enter into
18 contracts with individuals in California, including within the County of San
19 Francisco. Each of the Defendants, therefore, has purposefully availed itself of the
20 privilege of doing business in California, and critical elements of Defendants’
21 wrongdoing occurred in this State.

22 4. Intradistrict Assignment. A substantial part of the events which give rise to
23 the claims occurred in San Francisco County, California, where defendant Visa is
24 located.

25 **NATURE OF THE ACTION**

26 5. The Defendants in this case, who are among America’s most prominent
27 financial institutions, are knowingly providing crucial transactional support services
28 for the sale of millions of stolen photos and film clips worth billions of dollars that

1 belong to Perfect 10 and third-parties, as follows:

2 **A. The Stolen Content Websites**

3 6. Hidden in undisclosed locations around the world, thieves from every
4 country are operating websites (“Stolen Content Websites”) that routinely offer for
5 sale to the public stolen still and moving images consisting of (i) scans from Perfect
6 10 Magazine and images from its website perfect10.com, (ii) scans of supermodels
7 from other magazines, and (iii) the most treasured film clips (usually nude scenes of
8 top actresses) ever created by motion picture studios. Webmasters who run Stolen
9 Content Websites also typically engage in consumer fraud or other illegal acts by
10 doing one or more of the following: a) charging the consumer’s credit card without
11 authorization, b) falsely stating that memberships are free, c) promising nudes or
12 sexually explicit videos of celebrities that don’t exist, d) providing rape, incest,
13 and/or bestiality images or falsely promising such images, e) spamming, and f)
14 tricking the consumer into paying for other memberships without their knowledge.
15 Stolen Content webmasters typically use sham Internet registrations with bogus
16 addresses and contact information so that they are virtually impossible to track down
17 and sue.

18 7. Stolen Content Websites cannot exist without the knowledge and direct
19 participation of the financial institutions that process the credit card transactions for
20 such unlawful material and that, as a result, effectively act as knowing fences for the
21 sale of billions of dollars worth of stolen property.

22 **B. The Business of Defendants Herein**

23 8. Visa and MasterCard are joint ventures, each owned by associations of
24 thousands of banks, including Humboldt, which comprise a vast network which
25 processes hundreds of millions of dollars in payment card transactions every day.
26 The member banks issue MasterCard and Visa cards, and contract with merchants to
27 accept their payment cards and sell sales drafts generated from use of those cards to
28 the members, at a discount.

1 9. Typically, when a merchant accepts a payment card from a customer, the
2 merchant electronically and contemporaneously presents the transaction to an
3 acquiring member bank, such as Humboldt, or to a third-party processor (known in
4 the credit card industry as an “Independent Service Organization” (“ISO”)) acting as
5 agent for a member bank, for immediate purchase at a discount from the price being
6 paid by the customer. FDC, including its wholly-owned subsidiary, CSI, is one of
7 the largest, if not the largest, such ISO.

8 10. The merchant has a contract with the acquiring bank or ISO that
9 obligates the bank or ISO to purchase the customer charges from the merchant
10 immediately, provided the charges meet certain standards. Visa and MasterCard are
11 virtually present at the time of each and every transaction on their branded cards.
12 The acquirer (or the ISO through which the acquirer does business) presents the
13 transaction to MasterCard or Visa for verification of a myriad of characteristics,
14 including, but not limited to, that the credit card is not stolen, over its limit, expired,
15 or otherwise incapable of incurring charges. MasterCard or Visa authorizes or rejects
16 the transaction. However, Visa and MasterCard have chosen to ignore the obvious
17 illegality of each and every Stolen Content Website transaction that they review.

18 11. If the transaction is authorized, the acquirer purchases it from the
19 merchant, at a discount. The foregoing process occurs electronically, with the result
20 that a merchant can make a sale using a payment card and simultaneously sell same
21 to his acquiring bank, at a discount, receiving the net proceeds immediately.

22 12. Member banks, including Humboldt, often delegate responsibility for
23 processing payment card transactions to third party processors such as FDC and CSI.
24 That delegation of responsibility includes responsibility for supervising merchants to
25 make certain that merchants comply with Visa and MasterCard rules, and
26 terminating illegal businesses from the Visa and MasterCard systems. Unless
27 otherwise apparent from the context, references in this complaint to “FDC” include
28 Humboldt and FDC’s wholly owned subsidiary CSI.

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13. Visa and MasterCard receive a fee for every single transaction on their branded cards.

1 **C. Defendants' Right and Ability to Control the Stolen Content**
2 **Websites**

3 14. Visa and MasterCard are also responsible for administering the Visa and
4 MasterCard credit card networks, and they impose many requirements as a condition
5 to ISOs and acquiring banks participating in the system. In addition to prohibiting
6 member banks and third-party processors from providing services to merchants
7 engaged in illegal activity, the associations' rules require member banks and third-
8 party processors, including FDC, to investigate merchants suspected of engaging in
9 illegal activity and to terminate those merchants that are engaged in illegal activity.
10 The associations dictate "interchange rates," or the fees that acquirer banks must pay
11 issuing banks for each transaction. Visa and MasterCard require member banks to
12 terminate the accounts of merchants whose "chargeback" ratios exceed allowable
13 limits. A "chargeback" occurs when a customer requests reversal of a charge that is
14 fraudulent, unauthorized, or otherwise improper.

15 15. Visa and MasterCard rules and regulations require each and every
16 merchant that wishes to secure the benefits of participation in the Visa and
17 MasterCard systems to enter into a formal Merchant Agreement with an acquirer,
18 pursuant to which Merchants are licensed to accept MasterCard and Visa charges
19 and participate in the systems. Visa and MasterCard rules dictate many of the
20 significant terms and conditions of such agreements.

21 16. Plaintiff is informed and believes and based thereon alleges that
22 Humboldt, FDC and CSI have entered into Merchant Agreements with many
23 owner/operators of Stolen Content Websites. Attached hereto as Exhibit "1" and
24 incorporated herein by reference is a copy of a standard CSI Merchant Agreement.
25 Perfect 10 is informed and believes and based thereon alleges that the provisions of
26 the CSI Merchant Agreement are typical of merchant agreements throughout the
27 Visa and MasterCard systems.

28 17. Paragraph 1.01 of the CSI Merchant Agreement requires Stolen Content

1 Websites to accept all MasterCard and Visa charge cards presented to them.

2 18. Paragraph 1.02 of the CSI Merchant Agreement requires Stolen Content
3 Websites to display defendants' promotional materials with defendants' proprietary
4 names and symbols, unless they are "expressly exempted" by Visa or MasterCard.
5 (Ex. "1," ¶ 1.02.)

6 19. Paragraph 3.01, entitled "Compliance with Law," imposes the following
7 restrictions on Stolen Content Websites:

8 Merchant shall comply with all laws, ordinances and regulations
9 applicable to Merchant, Merchant's business and any Card transaction,
10 including without limitation all state and federal consumer credit and
11 consumer protection statutes and regulations. Neither Bank [Humboldt]
12 nor Cardservice International shall have any obligation to notify or
13 advise Merchant of the existence of such laws or changes in such laws.
14 *Merchant warrants that it has the right to sell the products it sells and to*
15 *use the names it uses.* (Emphasis added.)

16 20. Pursuant to Visa and MasterCard rules and regulations, and to the
17 contractual rights they insist upon, defendants direct merchants who accept their
18 credit cards and who operate Internet websites to alter or delete contents of such
19 websites in order to comply with laws and/or Visa and MasterCard rules, regulations
20 and policies. When MasterCard or Visa learns of a merchant engaged in illegal,
21 fraudulent, or otherwise improper business practices, their own regulations require
22 them to cause member banks to investigate and, depending on the nature of the
23 misconduct, terminate the merchants from the Visa and MasterCard systems. The
24 rules of both associations strictly prohibit members from servicing illegal businesses.

25 21. Defendants assert the right, which they frequently exercise, to suspend
26 merchants from the Visa and MasterCard systems, or to exclude them altogether.
27 For example, pursuant to paragraph 3.04(b) of the CSI Merchant Agreement,
28 Defendants have the right to terminate Stolen Content Websites "immediately" if the

1 merchant “violates any term, condition, covenant or warranty of this Agreement.”

2 22. Plaintiff is informed and believes and based thereon alleges that the
3 grounds for suspending and/or entirely excluding merchants from the system often
4 are that Defendants believe that the merchants have engaged in illegal transactions
5 and/or sell illegal products or services. If Defendants exclude a merchant from the
6 system, all members of the Visa and MasterCard systems, and all ISOs, are
7 prohibited from providing charge card processing services to that merchant, directly
8 or indirectly through third party aggregators.

9 23. Paragraph 7.01 of the CSI Merchant Agreement requires merchants to
10 use defendants’ preapproved forms when accepting payment by credit card.

11 24. Defendants dictate what products and services a merchant sells.
12 Merchants cannot sell different products without submitting a formal request to
13 defendants and receiving Defendants’ express pre-approval.

14 25. In addition to the foregoing, Defendants dictate the amount of credit card
15 sales Stolen Content Websites may make each month. Since Defendants know that
16 virtually all of the Stolen Content Websites’ business is done through charge card
17 payments, Defendants know that each time they increase the volume limits of a
18 Stolen Content Website, they are also increasing the number of illegal transactions
19 on such sites.

20 26. Plaintiff is informed and believes and based thereon alleges that, before
21 defendants will allow a merchant to participate in the Visa and MasterCard systems,
22 the Visa and MasterCard rules require the merchant to establish that it is financially
23 responsible and that the owner/operators have acceptable backgrounds and business
24 practices. Among other things, defendants inspect websites and business premises,
25 and obtain and review merchants’ bank statements, tax returns, credit reports, and a
26 merchant’s other financial information before allowing the merchant into the system.
27 Plaintiff is informed and believes and based thereon alleges that, based on their
28 reviews of Stolen Content Websites applying for merchant accounts, Defendants

1 know when Stolen Content Websites maintain no physical presence in the United
2 States in order to evade criminal and civil liability for their illegal conduct.

3 27. When Defendants receive what they deem to be an excessive number of
4 chargebacks on the accounts of Stolen Content Websites, Defendants place even
5 more limitations on the account holders and require even more detailed information
6 about their businesses.

7 28. Plaintiff is informed and believes and based thereon alleges that
8 Defendants also require Stolen Content Websites to give Defendants permission to
9 use their names in their advertising and promotional activities.

10 29. Defendants also regularly assert their right to require questionable
11 merchants, such as the Stolen Content Websites, to maintain substantial reserve
12 accounts with Humboldt in order to secure potential losses as a result of the
13 misconduct of such merchants.

14 **D. Defendants' Knowing Participation in the Stolen Content Websites'**
15 **Illegal Conduct**

16 30. Defendants, jointly with the Stolen Content Websites, are engaged in (i)
17 the willful and systematic infringement of the intellectual property rights of Perfect
18 10 and third-party publishers, film owners, and celebrities, and (ii) ongoing
19 deception of consumers.

20 31. The explosion of pornography on the Internet has been a windfall to
21 Defendants. Websites that provide pornographic images generate hundreds of
22 millions of transactions, each one resulting in a separate fee to Defendants. Since
23 2002, Perfect 10 repeatedly has identified specific Stolen Content Websites to each
24 defendant herein and asked each of the defendants to investigate and cease and desist
25 servicing those illegal businesses. Perfect 10 has given Defendants such notice
26 orally, in writing, and by e-mail. The notices have included screen shots and other
27 evidence of the websites' illegal conduct. Defendants, and each of them, have failed
28 and refused to investigate the Stolen Content Websites and to discontinue facilitating

1 and participating in the business of the websites. Copies of many such notices are
2 attached hereto as Exhibit “2” and incorporated herein by reference.

3 32. Defendants knowingly continue to supervise and materially contribute
4 to the Stolen Content Websites’ illegal conduct by authorizing their member banks
5 to acquire customers’ payment card charges for access to those websites, in violation
6 of MasterCard and Visa Rules; providing confirmations for charges for the Stolen
7 Content Websites; accepting fees for each charge card transaction on the Stolen
8 Content Websites; and failing and refusing to enforce their rules prohibiting member
9 banks and ISOs from servicing businesses engaged in illegal activities, directly or
10 indirectly, and enforcing other rules to assure that they profit from the Stolen
11 Content Websites.

12 33. Defendants aid and abet the Stolen Content Websites’ illegal
13 transactions by allowing them to process charges anonymously through off-shore
14 locations that have no existence except as conduits for processing charge card
15 transactions.

16 34. While most member banks and third-party processors refuse to acquire for
17 pornographic websites, Humboldt, FDC and CSI have at all times material herein
18 specialized in servicing pornographic websites. By charging them significantly more
19 than conventional merchants pay for the same services, including by levying fees of
20 as much as \$100 per chargeback, Humboldt, FDC and CSI significantly increase
21 their profit margins.

22 35. Defendants’ branded payment cards are overwhelmingly the primary way
23 by which customers pay to view Stolen Content Websites. Acceptance of
24 MasterCard and Visa is so expected by consumers as a form of online payment that
25 permission from MasterCard and Visa to accept their cards is tantamount to a pre-
26 condition for running a successful online business, and gives such websites a
27 significant competitive advantage. Inability to accept Visa and MasterCard would
28 make it impossible for an online website selling adult images to compete and operate

1 at a profit. If Defendants enforced their own rules when they received notice of a
2 Stolen Content Website, instead of turning a blind eye to the illegality, the Stolen
3 Content Websites would be eradicated. Perfect 10 is informed and believes, and
4 based thereon alleges, that Defendants do not enforce their own rules against
5 websites that they know are Stolen Content Websites because Defendants do not
6 want to lose the substantial revenues and profits they receive from the websites.

7 36. More specifically, Defendants are engaged in the following unlawful
8 practices:

- 9 • Defendants are knowingly and intentionally profiting from and
10 providing critical support for the infringement of Perfect 10's
11 copyrights and rights of publicity (by assignment) by reason of the
12 distribution of photographs owned by Perfect 10 on Stolen Content
13 Websites.
- 14 • Defendants are knowingly and intentionally profiting from and
15 providing critical support to sell millions of stolen images and film clips
16 worth billions of dollars which rightfully belong to third-party
17 publishers and film owners.
- 18 • Defendants are knowingly and intentionally profiting from and
19 providing critical support for the infringement of the copyrights of
20 Perfect 10 and publicity rights of Perfect 10 and others by the
21 unauthorized reproduction, creation of derivative works from, display,
22 advertisement and sale of illegally altered photographs of celebrities and
23 models, which falsely purport to show such celebrities performing
24 sexual acts and in various nude poses.
- 25 • Defendants are knowingly and intentionally profiting from and
26 providing critical support for Stolen Content Websites which also
27 compete unfairly by engaging in the following acts: a) making false
28 claims about their content, such as offering images of "Christina

1 Aguilera Masturbating!” b) falsely claiming that they are “free,” c)
2 grossly misstating the number of images on their sites, claiming for
3 example in one case that they have 90,000 images when they have less
4 than 3,000, d) using multiple “fronts” leading to the same content, e)
5 requiring consumers to affirmatively uncheck a small box, lest they are
6 unwittingly billed for memberships they did not want in the first place,
7 and f) “spamming” consumers.

8 37. With Defendants’ support, the Stolen Content Websites have become so
9 brazen that they actually flaunt their illegality. One such website, touting an illicit
10 video of Paris Hilton, proclaims, "Load it now before the lawyers take it down!"

11 **E. The Harm that Defendants’ Participation in the Businesses of the**
12 **Stolen Content Websites Has Caused to Perfect 10**

13 38. Based on the foregoing, Defendants are aiding and abetting unfair
14 competition against Perfect 10 and materially contributing to the infringement of
15 Perfect 10’s intellectual property rights by providing critical support for and
16 participating in the sale of vast quantities of content misappropriated from Perfect 10
17 and third parties, thereby diverting consumers from Perfect 10’s products and
18 services to Stolen Content Websites. Despite notice from Perfect 10 of the ongoing
19 violation of its rights on Stolen Content Websites, including infringements
20 specifically alleged in this Complaint, and other fraudulent acts perpetrated by such
21 websites, Defendants have continued wrongfully to purchase the specific credit card
22 sales drafts generated by the illegal sales, at a discount, thereby providing the only
23 profitable means by which a Stolen Content Website can consummate a sale. Nearly
24 all Stolen Content Website sales are credit card transactions.

25 39. Perfect 10 has been forced to spend over \$8 million in attorneys fees
26 over the last two and a half years attempting to stop the widespread theft on the
27 Internet of both Perfect 10 images and third-party intellectual property. That theft
28 has made it impossible for Perfect 10 to operate at a profit.

1 40. Defendants have failed and refused to apply other rules and regulations
2 to Stolen Content Websites, thereby continuing to profit from each illegal transaction
3 in which they participate. For example, Defendants have allowed certain Stolen
4 Content Websites to incur extraordinarily high chargeback rates because of the high
5 volume from their illegal conduct and the resulting high fees accruing to Defendants.
6 At the same time, Defendants have imposed arbitrarily low chargeback limits on
7 legitimate web content providers, including Perfect 10, because such providers,
8 lacking the increased revenues that result from the Stolen Content Websites' unfair
9 and illegal conduct, are far less profitable to Defendants than the Stolen Content
10 Websites.

11 **THE PARTIES**

12 **Plaintiff Perfect 10**

13 41. Plaintiff is, and at all times mentioned herein was, a California
14 corporation having its principal place of business in Beverly Hills, California.
15 Plaintiff owns and operates the website located at perfect10.com and publishes
16 Perfect 10 Magazine.

17 **The Defendants**

18 42. Perfect 10 is informed and believes, and on that basis alleges, that
19 defendant Visa is and at all times material herein has been a joint venture association
20 with offices at 123 Mission Street, 20th Floor, San Francisco, CA 94105 and
21 conducts substantial business in California, including within the County of San
22 Francisco. Plaintiff alleges that Visa is also an association of members, primarily
23 banks, that issue payment cards, acquire merchants who accept payment cards, or
24 both.

25 43. Perfect 10 is informed and believes, and on that basis alleges, that
26 defendant MasterCard is and at all times material herein has been a joint venture
27 association with offices at 2000 Purchase Street, Purchase, NY 10577, and conducts
28 substantial business in California, including within the County of San Francisco.

1 Plaintiff alleges that MasterCard is an association of members, primarily banks, that
2 issue payment cards, acquire merchants who accepts payment cards, or both.

3 44. Perfect 10 is informed and believes, and on that basis alleges, that
4 defendant FDC is a corporation with offices at 6200 South Quebec Street,
5 Greenwood Village, Colorado 80111, and conducts substantial business in
6 California, including within the County of San Francisco. Plaintiff alleges on
7 information and belief that FDC is an Independent Service Organization authorized
8 to act by and subject to MasterCard and Visa Rules, engaged in the business of
9 processing payment card transactions and data for Stolen Content Websites.
10 Plaintiff is further informed and believes that FDC is the managing agent of
11 MasterCard, Visa, and a number of their members banks.

12 45. Perfect 10 is informed and believes, and on that basis alleges, that
13 defendant CSI is and at all times material herein has been a wholly owned subsidiary
14 of FDC, located in Moorpark, California, and CSI conducts business within the
15 County of San Francisco.

16 46. Perfect 10 is informed and believes and based thereon alleges that
17 Humboldt is and at all times material herein has been a national banking association
18 organized and existing under the laws of the United States with its principal place of
19 business in Eureka, California.

20 47. Perfect 10 is informed and believes, and based thereon alleges that, at all
21 times material herein, CSI was the alter ego of FDC, and that there exists and has
22 existed at all times material herein a unity of interest and ownership between them,
23 such that any separateness between them has ceased to exist, and that CSI is a mere
24 shell, instrumentality and conduit through which FDC has at all times material herein
25 carried out its business, exercising complete control and dominance over CSI such
26 that any individuality or separateness of CSI from FDC has ceased to exist.

27 48. Adherence to the fiction of the separate existence of CSI as an entity
28 distinct from FDC would permit an abuse of the corporate privilege and would

1 sanction fraud and promote injustice.

2 49. Does 1 through 100, inclusive, are sued herein under fictitious names.
3 Their true names and capacities are unknown to plaintiff. When plaintiff ascertains
4 the Doe defendants' true names and capacities, plaintiff will amend this complaint
5 by inserting their true names and capacities herein. Plaintiff is informed and believes
6 and based thereon alleges that each defendant named herein as a Doe acted with
7 defendants and is responsible for the damages to plaintiff herein alleged. Each
8 reference in this complaint to defendants, or to any of them, also refers to all
9 defendants sued under fictitious names.

10 50. Plaintiff is informed and believes and based thereon alleges that at all
11 times material herein each of the defendants was the agent and employee of the other
12 defendants, and in doing the things hereinafter alleged, was acting within the course
13 and scope of such agency and employment.

14 **ALLEGATIONS COMMON TO ALL CLAIMS**

15 **A. Perfect 10's Business**

16 51. Perfect 10 is the publisher of the well-known adult entertainment
17 magazine PERFECT 10. PERFECT 10 Magazine has a circulation of over 65,000
18 copies per issue. Perfect 10 also owns the Internet website of the same name. The
19 Perfect 10 website receives approximately 100,000 unique visitors per month.

20 52. Perfect 10's business consists of the design, layout, filming, production,
21 marketing, and promotion of adult entertainment products, including photographs,
22 magazines, video productions, and other arts. Some of these copyrighted works
23 appear within PERFECT 10 magazine and Perfect 10's website.

24 53. Perfect 10 has invested, and continues to invest, substantial sums of
25 money, as well as time, effort, and creative talent, to produce its copyrighted works.
26 In order to produce such works, Perfect 10 must make numerous payments including
27 model fees, photographer fees, location costs, styling costs, make up costs, printing
28 costs, film and processing costs, travel costs, as well as public relations, legal, and

1 advertising costs. Perfect 10 is compensated for its creative efforts and monetary
2 investments largely from subscription fees to its website, sales of and subscriptions
3 to its magazine, and advertising revenue.

4 54. Perfect 10 is the owner of the valuable and well-known Perfect 10 family
5 of trademarks. These marks are used by Perfect 10 in connection with the sale of its
6 products, including PERFECT 10 magazine. Perfect 10 has spent millions of dollars
7 advertising and promoting the PERFECT 10 mark and Perfect 10 products and
8 services and has sold millions of dollars of products and services under the
9 PERFECT 10 mark. Perfect 10 has built up and now owns valuable goodwill
10 symbolized by the PERFECT 10 trademark.

11 55. Goods and services bearing the Perfect 10 trademarks have been featured
12 on many television and radio shows (including the Tonight Show, Howard Stern
13 Show, The Sopranos, Dawson's Creek, Battledome, Fox News, Hard Copy,
14 Entertainment Tonight, Extra, The Dating Game, Temptation Island, Monday Night
15 Football, Hanity and Combs, The O'Reilly Factor, The View, and Jenny Jones), in
16 movies (American Pie, Hollow Man, and The Way of the Gun), as well as in many
17 newspapers.

18 56. Perfect 10 regularly employs models and hires photographers in
19 connection with the creation of its photographic works. As a regular part of Perfect
20 10's business, it secures assignments from its models of their rights of publicity in
21 connection with these photographic works. Moreover, as a regular part of its
22 business, Perfect 10 hires photographers who perform work for hire.

23 57. The Perfect 10 website is a subscription site. Consumers are given
24 access to content on the website in exchange for the payment of a membership fee.

25 **B. Defendants' Business**

26 58. Upon information and belief, Perfect 10 alleges that Defendants operate
27 their businesses in the following manner: MasterCard and Visa are structured as
28 open, joint venture associations with members (primarily banks) that issue payment

1 cards, acquire merchants who accept payments, or both. Visa members have the
2 right to issue Visa cards and to acquire Visa transactions from merchants that accept
3 Visa cards. In exchange, they must follow Visa's by-laws and operation regulations.
4 The same is true of MasterCard.

5 59. As an ISO, FDC materially contributes to transactions involving
6 hundreds if not thousands of websites, including Stolen Content Websites, by
7 processing individual MasterCard and Visa charges on behalf of MasterCard, Visa,
8 and a number of their member banks. When a merchant accepts a credit card from a
9 customer for the provision of goods or services, including stolen content, the
10 customer executes a sales draft which the merchant electronically presents to an
11 acquirer such as FDC. FDC submits the transaction to Visa or MasterCard, and Visa
12 or MasterCard verify the validity of the customer's card and available credit. Visa or
13 MasterCard then authorizes or denies the transaction, on a transaction by transaction
14 basis.

15 60. If Visa or MasterCard authorize a transaction, the merchant immediately
16 transmits the sales draft to FDC, which immediately purchases the draft at a
17 discount.

18 61. The websites for which FDC and other acquirer banks process
19 transactions are required by MasterCard and Visa to adhere to certain "Terms and
20 Conditions" established by MasterCard and Visa which ostensibly prohibit illegal
21 content or illegal conduct.

22 62. FDC exercises substantial supervision and control over the Stolen
23 Content Websites for which it processes transactions. In fact, MasterCard and Visa
24 require such supervision and control. MasterCard and Visa rules prohibit the
25 processing of transactions that violate federal, state, and local laws. Examples of
26 such rules are attached hereto as Exhibit "3" and incorporated herein by reference.
27 On information and belief, FDC regularly reviews websites for which it processes,
28 ostensibly to assure that they comply with Visa and MasterCard regulations.

1 Plaintiff is informed and believes and based thereon alleges that Visa and
2 MasterCard have rules requiring members and processors to exercise similar close
3 supervision of all merchants.

4 63. Despite supposedly conducting such reviews, Defendants continue to
5 support and profit from websites which show obviously infringing content and/or
6 openly disclaim the rights to their content. As more fully set forth in paragraph 29,
7 above, Perfect 10 has provided Defendants with notice of unlawful activity many
8 Stolen Content Websites..

9 **C. Defendants' Wrongful Conduct**

10 64. Perfect 10 alleges upon information and belief that each of the
11 Defendants, individually and in concert with others, is providing critical support to
12 Stolen Content Websites engaged in the infringement of the copyrights, trademarks,
13 and publicity rights of Perfect 10 as well as the publicity rights of numerous third-
14 party film owners, publishers, models, and celebrities, as follows:.

15 **1. Specific Wrongful Conduct By Defendant FDC**

16 65. Stolen Content Websites for which FDC processes transactions display
17 images that violate Perfect 10's copyrights, trademarks, and assigned rights of
18 publicity, and similar intellectual property rights of third parties. Exhibit "4," hereto
19 is a list of some of the Stolen Content Websites. When a credit card holder uses his
20 or her card to buy a membership to a Stolen Content Website, which purchase is
21 facilitated by FDC, the credit card holder can view, download, and copy these
22 infringing images.

23 66. Plaintiff alleges upon information and belief that virtually all celebrity
24 content invoking the names and/or images of bona fide celebrities on the Stolen
25 Content Websites which Defendants support is misappropriated, including, more
26 specifically, as follows:

27 67. All or virtually all use of the names and images of bona fide celebrities
28 on the Stolen Content Websites is unauthorized, infringing the rights of publicity of

1 the celebrities, whose names and images are invoked.

2 68. Most of the infringements of Perfect 10 copyrights and rights of publicity
3 occur on the celebrity websites.

4 69. Each of the Defendants is liable for conduct of the other Defendants and
5 the Stolen Content Websites as follows:

6 70. Plaintiff alleges upon information and belief that, in addition to the
7 websites identified in Exhibit "4", many other websites for which FDC processes
8 transactions infringe Plaintiff's copyrights, trademarks, and rights of publicity, with
9 Defendants' knowing participation.

10 71. Stolen Content Websites for which FDC processes transactions contain
11 content that infringes in other ways the rights of Perfect 10 and third parties to this
12 action, including by the unauthorized display of images of celebrities. Such conduct
13 constitutes unfair competition against Perfect 10.

14 72. Plaintiff alleges upon information and belief that, in addition to the
15 websites identified on Exhibit "4," other websites for which FDC processes
16 transactions violate third party rights of publicity, and thereby compete unfairly with
17 Perfect 10.

18 73. Defendants are profiting from and providing critical support for Stolen
19 Content Websites which, aside from stealing massive quantities of celebrity images,
20 commit various forms of unfair competition. Defendants are providing critical
21 support to websites which:

- 22 a. Deceive consumers by making false claims about their content such
23 as "Christina Aguilera Masturbating."
24 b. Grossly misstate the number of images they contain. For example, in
25 one case, a website claimed that it had 90,000 images when it had
26 less than 3,000.
27 c. Have multiple "fronts" leading to the same content.
28 d. Provide memberships to consumers who don't want them, for

1 example, by requiring consumers to affirmatively uncheck a small
2 box, lest they are unwittingly billed for memberships they did not
3 want in the first place.

4 e. Send large amounts of spam.

5 74. Plaintiff alleges upon information and belief that FDC has knowledge of
6 the Stolen Websites' illegal transactions before, when and after they occur. Among
7 other things, Plaintiff and others have notified Defendants of this wrongful conduct,
8 but Defendants have continued to provide critical support for, and benefit from, such
9 conduct.

10 75. Starting in January of 2003, Perfect 10 wrote to Martin Elliot of Visa,
11 Noah Hanft of MasterCard, Adam Herbert of FDC, and a variety of attorneys for
12 those organizations putting them on notice of more than 240 specifically identified
13 Celebrity Porn Websites with obvious stolen content that they were supporting.

14 76. Perfect 10 also noted in its January 8, 2003 letter that many of the
15 celebrity porn sites with obviously stolen content had obviously phony Internet
16 registrations and in many cases defrauded consumers by having different homepages
17 and titles leading to the same content. Exhibit "4" includes a copy of that letter.

18 77. Declarations from celebrities, stating that they have not authorized the
19 use of their name, likeness, or identity on pornographic websites and that they do not
20 want their images and names so used, have also been sent to Defendants. Such
21 declarations, from celebrities such as Britney Spears, Christina Aguilera, Anna
22 Kournikova, Yasmine Bleeth, and others, many of which have been sent to
23 Defendants, are attached hereto as Exhibit "5".

24 78. MasterCard and Visa also received a letter from attorneys representing
25 Britney Spears, on March 5, 2003, notifying them of Stolen Content Websites which
26 defame their client and are supported by MasterCard and Visa. A copy of that letter
27 is attached hereto as Exhibit "6" and incorporated herein by reference.

28 79. Even without notice from Perfect 10 and attorneys for Britney Spears

1 and attorneys for other celebrities, Defendants knew or should have known about the
2 unlawful activity on the Stolen Content Websites they supported for a number of
3 reasons: (i) many of the websites contained the word “illegal,” “celeb,” “scan,” or
4 “fake” in their URL, suggesting that the website had unlawful material or had
5 unlawfully scanned its images; (ii) many of the websites have disclaimers indicating
6 that they did not own the rights to their content; (iii) most of the websites have
7 obviously unauthorized material on their homepages, such as promises of “beaver
8 shots” of various celebrities, “Britney and Christina – their first time oral sex;” and
9 (iv) many of the websites had obviously phony domain name registrations such as
10 BELIZE CITY, BZ BZ BZ; Box 821 The Valley AI; or BUDA, 1112-H HU.

11 80. Plaintiff alleges upon information and belief that the conduct on the Stolen
12 Content Websites for which FDC sells access is calculated to mislead consumers in
13 the following ways:

14 a. Consumers are likely to be misled to believe that Perfect 10 and
15 others, including celebrities, endorse or authorize the use of their names, likenesses
16 or content on the Stolen Content Websites.

17 b. Stolen Content Websites routinely falsely claim to have images of
18 popular celebrities in nude poses or performing sexual acts when in fact the websites
19 do not contain such content.

20 c. Some consumers are likely to believe that “fake” or counterfeit
21 images of popular celebrities on Content Websites are true images of those
22 celebrities.

23 d. Many Stolen Content Websites are designed to appear as multiple
24 websites with separate content, when in fact the webpages are all part of a single
25 website, or contain the same content, fraudulently inducing consumers to purchase
26 multiple memberships rather than a single membership.

27 81. Perfect 10 has never authorized Defendants or the Stolen Content
28 Websites for which Defendants and other acquirer banks process transactions to use

1 Perfect 10's copyrighted photographs or trademarks, or to invoke its rights of
2 publicity. Perfect 10 further alleges upon information and belief that no celebrity
3 (known outside the "porn" industry has authorized Defendants or the Stolen Content
4 Websites for which Defendants processes transactions to use his or her photograph
5 or name or to invoke his or her right of publicity. Upon information and belief,
6 Defendants know or should know that such use of celebrity images and identities is
7 not authorized.

8 82. Plaintiff alleges upon information and belief that Defendants have
9 contributory, vicarious and/or aider and abettor liability for the infringements of
10 Perfect 10's copyrights and other wrongful conduct on the Stolen Content Websites
11 for which Defendants processes transactions.

12 **2. Specific Wrongful Conduct By Defendants MasterCard and**
13 **Visa**

14 83. Plaintiff is informed and believes and based thereon alleges that
15 MasterCard and Visa regulations require the associations to review the content of
16 websites that accept MasterCard and Visa credit cards as a form of payment. Despite
17 such regulations, both MasterCard and Visa have, despite extensive notice from
18 Perfect 10 regarding the unlawful activities in which the Stolen Content Websites
19 have been engaged, repeatedly failed to enforce these regulations, and as a result,
20 have permitted this unlawful activity to continue unabated. Upon information and
21 belief, Perfect 10 further alleges that MasterCard and Visa have allowed some of the
22 largest and most successful Stolen Content Webmasters to run chargeback rates far
23 in excess of those allowed by their rules and regulations, such as, for example, 6%
24 and higher, when the purported established Visa/MasterCard limit is not more than
25 1%.

26 84. Simultaneously, while turning a blind eye to what is occurring on Stolen
27 Content Websites accepting MasterCard and Visa as forms of payments, Visa and
28 FDC have ironically—and unfairly—made it impossible for Perfect 10 to accept

1 Visa as a form of payment on a new website, by arbitrarily terminating Perfect 10's
2 merchant account in 2001 and wrongfully placing Perfect 10 and its president on the
3 black list.

4 **FIRST CLAIM FOR RELIEF**

5 (Copyright Infringement, Vicarious Liability, and Contributory
6 Infringement Against All Defendants -- 17 U.S.C. §§ 501 et seq.)

7 85. Perfect 10 realleges and incorporates herein by reference each and every
8 allegation of paragraphs 1 through 84 above as though fully set forth at length.

9 86. At all times relevant hereto, Perfect 10 has been the owner of all right,
10 title, and interest to each of the copyrights in suit, or has been assigned the
11 copyrights and all claims for infringement of those copyrights. Perfect 10 (or its
12 predecessor in interest) has registered the copyrights for its magazines, calendars,
13 website, and photographs, each of which contain individually copyrighted works that
14 Defendants have unlawfully reproduced, copied, prepared derivative works from,
15 distributed, and publicly displayed.

16 87. Attached hereto as Exhibit "7" are copies of Perfect 10's copyright
17 registrations.

18 88. Perfect 10's copyrighted photographs are contained in PERFECT 10
19 magazine and Perfect 10 calendars, which will be made available to Defendants'
20 attorneys at the offices of Perfect 10's attorneys, and in Perfect 10's website, which
21 can be accessed at perfect10.com.

22 89. Each of Perfect 10's copyrighted works consists of material wholly
23 original with Perfect 10, and each is copyrightable subject matter under the laws of
24 the United States.

25 90. Plaintiff is informed and believes, and on that basis alleges, that
26 Defendants have knowingly induced, caused, encouraged, and assisted others to
27 infringe, and/or materially contributed to the infringement by others of Perfect 10's
28 copyrights, including by the reproduction, alteration, public display and distribution

1 of the copyrighted works on the Stolen Content Websites, as set forth above.

2 91. Plaintiff alleges upon information and belief that Defendants knew,
3 based on explicit notice and on the open and obvious infringing nature of the
4 content, that photographs on the Stolen Content Websites were infringing and had
5 reason to know that other photographs on the websites were infringing. Indeed,
6 some of these photographs, as they appeared on these websites, contain a Perfect 10
7 copyright notice and/or a caption that states "Perfect 10" or a variation thereof. In
8 addition, many of these websites specifically admit that the websites do not own
9 their content.

10 92. Through the conduct averred herein, Defendants have engaged and
11 continue to engage in the business of knowingly and systematically inducing,
12 causing, and materially contributing to the above-described unauthorized
13 reproduction, public display and distribution of, and creation of derivative works
14 from, Perfect 10's copyrighted works, including by supporting the infringing activity
15 on the Stolen Content Websites, as set forth above. Defendants have contributory
16 liability for the infringement of Perfect 10's copyrights, as set forth above.

17 93. At all times relevant herein, the Defendants had the right and ability to
18 supervise and/or to control the infringing content that exists on the Stolen Content
19 Websites by refusing to process credit cards for such websites and/or simply
20 enforcing their own rules and regulations. Defendants derived substantial financial
21 benefit from infringement of Perfect 10's copyrights, in that, among other things, the
22 availability of approximately 20,000 Perfect 10 images on the Stolen Content
23 Websites acted as a draw for members who pay subscription fees, a portion of which
24 fees are ultimately earned by Defendants. The Defendants have vicarious liability
25 for the infringement of Perfect 10's copyrights, as set forth above.

26 94. Defendants' acts alleged herein were performed without authorization by
27 Perfect 10.

28 95. The infringement of each of Perfect 10's rights in and to each Perfect 10

1 copyrighted photograph constitutes a separate and distinct act of infringement of a
2 separate and distinct copyrighted work.

3 96. The foregoing acts of infringement by Defendants have been willful,
4 intentional and purposeful, in disregard of and with indifference to the rights of
5 Perfect 10.

6 97. Defendants' conduct constitutes contributory and/or vicarious
7 infringement of Perfect 10's copyrights, and Perfect 10's exclusive rights under
8 copyright, in violation of Sections 106 and 501 of the Copyright Act, 17 U.S.C. §§
9 106, 501.

10 98. As a direct and proximate result of the foregoing, Perfect 10 has suffered
11 substantial damages to its business in the form of diversion of trade, loss of profits,
12 injury to goodwill and reputation, and a dilution of the value of its exclusive rights in
13 an amount to be established at trial. Perfect 10 is entitled to its actual damages and
14 Defendants' profits attributable to the infringement pursuant to 17 U.S.C. § 504(b).

15 99. Alternatively, Perfect 10 is entitled to the maximum statutory damages,
16 pursuant to 17 U.S.C. § 504(c), in the amount of \$150,000 for each work infringed
17 by each website or such other amounts as may be proper under 17 U.S.C. § 504(c).

18 100. Perfect 10 is entitled to its attorneys' fees and full costs pursuant to 17
19 U.S.C. § 505.

20 101. Defendants' conduct is causing and, unless enjoined and restrained by
21 this Court, will continue to cause Perfect 10 great and irreparable injury that cannot
22 fully be compensated or measured in money. Perfect 10 has no adequate remedy at
23 law. Pursuant to 17 U.S.C. § 502, Perfect 10 is entitled to preliminary and
24 permanent injunctive relief prohibiting further infringement of Perfect 10's
25 copyrights.

26 **SECOND CLAIM FOR RELIEF**

27 (Trademark Infringement, Vicarious Liability, and
28 Contributory Infringement Against All Defendants)

1 102. Perfect 10 realleges and incorporates herein by reference each and
2 every allegation of paragraphs 1 through 102 above as though fully set forth at
3 length.

4 103. Perfect 10 is the owner of the registered trademark/service mark
5 PERFECT 10 and PERFECT10.COM. The United States trademark/service mark
6 registrations for PERFECT 10 and PERFECT10.COM, Registration Nos. 2,202,643;
7 2,235,145; 2,709,583; and 2,573,998, are for entertainment services in the nature of
8 adult entertainment and beauty contests provided via a global computer network;
9 entertainment services in the nature of beauty contests; magazines featuring adult
10 entertainment, beauty contests, pictures of female models, interviews, fiction, and
11 articles on human relations, sports, entertainment, lifestyles, and fitness; calendars;
12 and unmounted photographs. Perfect 10 is also the owner of trademark and service
13 mark registrations for the mark PERFECT 10 in various foreign countries. Attached
14 hereto as Exhibit "8" are trademark registrations for Perfect 10 trademarks.

15 104. The PERFECT 10 trademark has been continually used by Perfect 10
16 and its predecessors in commerce since 1991 and is widely known throughout the
17 United States and other parts of the world.

18 105. Perfect 10 has also applied for registration of the PERFECT 10
19 trademark for other products, and such applications have been allowed.

20 106. Perfect 10 has spent millions of dollars advertising and promoting the
21 PERFECT 10 mark and Perfect 10 products and services, and has sold millions of
22 dollars of products and services under the PERFECT 10 mark.

23 107. As a result of the aforementioned use, promotion, and advertisement of
24 the PERFECT 10 trademark, Perfect 10 has built up and now owns valuable
25 goodwill symbolized by the PERFECT 10 trademark.

26 108. As a result of the care and skill exercised by Perfect 10 over the nature
27 and quality of goods and services sold under the registered PERFECT 10 mark and
28 the extensive promotion, advertising, sale, and public acceptance thereof, these

1 goods and services have acquired a fine reputation, and this trademark has become
2 renowned as a symbol of the goodwill that Plaintiff has created throughout the
3 United States and elsewhere by selling products and services of high quality and by
4 fairly and honorably dealing with the trade and public in the sale of these products
5 and services.

6 109. Photographs containing a Perfect 10 copyright notice and/or a caption
7 “Perfect 10,” “P-10,” or similar designation have been posted on the Stolen Content
8 Websites.

9 110. Defendants are knowingly inducing, causing, and materially
10 contributing to the conduct of the Stolen Content Websites, as alleged above.
11 Defendants had the right and ability to supervise and/or to control the infringing
12 content that exists on the Stolen Content Websites, and receive a direct financial
13 benefit from the infringing activity, as alleged above.

14 111. Defendants are providing critical support to Stolen Content Webmasters
15 that are using the PERFECT 10 mark in a manner that is likely to cause the public to
16 believe that Stolen Content Websites emanate from and/or are endorsed by, affiliated
17 with, sponsored by, and/or otherwise authorized by Perfect 10.

18 112. Defendants are liable for inducing infringement or contributory
19 infringement of Perfect 10’s trademarks, and/or are vicariously liable, by reason of
20 the uses alleged herein. Defendants also are liable as co-conspirators for the acts of
21 the Stolen Content Websites, as alleged above.

22 113. Defendants’ actions have at all times been without Perfect 10’s consent.
23 Defendants’ acts constitute willful and deliberate infringement of Perfect 10’s
24 registered trademarks/service marks in violation of trademark and unfair competition
25 laws, including, but not limited to, Sections 32 and 43 of the Lanham Act, 15 U.S.C.
26 §§ 1114 and 1125.

27 114. Defendants’ acts complained of herein have damaged, and will damage,
28 Perfect 10 irreparably. Perfect 10 has no adequate remedy at law for these wrongs

1 and injuries. The damage to Perfect 10 includes harm to its goodwill and reputation
2 in the marketplace that money cannot fully compensate. Perfect 10 is, therefore,
3 entitled to a preliminary and permanent injunction restraining and enjoining
4 Defendants and their agents, servants, and employees, and all persons acting
5 thereunder, in concert therewith or on their behalf, from providing critical support to
6 any Stolen Content Website using Perfect 10's PERFECT 10 mark, or any colorable
7 imitations thereof, in connection with their websites or in the sale, offering for sale,
8 and advertising of their goods and services, or in any manner likely to cause mistake
9 or to deceive the public as to the source, origin, or affiliation of Defendants' goods
10 and services.

11 115. Because Defendants have willfully supported Stolen Content Websites
12 who have used the PERFECT 10 mark in a manner calculated to cause confusion in
13 the sale, offering for sale, and advertising of services, Perfect 10 is entitled to
14 recover all damages sustained as a result of Defendants' unlawful conduct, including
15 (1) Defendants' profits, (2) Perfect 10's damages, (3) treble those amounts, (4) the
16 costs of the suit, and (5) reasonable attorneys' fees, pursuant to 15 U.S.C. § 1117.

17 **THIRD CLAIM FOR RELIEF**

18 (Trademark Disparagement Against All Defendants -- 15 U.S.C. §
19 1125(a))

20 116. Perfect 10 realleges and incorporates herein by reference each and every
21 allegation of paragraphs 1 through 115 above as though fully set forth at length.

22 117. The acts of Defendants alleged herein create an undesirable,
23 unwholesome, or unsavory mental association with Perfect 10 and its PERFECT 10
24 mark.

25 118. As a result of Defendants' wrongful acts, the public is likely to be
26 confused or deceived into believing that the Stolen Content Websites' goods and
27 services are affiliated with, connected with, or sponsored by Perfect 10 or with the
28 genuine PERFECT 10 trademark.

1 119. This deception, likely confusion, and association damages Perfect 10's
2 valuable goodwill and disparages Perfect 10's rights in the PERFECT 10 mark.

3 120. Defendants are liable for inducing or materially contributing to the
4 conduct causing a disparagement of Perfect 10's trademarks, and/or are vicariously
5 liable, by reason of the uses alleged above. Defendants also are liable as co-
6 conspirators for the acts of the Stolen Content Websites, as alleged above.

7 121. As a direct and proximate result of Defendants' actions as alleged herein,
8 Perfect 10 has been damaged in an amount presently unknown, but to be proven at
9 time of trial. Perfect 10 is also entitled to recover Defendants' profits.

10 122. Perfect 10 has incurred costs and attorneys' fees in bringing this action.

11 123. Defendants' actions as alleged above are greatly and irreparably
12 damaging Perfect 10 and will continue to do so unless Defendants are restrained by
13 this Court. Plaintiff is entitled to injunctive relief.

14 **FOURTH CLAIM FOR RELIEF**

15 (Wrongful Use of a Registered Mark Against All Defendants --

16 Cal. Bus. & Prof. Code § 14335)

17 124. Perfect 10 realleges and incorporates herein by reference each and every
18 allegation of paragraphs 1 through 124 above as though fully set forth at length.

19 125. Defendants' actions in providing critical support to Stolen Content
20 Websites who are using and reproducing the PERFECT 10 mark in connection with
21 the sale, offering for sale, and advertising of their goods and services are likely to
22 cause mistake and to deceive the public as to the source or origin of Stolen Content
23 Website's services. Defendants' actions have at all times been, and continue to be,
24 without Perfect 10's consent. Defendants' support of Stolen Content Websites
25 constitutes unlawful infringement in violation of California Business and Professions
26 Code § 14335.

27 126. Defendants' acts complained of herein have damaged, and will damage,
28 Perfect 10 irreparably. Plaintiff is entitled to injunctive relief.

FIFTH CLAIM FOR RELIEF

(Violation of Right of Publicity Against All Defendants --
Cal. Civil Code § 3344 and common-law right of publicity)

127. Perfect 10 realleges and incorporates herein by reference each and every allegation of paragraphs 1 through 126 above as though fully set forth at length.

128. Perfect 10 is the assignee of publicity rights in the likenesses of models and actresses appearing in PERFECT 10 magazine, on its website, in calendars, in photographs, and otherwise, which models and actresses were the subject of photographs appearing on the Stolen Content Websites. Attached hereto as Exhibit “9” is a list of the identities of the models and actresses who have assigned their rights of publicity to Perfect 10, which rights have been misappropriated by Stolen Content Websites with the critical support of Defendants.

129. Defendants knowingly support Stolen Content Websites which violate Plaintiff’s rights of publicity by appropriating likenesses belonging to Perfect 10 and by publishing the same on the Internet.

130. The appropriation was unauthorized and without the prior consent of Perfect 10 or any authorized party.

131. The Stolen Content Website’s conduct involved the appropriation of the names and photographic images of Plaintiff’s assignors. These assignors are readily identifiable in such photographs, and the names of certain of these assignors have been wrongfully used on the Stolen Content Websites.

132. The misappropriation by Stolen Content Websites was on or in products, merchandise or goods, or in advertising for them.

133. Defendants are liable for aiding and abetting the infringement, and/or have vicarious liability, as alleged above.

134. By reason of Defendants’ acts, Perfect 10 has suffered substantial damage to its business in the form of diversion of trade, loss of profits, injury to goodwill and reputation, and a dilution of the value of its exclusive rights, all of

1 which are not yet fully ascertainable. Defendants have profited from these acts.

2 135. Defendants' critical support of Stolen Content Websites that infringe
3 Perfect 10's rights of publicity has damaged, and will damage, Perfect 10
4 irreparably. Perfect 10 has no adequate remedy at law for these wrongs and injuries.
5 The damage to Perfect 10 includes harm to the goodwill, value, and reputation of the
6 persons who have assigned their rights of publicity to Perfect 10 in a manner that
7 money cannot compensate. Perfect 10 is, therefore, entitled to a preliminary and
8 permanent injunction restraining and enjoining Defendants and their agents,
9 servants, and employees, and all persons acting thereunder, in concert therewith or
10 on their behalf, from infringing the rights of publicity that have been assigned to
11 Perfect 10.

12 136. Plaintiff is informed and believes, and on that basis alleges, that the
13 aforementioned acts of Defendants were willful, oppressive, fraudulent, and
14 malicious, and Plaintiff is therefore entitled to punitive damages.

15 **SIXTH CLAIM FOR RELIEF**

16 (Unfair Competition Against All Defendants -- common law,
17 California Business & Professions Code §§17200 et seq.,
18 and Lanham Act §43(a))

19 137. Perfect 10 realleges and incorporates herein by reference each and every
20 allegation of paragraphs 1 through 136 above as though fully set forth at length.

21 138. Defendants are providing critical support for and profiting from the
22 unfair competition perpetrated by Stolen Content Websites against Perfect 10 by
23 reason of the conduct alleged herein, including the following:

24 139. Defendants have provided critical support to Stolen Content Websites
25 that offer a vast library of misappropriated content that is used to compete directly
26 and unfairly against Plaintiff, including, without limitation by (i) selling the
27 misappropriated content at substantially less than the cost of selling such content
28 legitimately and (ii) selling misappropriated content that is not lawfully available to

1 Perfect 10 or other competitors acting lawfully. This misappropriated content
2 includes (but is not limited to) material that infringes upon the rights of Perfect 10
3 and third-party publishers, film owners, celebrities and models, including their rights
4 of publicity and privacy and their rights not to be placed in a false light. Attached
5 hereto as Exhibit "10" is a list of some of the third-party celebrities and models
6 whose rights of publicity and/or rights of privacy (false light) have been infringed by
7 Stolen Content Websites which receive critical support by Defendants. Given the
8 sheer volume and changing character of the misappropriations taking place, this list
9 is not exhaustive, but is rather an exemplar of the misappropriation that has taken
10 place.

11 Defendants are providing critical support to Stolen Content Websites which deceive
12 consumers by misrepresenting the source or sponsorship of material on their
13 websites, by palming off the property of Perfect 10 and third parties as their own, by
14 misrepresenting the nature, characteristics, and identity of material on the Stolen
15 Content Websites (for example, by falsely claiming that there are nude photographs
16 of celebrities and by using fake composite pictures), by misrepresenting the amount
17 and scope of the material on or through the Stolen Content Websites, and/or by
18 falsely claiming that a website is free or tricking consumers into paying for another
19 website.

20 140. Defendants are also providing critical support to webmasters that are
21 engaged in other clearly illegal activity such as a) selling access to unauthorized
22 passwords, including unauthorized passwords to Perfect10.com, and other websites
23 that Perfect 10 owns rights to, including, amyweber.net and ambersmith.net, thereby
24 vastly reducing the demand for memberships to perfect10.com and leading to
25 massive infringement of Perfect 10's copyrights and misappropriation of its rights of
26 publicity (by assignment); websites that promote rape and/or incest; websites that
27 appear to offer the illegal downloading of hundreds of millions of songs and/or
28 movie clips; websites that appear to sell devices to steal cable signals.

1 141. The Stolen Content Websites and websites which distribute unauthorized
2 passwords to perfect10.com and other websites, along with the misrepresentations of
3 Stolen Content Websites which receive critical support from Defendants, are
4 wrongfully diverting consumer traffic from Perfect 10's website and PERFECT 10
5 magazine. Furthermore, while allowing competitors who are engaged in various
6 obviously illegal acts to process via MasterCard and Visa, Defendants have denied
7 Perfect 10 the ability to process Visa cards, and terminated Perfect 10's merchant
8 account, thus severely impacting its business.

9 142. The unlawful and unfair conduct is injuring the goodwill of Perfect 10.

10 143. Defendants are each liable for the unfair competition on the Stolen
11 Content Websites, and/or are liable for aiding and abetting such conduct.

12 144. By this conduct, Plaintiff has directly suffered injuries and the
13 Defendants have been unjustly enriched.

14 145. Plaintiff is entitled to restitution, the recovery of damages, and the
15 recovery of the profits earned by Defendants by virtue of their conduct.

16 146. As a consequence of the unfair competition by Defendants, Plaintiff is
17 suffering irreparable injury, by reason of which such conduct should be enjoined.

18 147. Plaintiff is entitled to its reasonable attorneys' fees.

19 148. Plaintiff is informed and believes, and on that basis alleges, that the
20 aforementioned conduct of Defendants is willful, oppressive, fraudulent, and
21 malicious, and Plaintiff is therefore entitled to punitive damages.

22 **SEVENTH CLAIM FOR RELIEF**

23 (False Advertising Against All Defendants – common law,
24 California Business & Professions Code §§17500 et seq.)

25 149. Perfect 10 realleges and incorporates herein by reference each and every
26 allegation of paragraphs 1 through 148 above as though fully set forth at length.

27 150. Defendants' critical support of Stolen Content Websites which
28 misrepresent the nature, scope, characteristics, identity, cost, and source or

1 sponsorship of material available on or through the Stolen Content Websites
2 constitutes aiding and abetting liability for deceptive, untrue, and misleading
3 advertising and therefore constitutes a violation of, inter alia, California Business
4 and Professions Code §§17500 et seq. and California common law.

5 151. These advertisements are likely to have deceived and continue to deceive
6 the consuming public. Defendants knew, recklessly disregarded, or reasonably
7 should have known that such advertising was untrue and/or misleading.

8 152. As a result of the conduct described above, Defendants have been and
9 will be unjustly enriched at the expense of Perfect 10 and the general public. The
10 interests of the general public and Perfect 10 are, therefore, closely related.
11 Defendants have been unjustly enriched, among other things, by the receipt of tens
12 of millions of dollars in fees obtained by processing subscriptions to the Stolen
13 Content Websites, both in California and throughout the world, which are promoted
14 and sold through advertisements that affirmatively misrepresent, either directly or by
15 implication, the nature, scope, characteristics, identity, cost, and source or
16 sponsorship of the material on the websites.

17 153. Pursuant to Business and Professions Code §§ 17203 and 17535, Perfect
18 10, on behalf of itself and the general public, which is unable effectively to assert its
19 interests, seeks an order of this Court ordering Defendants immediately to cease such
20 support for acts of unfair competition and false advertising, and enjoining
21 Defendants from continuing to support Stolen Content Websites which falsely
22 advertise or conduct business via the unlawful, deceptive, unfair or fraudulent
23 business acts and practices, and the untrue and misleading advertising complained of
24 herein. Perfect 10 additionally requests an order disgorging Defendants' ill-gotten
25 gains and restitution of all monies wrongfully acquired by Defendants by means of
26 their support of such acts of unfair competition and false advertising, damages,
27 interest and attorneys' fees.

28 **PRAYER FOR RELIEF**

1 WHEREFORE, plaintiff Perfect 10 prays for judgment in favor of Plaintiff and
2 against Defendants as follows:

3 1. That Defendants, and any of their officers, agents, servants, employees,
4 representatives, and attorneys, and all persons in active concert or participation with
5 them, be preliminarily and permanently enjoined from:

6 a. providing merchant services for, or processing credits cards for,
7 websites with obviously stolen content, including celebrity porn sites;

8 b. providing merchant services for, or processing credit cards for,
9 websites which are clearly involved in consumer fraud;

10 c. contributing to or profiting from the theft of Perfect 10 images or
11 the violation of Perfect 10's rights of publicity;

12 d. inducing, causing, or materially contributing to the infringement
13 of Perfect 10's copyrights and trademarks, and the misappropriation of its rights of
14 publicity;

15 e. aiding or abetting in unfair competition against Perfect 10;

16 f. aiding or abetting in false advertising; and

17 g. maintaining plaintiff's name, and that of its president, on the
18 Black List.

19 2. For restitution in the amount of the benefit to Defendants by reason of
20 their unlawful, unfair or fraudulent content.

21 3. An award of Perfect 10's actual damages.

22 4. That an accounting be made for all profits, income, receipts, or other
23 benefits derived by Defendants.

24 5. Alternatively, statutory damages under the Copyright Act.

25 6. Treble damages under the Lanham Act.

26 7. That Defendants pay to Plaintiff general damages in an amount to be
27 proven.

28 8. Alternatively, statutory damages under California Civil Code Section

1 3344.

2 9. For punitive damages.

3 10. That Plaintiff be awarded its attorneys' fees and costs.

4 11. That Plaintiff be awarded such other and further relief as this Court
5 deems just and appropriate.

6
7 Dated: September 3, 2004

Howard King
Stephen D. Rothschild
KING, HOLMES, PATERNO & BERLINER

8
9 Jeffrey N. Mausner
BERMAN, MAUSNER & RESSER

10 Daniel J. Cooper

11
12
13 By: _____
14 Howard King
Attorneys for Plaintiff, PERFECT 10, INC.

15
16 **DEMAND FOR JURY TRIAL**

17 Plaintiff Perfect 10, Inc. hereby demands a jury trial pursuant to Rule 38(b) of
18 the Federal Rules of Civil Procedure.

19 Dated: September 3, 2004

Howard King

20 Stephen D. Rothschild
KING, HOLMES, PATERNO & BERLINER

21 Jeffrey N. Mausner
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22 Daniel J. Cooper
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25 By: _____
26 Howard King
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