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 VISA INTERNATIONAL SERVICE ASSOCIATION

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 10 UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 11
 12 SAN JOSE DIVISION

13 PERFECT 10, INC., a California corporation,

14 Plaintiff,

15 v.

16 VISA INTERNATIONAL SERVICE
 ASSOCIATION; FIRST DATA CORP, a
 corporation; CARDSERVICE
 17 INTERNATIONAL, INC., a corporation;
 MASTERCARD INTERNATIONAL
 18 INCORPORATED, a corporation;
 HUMBOLDT BANK, a national banking
 19 association; and DOES 1 through 100,
 inclusive,

20 Defendants.
 21

Case No. CV 04 00371 JW (PVT)

**DECLARATION OF MARK T. JANSEN IN
 SUPPORT OF DEFENDANT VISA
 INTERNATIONAL SERVICE
 ASSOCIATION'S MOTION FOR AWARD
 OF ATTORNEYS' FEES AND COSTS**

Date: January 31, 2005

Time: 9:00 a.m.

The Hon. James Ware
 Courtroom 8, 4th Floor

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 23 I, Mark T. Jansen, declare as follows:

24 1. I am an attorney licensed to practice law in the State of California, am a partner in the
 25 law firm of Townsend and Townsend and Crew LLP ("Townsend"), and am attorney of record for
 26 defendant Visa International Service Association ("Visa") in this action. This declaration is submitted
 27 in support of Visa's motion for an award of its attorneys' fees and costs reasonably incurred in defense
 28 of this action. The following facts are within my personal knowledge and I would be competent to

1 testify if called herein as a witness.

2 2. Plaintiff Perfect 10, Inc. ("Perfect 10") brought an unprecedented copyright and
3 trademark infringement action against Visa and other defendants in this action. Plaintiff did not
4 accuse defendants of infringement, but sued them under contributory and vicarious liability theories
5 merely because they supplied their normal, content-neutral credit card transaction processing services
6 to otherwise unrelated -- and largely unidentified -- independent website merchants.

7 3. Plaintiff brought this case against numerous defendants: Visa International Service
8 Association, First Data Corporation, CardService International, Inc., Humboldt Bank, and MasterCard
9 International Incorporated. Visa is represented by Townsend, MasterCard International Incorporated
10 is represented by Winston & Strawn LLP; and First Data Corporation, CardService International, Inc.,
11 and Humboldt Bank are represented by Kecker & Van Nest, LLP

12 4. In the interest of economy, the defendants coordinated the defense of this action to the
13 extent practical in order to avoid a significant duplication of efforts. The primary example of this was
14 that the defendants filed a consolidated motion to dismiss the original complaint; coordinated legal
15 research; exchanged drafts of motions and legal memoranda; and coordinated in the preparation of
16 other briefs and papers with the Court, including the filing of this motion for an award of attorneys'
17 fees, which, although prepared by Visa's counsel and filed on behalf of only Visa, will be substantially
18 relied upon by the other defendants in support of their motions for attorneys' fees.

19 5. Given the nature of the claims and potential enormous exposure to Visa and the Visa
20 system, as well as Plaintiff's tortured interpretation of the controlling intellectual property and unfair
21 practices law, Visa was forced to engage specialized counsel to defend itself in this action. Visa
22 focused its efforts on the defense of the copyright and trademark claims. Visa's counsel reasonably
23 spent substantial time investigating the detailed and lengthy factual allegations, and conducting
24 thorough legal research. Visa's counsel wrote the first draft of the copyright, trademark, and unfair
25 competition sections of Defendants' original consolidated brief, and also conducted substantial legal
26 research, and drafted argument on the libel and tortious interference claims.

27 6. The defendants also coordinated in other preliminary procedural issues so as to reduce
28 the expense of defense as much as possible. For example, defendants jointly decided it would be a

1 waste of effort to conduct a Rule 26(f) conference and engage in any preliminary exchange of
2 documents, and successfully convinced Plaintiff's counsel to defer any such work until the pleadings
3 were resolved.

4 7. Defendants filed a consolidated motion to dismiss Plaintiff's original complaint and the
5 Court heard Defendants' motion on July 9, 2004. A true and correct copy of the transcript of the
6 hearing (7/9/04 RT) is attached hereto as Exhibit 1. The Court ruled from the bench that the alleged
7 facts did not fit within any recognized theory of liability and questioned whether Plaintiff could
8 possibly allege additional material facts that would support a claim for relief.

9 8. On August 6, 2004, the Court issued its Order dismissing Plaintiff's complaint, but
10 giving Plaintiff leave to amend its copyright, trademark and related state law claims if it desired.
11 Plaintiff's libel and intentional interference with economic relations claims were dismissed with
12 prejudice. Attached as Exhibit 2 hereto is a true and correct copy of this Court's August 6, 2004
13 Order Granting Defendants' Motion to Dismiss (the "8/6/04 Order").

14 9. Plaintiff filed a First Amended Complaint, and Defendants once again filed a motion to
15 dismiss. At the November 15, 2004 hearing on the motion to dismiss, where the entirety of the oral
16 argument was devoted to the copyright claims, the Court questioned why Plaintiff had bothered
17 amending as no materially new facts had been added. In response, Plaintiff's counsel stated he had
18 done so at the demand of his client. The Court again ruled from the bench, dismissing the Complaint
19 with prejudice, and followed that with a written opinion and decision on December 3, 2004. Attached
20 as Exhibit 3 hereto is a true and correct copy of this Court's Order Granting Defendants' Motion to
21 Dismiss First Amended Complaint dated December 3, 2004 (the "12/3/04 Order"). The undersigned
22 promptly ordered a transcript of the November 15, 2004 hearing from court reporter Irene Rodriguez.
23 Ms. Rodriguez is currently the court reporter in two trials and thus, has been unable to complete the
24 hearing transcript. Visa will submit the transcript with its reply brief.

25 10. As prevailing parties, Visa and the other defendants are entitled to an award of their
26 attorneys' fees and other expenses incurred in defending this action. Pursuant to Civil L.R. 54-5(b)(1),
27 counsel for all defendants met and conferred with Plaintiff's attorney, Howard King, prior to the
28 bringing of this motion, for the purpose of attempting to resolve any disputes with respect to the

1 motion. Specifically, immediately following the November 15, 2004 hearing on Defendants' motions
2 to dismiss the First Amended Complaint, all defense counsel met in person with Mr. King and
3 requested that his client agree that it was obligated to pay defendants' legal defense fees. Mr. King
4 responded that his client could not agree and that defendants would have to move to obtain a fee
5 award. Because Plaintiff's attorney refused to acknowledge Plaintiff's liability to reimburse any part
6 of Defendants' attorneys' fees as part of costs, this motion was required.

7 11. Plaintiff and its counsel persisted in prosecuting this baseless claim despite repeated
8 requests that they drop the action, and being fully aware of not just the complete lack of authority
9 supporting their claims, but a multitude of federal and state decisions clearly holding that banks, credit
10 card transaction processing services like Visa and other financial institutions, cannot be liable to third
11 parties for the violations of their depositors, borrowers, or other customers. I had at least one, and
12 possibly two telephone conversations with Plaintiff's attorney Stephen Rothschild prior to the hearing
13 on Defendants' First Motion to Dismiss in which I requested Mr. Rothschild to voluntarily dismiss the
14 action in light of its lack of legal support. In these conversations, I pointed out that Perfect 10 would
15 otherwise be liable for Visa's defense expenses. I had several similar conversations with Mr. King and
16 with Perfect 10's in-house counsel Daniel Cooper, immediately after the Court issued its August 6,
17 2004 Order, and during the weeks leading up to the November 15, 2004 hearing. In my discussion
18 with Mr. King during the week after the 8/6/04 Order issued, Mr. King said in substance that he
19 realized he could not amend his client's complaint to add new facts to satisfy the pleading
20 requirements enunciated by this Court in its 8/6/04 Order.

21 12. Mr. King made a similar statement to the Press immediately following this Court's
22 August 6, 2004 Order. Attached hereto as Exhibit 4 is a true and correct copy of an article published
23 August 16, 2004 in the San Francisco Recorder, containing Mr. King's Statement that "[f]rom the
24 beginning, we knew it would probably be decided by a higher court," and "I didn't see a lot of rays of
25 hope in Judge Ware's opinion."

26 13. Attached hereto as Exhibit 5 is a true and correct copy of an article published June 4,
27 2004 in the San Francisco Recorder, containing a quote attributed to Mr. King. Mr. King has never
28 denied, and indeed personally acknowledged to me, that he made the statement attributed to him.

1 14. This case received wide attention in other legal, national and international publications.
2 For example, articles regarding this case also appeared in: *The New York Times*, *National Law*
3 *Journal*, *Washington Internet Daily*, *The Computer & Internet Lawyer*, *E-Commerce Law & Strategy*,
4 *Information Today*, *The Internet Newsletter*, *CBS MarketWatch*, *IP Law and Business*, *Truth* (New
5 Zealand), *Gold Coast Bulletin* (Australia), *The Evening Standard* (London), and *National Post's*
6 *Financial Post & FP Investing* (Canada), among others. Attached as Exhibit 6 hereto are true and
7 correct copies of representative articles discussing this case.

8 15. Plaintiff's unfounded civil action, as described above, has forced Visa to incur
9 substantial legal defense expenses. Attached hereto as Exhibit 7 is a true and correct copy of a billing
10 summary prepared at my request by Townsend's accounting department, listing each invoice for
11 attorneys fees sent to Visa for work done on Visa's behalf as a result of this action. Exhibit 7 lists each
12 Townsend invoice sent to Visa by date of issuance, and the amount of fees for (a) attorney time and
13 (b) litigation costs. The total amount billed to Visa in connection with this matter as of November 30,
14 2004 is \$299,603.16, consisting of \$294,617.00 in attorney time and \$4,986.16 in costs.

15 16. The following individuals at Townsend provided legal services to Visa in connection
16 with this action. Attached as Exhibit 8 is a true and correct copy of a statement summarizing the total
17 time and fees billed by each individual, as of November 30, 2004. Pursuant to Civil L.R. 54-5(b)(2),
18 if the Court requires, an abstract of or the contemporary time records are available for inspection
19 subject to attorney-client privilege and work product doctrine protections, as applicable.

20 a. Mark T. Jansen (Litigation Partner). Mr. Jansen provided the following legal
21 services to Visa in the defense of this action: case review and assessment, litigation strategy, legal and
22 fact analysis, client counseling, correspondence with opposing counsel, supervising legal research and
23 brief drafting, coordinating joint defense strategy and filings, and oral argument. As of November 30,
24 2004, Mr. Jansen provided Visa with 283.4 hours of legal services and Visa was billed \$130,364.00 in
25 fees for that time.

26 b. John C. Baum (Trademark & Copyright Partner). Mr. Baum provided the
27 following legal services to Visa in the defense of this action: case review and assessment, litigation
28 strategy, client counseling, reviewing Plaintiff's document production and communications,

1 correspondence with opposing counsel, supervising legal research and brief drafting, and coordinating
2 joint defense strategy and filings. As of November 30, 2004, Mr. Baum provided Visa with 125 hours
3 of legal services and Visa was billed \$49,815.00 in fees for that time.

4 c. Daniel J. Furniss (Litigation Partner). Mr. Furniss provided the following legal
5 services to Visa in the defense of this action: case review and assessment, litigation strategy, and client
6 counseling. As of November 30, 2004, Mr. Furniss provided Visa with 28.5 hours of legal services
7 and Visa was billed \$15,675.00 in fees for that time.

8 d. Paul W. Vapnek (Of Counsel). Mr. Vapnek provided services regarding legal
9 ethics issues. As of November 30, 2004, Mr. Vapnek provided Visa with 0.5 hours of legal services
10 and Visa was billed \$260.00 in fees for that time.

11 e. Anthony J. Malutta (Trademark & Copyright Associate). Mr. Malutta provided
12 the following legal services to Visa in the defense of this action: legal research, fact investigation,
13 memoranda drafting, and brief drafting. As of November 30, 2004, Mr. Malutta provided Visa with
14 103 hours of legal services and Visa was billed \$32,000.00 in fees for that time.

15 f. Leonard J. Augustine, Jr. (Litigation Associate). Mr. Augustine provided the
16 following legal services to Visa in the defense of this action: legal research, fact investigation,
17 memoranda drafting, and brief drafting. As of November 30, 2004, Mr. Augustine provided Visa with
18 93.9 hours of legal services and Visa was billed \$17,948.00 in fees for that time.

19 g. Jennifer M. Rich (Trademark & Copyright Associate). Ms. Rich provided the
20 following legal services to Visa in the defense of this action: legal research, fact investigation,
21 memoranda drafting, and brief drafting. As of November 30, 2004, Ms. Rich provided Visa with
22 168.6 hours of legal services and Visa was billed \$40,400.50 in fees for that time.

23 h. Elizabeth R. Gosse (Trademark & Copyright Associate). Ms. Gosse provided
24 legal research services to Visa in defense of this action. As of November 30, 2004, Ms. Gosse
25 provided Visa with 1.2 hours of legal services and Visa was billed \$336.00 in fees for that time.

26 i. Priya Sreenivasan (Litigation Associate). Ms. Sreenivasan provided legal
27 research services to Visa in defense of this action. As of November 30, 2004, Ms. Sreenivasan
28 provided Visa with 9.9 hours of legal services and Visa was billed \$2,128.50 in fees for that time.

1 j. Steven D. Bassett (Paralegal). Mr. Bassett provided paralegal services in
2 defense of this action. As of November 30, 2004, Mr. Bassett provided Visa with 9.0 hours of legal
3 services and Visa was billed \$1,800.00 in fees for that time.

4 k. Brian R. Miller (Paralegal). Mr. Miller provided paralegal services in defense
5 of this action. As of November 30, 2004, Mr. Miller provided Visa with 16.4 hours of legal services
6 and Visa was billed \$3,280.00 in fees for that time.

7 l. Nicole D. Skibola (Case Clerk). Ms. Skibola provided case clerk and document
8 management services in defense of this action. As of November 30, 2004, Ms. Skibola provided Visa
9 with 7.1 hours of legal services and Visa was billed \$610.00 in fees for that time.

10 17. Timekeeping billers at Townsend (attorneys, paralegals, and case clerks) record the
11 time they spend on particular matters as they complete each task, on a daily basis. The time entries
12 are entered into desktop software ("DTE 2001") and released periodically into the firm's accounting
13 system for bill preparation by the firm's accounting department as directed by the billing partner.

14 18. The individuals at Townsend who performed legal work defending Visa have the
15 following qualifications:

16 a. Daniel J. Furniss (Partner). Over twenty eight years experience in commercial
17 litigation including trademark and copyright, patent, unfair competition, and antitrust litigation.
18 Daniel J. Furniss is co-chair of the firm's Litigation practice group. Attached as Exhibit 9 is a true and
19 correct copy of Daniel J. Furniss' professional biography. Mr. Furniss' regular and customary hourly
20 billing rate for 2004, which is the rate being charged to and paid by Visa for the defense of this action,
21 is \$550 per hour.

22 b. Mark T. Jansen (Partner). Over twenty years experience in unfair business
23 practice, antitrust and commercial litigation, including trademark and copyright, unfair competition,
24 and antitrust litigation. Associated with the predecessor firm of Khourie, Crew & Jaeger from 1984
25 through 1991 and partner with the firm since January, 1992. Mark T. Jansen is a member of the firm's
26 Litigation practice group. Attached as Exhibit 10 is a true and correct copy of Mark T. Jansen's
27 professional biography. Among the important trademark and copyright cases that Mr. Jansen has
28 worked on are *Sebastian v. Longs Drug Stores*, 53 F.3d 1073 (9th Cir. 1995), and *Duggan's Funeral*

1 *Services Inc. v. Duggan's Serra Mortuary*, 80 Cal.App.4th 151 (2000). Mr. Jansen's regular and
2 customary hourly billing rate for 2004, which is the rate being charged to and paid by Visa for the
3 defense of this action, is \$460 per hour.

4 c. John C. Baum (Partner). Over eleven years experience in litigation and
5 intellectual property, John C. Baum is a member of the firm's Trademark & Copyright practice group.
6 Attached as Exhibit 11 is a true and correct copy of John C. Baum's professional biography. Mr.
7 Baum's regular and customary hourly billing rate for 2004, which is the rate being charged to and paid
8 by Visa for the defense of this action, is \$405 per hour.

9 d. Paul W. Vapnek (Of Counsel). Attached as Exhibit 12 is a true and correct
10 copy of Paul W. Vapnek's professional biography. Mr. Vapnek's regular and customary hourly billing
11 rate for 2004, which is the rate charged to Visa for the defense of this action, is \$520 per hour.

12 e. Anthony J. Malutta (Associate). Over six years experience in intellectual
13 property counseling and litigation, including trademark, copyright, and unfair competition litigation.
14 Associated with the firm since September 2000, Anthony J. Malutta is a member of the firm's
15 Trademark & Copyright practice group. Attached as Exhibit 13 is a true and correct copy of Anthony
16 J. Malutta's professional biography. Mr. Malutta's regular and customary hourly billing rate for 2004,
17 which is the rate being charged to and paid by Visa for the defense of this action, is \$320 per hour.

18 f. Leonard J. Augustine, Jr. (Associate). Approximately two years experience in
19 intellectual property litigation, including patent, trademark and copyright litigation, and four years
20 experience advising high-technology clients in corporate and transactional matters, including equity
21 financings, mergers and acquisitions, and securities law compliance. Associated with the firm since
22 September, 2003, Leonard J. Augustine, Jr. is a member of the firm's Litigation group. Attached as
23 Exhibit 14 is a true and correct copy of Mr. Augustine's professional biography. Mr. Augustine's
24 regular and customary hourly billing rate for 2004, which is the rate being charged to and paid by Visa
25 for the defense of this action, is \$280 per hour.

26 g. Jennifer M. Rich (Associate). Jennifer M. Rich was associated with the firm
27 from September 2003 to September 2004 and was a member of the firm's Trademark & Copyright
28 practice group. In 2002-2003, before coming to work at Townsend, Ms. Rich was a judicial law clerk

1 for the Honorable Procter Hug, Jr., United States Circuit Court Judge for the Ninth Circuit. Ms. Rich
2 returned to work at the Ninth Circuit Court of Appeals in October 2004, where she is now a Staff
3 Attorney. Attached as Exhibit 15 is a true and correct copy of Jennifer M. Rich's professional
4 biography. Ms. Rich's regular and customary hourly billing rate for 2004, which is the rate charged to
5 Visa for the defense of this action, is \$245 per hour.

6 h. Elizabeth R. Gosse (Associate). Associated with the firm since October, 2001,
7 Elizabeth R. Gosse is a member of the firm's Trademark & Copyright practice group. Attached as
8 Exhibit 16 is a true and correct copy of Elizabeth R. Gosse's professional biography. Ms. Gosse's
9 regular and customary hourly billing rate for 2004, which is the rate charged to Visa for the defense of
10 this action, is \$280 per hour.

11 i. Priya Sreenivasan (Associate). Associated with the firm since September,
12 2004, Priya Sreenivasan is a member of the firm's Litigation practice group. Attached as Exhibit 17 is
13 a true and correct copy of Ms. Sreenivasan's professional biography. Ms. Sreenivasan's regular and
14 customary hourly billing rate for 2004, which is the rate charged to Visa for the defense of this action,
15 is \$215 per hour.

16 j. Steven D. Bassett (Paralegal). Mr. Bassett's regular and customary hourly
17 billing rate for 2004, which is the rate charged to Visa for the defense of this action, is \$200 per hour.

18 k. Brian R. Miller (Paralegal). Mr. Miller's regular and customary hourly billing
19 rate for 2004, which is the rate charged to Visa for the defense of this action, is \$200 per hour.

20 l. Nicole D. Skibola (Case Clerk). Ms. Skibola's regular and customary hourly
21 billing rate for 2004, which is the rate charged to Visa for the defense of this action, is \$100 per hour.

22 19. The hourly rates charged to Visa are both (a) the regular hourly rates billed to all of the
23 firm's clients and (2) reasonable, competitive rates for attorneys, paralegals, and case clerks with their
24 qualifications and experience in the San Francisco Bay Area market.

25 I declare under the penalty of perjury under the laws of the State of California that the
26 foregoing is true and correct. Executed December 15, 2004 at San Francisco, California.

27
28 _____
/s/
Mark T. Jansen

PROOF OF SERVICE

I, Linda M. Tan, declare: I am employed in the City and County of San Francisco, California in the office of a member of the bar of this court at whose direction this service was made. I am over the age of eighteen and not a party to this action. My business address is Townsend and Townsend and Crew LLP, Two Embarcadero Center, Eighth Floor, San Francisco, California, 94111.

On December 15, 2004, I served the following documents exactly entitled: **DECLARATION OF MARK T. JANSEN IN SUPPORT OF DEFENDANT VISA INTERNATIONAL SERVICE ASSOCIATION'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS** on the interested parties in this action by:

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E-FILING AND/OR E-MAILING DOCUMENT

ELECTRONIC TRANSMISSION: I caused said document to be sent by electronic transmission to the e-mail address indicated for the party(ies) listed above. The transmitting terminal address is _____@townsend.com.

ONLY E-FILING DOCUMENT

ELECTRONIC TRANSMISSION: I declare that a copy of said document(s) was filed electronically on December 15, 2004. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this declaration was executed on December 15, 2004, at San Francisco, California.

/s/
Linda M. Tan

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