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10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA

12 PERFECT 10, INC., a California corporation,

13 Plaintiff,

14 v.

15 GOOGLE, INC., a corporation; and
16 DOES 1 through 100, inclusive,

17 Defendant.

Case No. CV 04-9484 AHM (SHx)
 Consolidated with Case No. CV 05-4753
 AHM (SHx)

**PERFECT 10'S RESPONSE TO
 GOOGLE, INC.'S EVIDENTIARY
 OBJECTIONS TO THE
 DECLARATION OF MELANIE
 POBLETE RE GOOGLE'S
 MOTIONS FOR SUMMARY
 JUDGMENT**

BEFORE JUDGE A. HOWARD MATZ

18 AND CONSOLIDATED CASE.

Date: None Set (taken under submission)
 Time: None Set
 Place: Courtroom 14, Courtroom of the
 Honorable A. Howard Matz

Discovery Cut-Off Date: None Set
 Pretrial Conference Date: None Set
 Trial Date: None Set

1 Plaintiff Perfect 10, Inc. (“Perfect 10”) hereby responds to Defendant
2 Google Inc.’s (“Google”) Evidentiary Objections to the Declaration of Melanie
3 Poblete submitted by Perfect 10 in connection with Perfect 10’s Opposition to
4 Google’s Motions for Summary Judgment Re DMCA Safe Harbor for its Web
5 and Image Search, Blogger Service, and Caching Feature (the “Poblete
6 Declaration” or “Poblete Decl.”) (Docket No. 484) as follows:¹

7 **I. PERFECT 10’S “SAMPLE” OF IMAGES FROM ITS DMCA**
8 **NOTICES IS RELEVANT TO GOOGLE’S SUMMARY**
9 **JUDGMENT MOTIONS.**

10 Google’s primary objection to the Poblete Declaration is that the
11 declaration is irrelevant because it discusses the “Sample” of Perfect 10 images
12 included in Exhibit 9 to the Declaration of Dr. Norman Zada submitted by
13 Perfect 10 in opposition to Google’s three Motions for Summary Judgment (the
14 “Zada Declaration”). *See* Evidentiary Objections at 1.

15 In opposing Google’s three Motions for Summary Judgment, Perfect 10
16 elected, for evidentiary purposes, to reference a few selected images identified
17 in its DMCA notices and provide evidence of copyright ownership for those
18 images. Accordingly, in order to save time and the Court’s resources, Perfect
19 10 selected a sample of 12 such images from its full image library (the
20 “Sample”).

21 ¹ In addressing Google’s objections to the Poblete Declaration, the
22 general principles applicable to declarations submitted in opposition to
23 summary judgment motions should be applied, as discussed in Section I of
24 Perfect 10’s Reply to Google, Inc.’s Evidentiary Objections to the Declaration
25 of Dr. Norman Zada, submitted concurrently herewith, which is incorporated
26 herein as if set forth in full. For example, the Ninth Circuit has adopted a
27 general principle with respect to evidentiary objections for summary judgment
28 motions that courts must “treat the opposing party’s papers more indulgently
than the moving party’s papers.” *Lew v. Kona Hosp.*, 754 F.2d 1420, 1423 (9th
Cir.1985). *See also Scharf v. U.S. Att’y Gen.*, 597 F.2d 1240, 1243 (9th
Cir.1979) (“courts generally are much more lenient with the affidavits of a party
opposing a summary judgment motion.”)

1 The Court has favored a sampling approach with regard to Perfect 10's
2 images. See December 2, 2008 Order Setting Status Conference Re Case
3 Management, *Perfect 10, Inc. v. Microsoft, Inc.*, Case No. 07-5156 AHM
4 (SHx), Docket No. 51. However, if the Court wants to see evidence of
5 copyright ownership of additional images from Perfect 10 Magazines, that
6 evidence is contained on the disk, Exhibit 9 to the Zada Declaration (Docket
7 No. 490), in a folder labeled "The Sample," in subfolders labeled "Registration
8 Certificates," "Deposit Materials," and "Work Made for Hires & AoRs," which
9 cover many other Perfect 10 images as well.

10 **II. THE POBLETE DECLARATION IS OTHERWISE ADMISSIBLE.**

11 Google's remaining objections to the Poblete Declaration lack merit.
12 The Poblete Declaration deals mainly with the registration of, and the deposit
13 materials associated with, the 12 sample images referenced in the Zada
14 Declaration, which was filed concurrently. Ms. Poblete is an experienced legal
15 assistant with extensive knowledge of the images, copyright registrations, and
16 deposit materials relevant to Perfect 10's copyright infringement claims. She
17 personally examined all the images and deposit materials referenced in her
18 declaration. Poblete Decl. ¶¶1-15. Therefore, Ms. Poblete's testimony
19 regarding the images and deposit material is based upon her personal
20 knowledge and cannot be considered hearsay. Furthermore, based upon her
21 legal experience, Ms. Poblete unquestionably is qualified to examine Copyright
22 Office materials and testify about the documents she reviewed. Finally, the
23 documents referenced in the Poblete Declaration were provided to the Court
24 and all parties for examination. For all of these reasons, Google's remaining
25 objections to the Poblete Declaration are meritless.

26 **III. PERFECT 10'S RESPONSES TO GOOGLE'S SPECIFIC**
27 **OBJECTIONS.**

28 As explained below, this Court should disregard Google's specific

1 objections to the Poblete Declaration:

<u>Proffered Evidence & Objection</u>	<u>Perfect 10's Response</u>
<p>2 3 4 1. Poblete Decl., at ¶ 2 ("I have 5 verified that Perfect 10 has in its 6 deposit material for copyright 7 registrations filed with the U.S. 8 Copyright Office, over 19,000 unique 9 images.") 10 <u>Fed. R. Evid. 401, 403, 602</u> 11 12 The statement is irrelevant, lacks 13 foundation, and does not appear to be 14 within the witness's personal 15 knowledge.</p>	<p>As explained above, Ms. Poblete's statement is based upon her personal knowledge and has sufficient foundation.</p>
<p>16 2. Poblete Decl., at ¶ 2 ("In this 17 Declaration, I will reference images 18 contained in exhibits to the Zada 19 Declaration that constitute Perfect 10's 20 'Sample' of twelve images. The twelve images referenced in this Declaration which constitute Perfect 10's 'Sample' are contained in deposit materials for Perfect 10 copyright registrations with the U.S. Copyright Office.") <u>Fed. R. Evid. 401, 403, 602</u> The statement is irrelevant (see Part I, supra), lacks foundation, and is speculative.</p>	<p>As explained above, Ms. Poblete's statement is based upon her personal knowledge and the tasks she performed on behalf of Perfect 10. Accordingly, the statement has sufficient foundation and is not speculative.</p>
<p>21 3. Poblete Decl., at ¶¶ 3-25 22 <u>Fed. R. Evid. 401, 402, 403, 602, 1002</u> 23 These portions of the Poblete 24 Declaration all make reference to 25 Exhibit 9 of the Zada Declaration, 26 a/k/a "the Sample." Such references 27 are argumentative, violate the best 28 evidence rule (P10 seeks to take the entirety of its defective notices out of context by cherry-picking only select, individual images), irrelevant (Google's motions go to the entirety of</p>	<p>As explained above, Ms. Poblete's testimony regarding the Sample is based upon her personal knowledge and the tasks she performed on behalf of Perfect 10. Accordingly, her testimony has sufficient foundation and is not speculative or argumentative. Moreover, Ms. Poblete's testimony does not violate the best evidence rule. Google has failed to establish, and cannot establish, that Perfect 10's use of the Sample constitutes "cherry-picking." Moreover, the images selected for use</p>

1 P10's copyright claims, see Section I,
2 supra), speculative, and lack
3 foundation, as no explanation is
4 provided as to how or why "the
Sample" was constructed.

in the Sample simply establish Perfect
10's ownership of the images
referenced in opposition to Google's
three Motions for Summary Judgment.

5 **IV. CONCLUSION.**

6 For the foregoing reasons, this Court should disregard Google's
7 evidentiary objections and consider the Declaration of Melanie Poblete and the
8 exhibits referenced therein in their entirety.

9 Dated: October 12, 2009

Respectfully submitted,
LAW OFFICES OF JEFFREY N. MAUSNER

11 By: Jeffrey N. Mausner

12 Jeffrey N. Mausner
13 Attorney for Plaintiff Perfect 10, Inc.
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