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11 UNITED STATES DISTRICT COURT  
 12 CENTRAL DISTRICT OF CALIFORNIA

13 PERFECT 10, INC., a California  
 corporation,  
 14  
 Plaintiff,  
 15  
 vs.  
 16 GOOGLE INC., a corporation; and  
 17 DOES 1 through 100, inclusive,  
 18  
 Defendants.

CASE NO. CV 04-9484 AHM (SHx)  
 [Consolidated with Case No. CV 05-  
 4753 AHM (SHx)]

**DEFENDANT GOOGLE INC.'S  
 REPLY TO PERFECT 10, INC.'S  
 "RESPONSES" TO GOOGLE'S  
 EVIDENTIARY OBJECTIONS IN  
 SUPPORT OF ITS MOTIONS FOR  
 SUMMARY JUDGMENT RE:  
 GOOGLE'S ENTITLEMENT TO  
 SAFE HARBORS UNDER 17 U.S.C.  
 § 512**

19 AND COUNTERCLAIM

Hon. A. Howard Matz

20 PERFECT 10, INC., a California  
 corporation,  
 21  
 Plaintiff,  
 22  
 vs.  
 23 AMAZON.COM, INC., a corporation;  
 24 A9.COM, INC., a corporation; and  
 25 DOES 1 through 100, inclusive,  
 26  
 Defendants.

Date: None Set (taken under  
 submission)  
 Time: None Set  
 Place: Courtroom 14

Discovery Cut-off: None Set  
 Pre-trial Conference: None Set  
 Trial Date: None Set

1 Defendant Google Inc. (“Google”) hereby replies to the following Perfect 10,  
2 Inc. “Responses” to Google’s Evidentiary Objections in Support of Google’s  
3 Motions for Partial Summary Judgment re: Google’s Entitlement to Safe Harbors  
4 Under 17 U.S.C. § 512 (hereinafter, the “Evidentiary Objection Responses”):

- 5 • PERFECT 10’S RESPONSE TO GOOGLE, INC.’S EVIDENTIARY  
6 OBJECTIONS TO THE DECLARATIONS OF SEAN CHUMURA,  
7 BENNETT MCPHATTER AND DAVID O’CONNOR RE:  
8 GOOGLE’S MOTIONS FOR SUMMARY JUDGMENT (Docket No.  
9 565);
- 10 • PERFECT 10’S RESPONSE TO GOOGLE, INC.’S EVIDENTIARY  
11 OBJECTIONS TO THE DECLARATIONS OF MARGARET JANE  
12 EDEN, DEAN HOFFMAN, C.J. NEWTON, AND LES SCHWARTZ  
13 RE: GOOGLE’S MOTIONS FOR SUMMARY JUDGMENT (Docket  
14 No. 566);
- 15 • PERFECT 10’S RESPONSE TO GOOGLE, INC.’S EVIDENTIARY  
16 OBJECTIONS TO THE DECLARATION OF SHEENA CHOU RE:  
17 GOOGLE’S MOTIONS FOR SUMMARY JUDGMENT (Docket No.  
18 567);
- 19 • PERFECT 10’S RESPONSE TO GOOGLE, INC.’S EVIDENTIARY  
20 OBJECTIONS TO THE DECLARATION OF JEFFREY MAUSNER  
21 RE: GOOGLE’S MOTIONS FOR SUMMARY JUDGMENT (Docket  
22 No. 568);
- 23 • PERFECT 10’S RESPONSE TO GOOGLE, INC.’S EVIDENTIARY  
24 OBJECTIONS TO THE DECLARATION OF MELANIE POBLETE  
25 RE: GOOGLE’S MOTIONS FOR SUMMARY JUDGMENT (Docket  
26 No. 569);
- 27 • PERFECT 10’S REDACTED REPLY TO GOOGLE INC.’S  
28 EVIDENTIARY OBJECTIONS TO THE DECLARATION OF DR.

1 NORMAN ZADA RE: GOOGLE’S MOTIONS FOR SUMMARY  
2 JUDGMENT (Docket No. 570; redacted portions filed under seal).

3 Although these documents purport to be “Responses” to objections to evidence, in  
4 fact, they are largely sur-reply briefs containing new argument and new evidence on  
5 the merits of Google’s pending motions for summary judgment regarding Google’s  
6 entitlement to DMCA safe harbor. Perfect 10’s (“P10”) filing of these briefs  
7 contravenes Local Rule 7-10 and the Court’s Scheduling and Case Management  
8 Order. The new arguments and evidence presented therein (as identified below)  
9 should be stricken and/or disregarded.

10 **I. P10’S EVIDENTIARY OBJECTION RESPONSES ARE IMPROPER**  
11 **SUR-REPLIES, AND THEIR NEW ARGUMENTS AND EVIDENCE**  
12 **SHOULD BE DISREGARDED.**

13 After the completion of briefing on Google’s three Motions for Partial  
14 Summary Judgment, and without obtaining leave of Court, P10 filed the six above-  
15 titled Evidentiary Objection Responses. The vast majority of these documents  
16 constitute improper sur-reply briefing and should be disregarded.

17 Local Rule 7-10 provides that “[a]bsent prior written order of the Court, the  
18 opposing party shall not file a response to the reply.” Additionally, Paragraph  
19 III.C.5 of this Court’s Scheduling and Case Management Order provides that “[t]he  
20 non-moving party may not file a sur-reply unless the Court first grants leave to do  
21 so.” Courts routinely strike or refuse to consider documents submitted in violation  
22 of these rules. *See, e.g., Spalding Laboratories, Inc. v. Arizona Biological Control,*  
23 *Inc.*, 2008 WL 2227501, at \*1 n.2 (C.D. Cal. 2008) (“The Court strikes and does not  
24 consider Spalding’s 14-page ‘sur-opposition’ to ARBICO’s reply brief.”) (citing  
25 Local Rule 7-10); *DISC Intellectual Properties LLC v. Delman*, 2007 WL 4973849,  
26 at \*1 n.1 (C.D. Cal. 2007) (rejecting “Defendants ... attempt[] to file a Response to  
27 Plaintiffs’ Reply in violation of Local Rule 7-10.”); *see also Cruz v. Tilton*, 2009  
28 WL 3126518, at \*1 (E.D. Cal. 2009).

1 On July 2, 2009, Google filed three motions for summary judgment regarding  
2 Google’s entitlement to DMCA safe harbor regarding its Caching feature, Blogger  
3 service and Search service, respectively. See Docket Nos. 423-51. On August 9,  
4 2009, P10 submitted its opposition materials, including three opposition briefs, three  
5 separate statements of allegedly disputed facts, and eleven declarations. See Docket  
6 Nos. 473-84. On September 8, 2009, Google filed its reply papers. See Docket  
7 Nos. 502-21.

8 Thereafter, on October 12, 2009, P10 filed the Evidentiary Objection  
9 Responses—despite having never sought or obtained leave to file any additional  
10 argument or evidence in sur-reply to Google’s reply materials. These documents  
11 contain dozens of pages of argument on multiple subjects, including (1) the  
12 substantive standards for summary judgment motions and for DMCA safe harbor,<sup>1</sup>  
13 (2) the merits of Google’s DMCA instructions and repeat infringer policy, (3) the  
14 alleged sufficiency of P10’s DMCA notices, and (4) the specifics of Google’s  
15 responses to P10’s claimed notices.<sup>2</sup> For example, the “Reply” to Google’s  
16

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17 <sup>1</sup> For example, P10 urges that to obtain summary judgment, Google must prove  
18 that *all* of P10’s notices are deficient, whereas to defeat summary judgment, Perfect  
19 10 need show only that *one* of its notices was compliant. This is not the case—each  
20 portion of each claimed notice stands or falls on its own merits, as the Court made  
21 clear to P10 during the October 6, 2008 Status Conference.

22 <sup>2</sup> P10’s “Responses” also raise arguments on matters not even addressed in the  
23 Objections to which they purportedly respond. For instance, P10 represents that  
24 Google failed to disclose Google witnesses Shantal Rands Poovala, Paul Haahr, and  
25 Bill Brougher during discovery, and that P10 “only learned of” these witnesses  
26 “around the time” their declarations were filed in July 2009. This is incorrect.  
27 Google designated all three of these declarants as persons most knowledgeable  
28 regarding certain topics under Rule 30(b)(6)—Ms. Poovala and Mr. Haahr by letter  
dated August 28, 2008 (nearly 15 months ago) and Mr. Brougher by letter dated  
October 26, 2006 (more than three years ago). Mr. Mausner personally deposed  
each of them—Mr. Brougher on January 11, 2007, and Ms. Poovala and Mr. Haahr  
in November of 2008. See October 5, 2009 Mausner Decl. ¶¶ 6 & 7. P10’s

(footnote continued)

1 Objections to the August 7, 2009 Zada Declaration alone contains 19 pages of  
 2 argument covering various substantive issues, complete with its own Table of  
 3 Contents and Table of Authorities. These are not mere “Responses” to evidentiary  
 4 objections; these are sur-replies filed without the required leave, and should be  
 5 disregarded and/or stricken. *See Spalding Labs.*, 2008 WL 2227501, at \*1 n.2;  
 6 *DISC Intellectual Properties*, 2007 WL 4973849, at \*1 n.1; *Cruz*, 2009 WL  
 7 3126518, at \*1. The specific objectionable portions are as follows:

<u>Portions to be Stricken</u>	<u>Description</u>
<b>P10’S RESPONSE TO GOOGLE’S OBJECTIONS TO CHUMURA, MCPHATTER, AND O’CONNOR DECLARATIONS</b>	
Sections III.A (5:1-6:1) and III.C (7:19-8:8)	Argument contending that the Chumura, McPhatter, and O’Connor Declarations prove that P10’s DMCA notices identified the location of infringing material and could be readily processed
Section III.B (6:2-7:18)	Argument contending that the Chumura, McPhatter, and O’Connor Declarations (filed with P10's opposition briefs) substantively refute the Declaration of Shantal Rands Poovala (filed with Google’s opening briefs)
Section V (10:1-19)	Argument regarding the substantive standards governing motions for summary judgment, and urging that P10’s DMCA notices identified the location of infringing material and could be readily processed
<b>P10’S RESPONSE TO GOOGLE’S OBJECTIONS TO EDEN, HOFFMAN, NEWTON AND SCHWARTZ DECLARATIONS</b>	
Portions of Section I.A (3:18-4:11) and Section II.A (4:19-5:20)	Argument regarding Google’s repeat infringer policy and eligibility for DMCA safe harbor

24 \_\_\_\_\_  
 25 argument that these witnesses’ declarations should be stricken is both incorrect and  
 26 an improper sur-reply argument. *See Moore v. Computer Associates Intern., Inc.*,  
 27 2009 WL 2870213, at \*3-4 (D. Ariz. 2009) (denying motion to strike affidavit when  
 28 affiant “was a corporate witness, designated under Federal Rule of Civil Procedure  
 30(b)(6), and thus Rule 26 disclosure was not required.”).

1	Section II.B (5:21-6:5)	Argument contending that the Eden, Hoffman, Newton and Schwartz Declarations substantively refute the Declaration of Shantal Rands Poovala
2		
3	Section II.C (6:6-7:2) and	Argument regarding Google’s DMCA
4	Section II.D (7:3-7:11)	instructions and eligibility for DMCA safe harbor
5	Section VII (9:12-10:2)	Argument regarding the substantive standards governing motions for summary judgment and urging that Google is ineligible for DMCA safe harbor
6		
7	<b>RESPONSE TO GOOGLE’S OBJECTIONS TO CHOU DECLARATION</b>	
8		
9	Section I (1:7-2:20)	Argument regarding alleged “infringements” identified by Ms. Chou and regarding Google’s DMCA instructions
10		
11	Section II (2:21-3:2)	Argument regarding the contents and alleged propriety of P10’s DMCA notices
12	Section IV (3:18-4:8)	Argument regarding liability for alleged activities of “pay sites”
13	<b>P10’S RESPONSE TO GOOGLE’S OBJECTIONS TO MAUSNER DECLARATION</b>	
14		
15	Footnote 1 (1:23-28) and portions of Section III (3:28-4:13)	Argument regarding the substantive standards governing motions for summary judgment
16		
17	Portions of Section I (1:15-18) and Section II (2:4-3:4)	Argument regarding Google’s alleged contributory liability and eligibility for DMCA safe harbors
18		
19	<b>P10’S RESPONSE TO GOOGLE’S OBJECTIONS TO POBLETE DECLARATION</b>	
20		
21	Footnote 1 (1:21-27)	Argument regarding the substantive standards governing motions for summary judgment
22	Section I (1:7-2:9)	Argument regarding a purported “sampling” approach to the case
23	<b>P10’S RESPONSE TO GOOGLE’S OBJECTIONS TO ZADA DECLARATION</b>	
24		
25	Portions of Section I (3:2-13)	Argument regarding the substantive standards governing motions for summary judgment
26	Portions of Section II (6:23-28)	Commentary regarding the claimed substance of the Declaration of Shantal Rands Poovala
27	Portions of Section IV (8:23-10:4) and Section V (10:12-26)	Argument regarding the substantive standards governing motions for summary judgment and
28		

1		Google's eligibility for DMCA safe harbor
2	Portions of Section VI (11:7-14) and Section VII (12:5-9)	Argument regarding Google's eligibility for DMCA safe harbor
3	Section VIII (12:16-14:5)	Argument regarding Google's DMCA instructions
4		
5	Portions of Section IX (14:14-17)	Argument regarding liability for alleged activities of "pay sites"
6	Portions of Section X (14:25-15:5)	Argument regarding the contents and alleged propriety of P10's DMCA notices
7	Portions of Section XI (15:27-16:1)	Argument regarding the contents of documents P10 refers to as "part of [a] 'DMCA log'"
8		
9	Portions of Section XIII (16:22-25)	Argument regarding the contents and alleged propriety of P10's DMCA notices
10	Portions of Section XV (17:21-24)	Argument regarding the contents and alleged propriety of P10's DMCA notices and Google's responses thereto
11		
12	Portions of Section XVI (18:21-19:2)	Argument regarding Google's DMCA policy for AdWords
13		

14 For the foregoing reasons, Google respectfully requests that the above-  
15 referenced portions of P10's Evidentiary Objection Responses be disregarded and/or  
16 stricken.

17 DATED: November 23, 2009

Respectfully submitted,

18 QUINN EMANUEL URQUHART OLIVER &  
19 HEDGES, LLP

20  
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23 Attorneys for Defendant GOOGLE INC.

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