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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
 EVIDENTIARY OBJECTIONS TO
 THE DECLARATION OF JEFFREY
 N. MAUSNER FILED IN FURTHER
 OPPOSITION TO GOOGLE'S
 MOTIONS FOR SUMMARY
 JUDGMENT REGARDING
 GOOGLE'S ENTITLEMENT TO
 DMCA SAFE HARBOR**

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”) submits the following evidentiary
2 objections to the Declaration of Jeffrey Mausner in Support of Perfect 10’s (“P10”) Evidentiary Objections and Responses to Google’s Evidentiary Objections re:
3 Google’s Three Motions for Summary Judgment. (Docket No. 571) (“Mausner
4 Declaration”). The Mausner Declaration is inadmissible, improper, and was filed in
5 contravention of Local Rule 7-10 and the Court’s Scheduling and Case Management
6 Order. It should be disregarded and/or stricken in its entirety.

7
8 **I. THE MAUSNER DECLARATION IS AN IMPROPER SUR-REPLY**
9 **AND SHOULD BE DISREGARDED.**

10 The Mausner Declaration, filed after Google had submitted its reply briefs in
11 support of its motions for summary judgment regarding DMCA safe harbors,
12 constitutes an improper sur-reply and should be disregarded in its entirety.

13 Local Rule 7-10 provides that “[a]bsent prior written order of the Court, the
14 opposing party shall not file a response to the reply.” Additionally, Paragraph
15 III.C.5 of this Court’s Scheduling and Case Management Order provides that “[t]he
16 non-moving party may not file a sur-reply unless the Court first grants leave to do
17 so.” Courts routinely strike or refuse to consider documents submitted in violation
18 of these rules. *See, e.g., Spalding Laboratories, Inc. v. Arizona Biological Control,*
19 *Inc.*, 2008 WL 2227501, at *1 n.2 (C.D. Cal. 2008) (“The Court strikes and does not
20 consider Spalding’s 14-page ‘sur-opposition’ to ARBICO’s reply brief.”) (citing
21 Local Rule 7-10); *DISC Intellectual Properties LLC v. Delman*, 2007 WL 4973849,
22 at *1 n.1 (C.D. Cal. 2007) (rejecting “Defendants ... attempt[] to file a Response to
23 Plaintiffs’ Reply in violation of Local Rule 7-10.”); *see also Cruz v. Tilton*, 2009
24 WL 3126518, at *1 (E.D. Cal. 2009) (striking document titled “Response in Support
25 of denying 12(b) Motion” on grounds that it “appears to be a surreply”).

26 On July 2, 2009, Google filed three motions for summary judgment regarding
27 Google’s entitlement to DMCA safe harbors for its Caching feature, Blogger service
28 and Search service, respectively. *See* Docket Nos. 423-51. On August 9, 2009, P10

1 submitted its opposition materials, including three separate opposition briefs, three
2 separate statements of allegedly disputed facts, and eleven separate declarations.
3 *See* Docket Nos. 473-84. On September 8, 2009, Google filed its reply papers. *See*
4 Docket Nos. 502-21.

5 Thereafter, on October 12, 2009, P10 filed the Mausner Declaration—despite
6 having never sought or obtained leave to file any additional argument or evidence in
7 sur-reply to Google’s reply materials.¹ For example, the Mausner Declaration
8 incorrectly suggests that Google failed to disclose certain of its declarants
9 (Paragraph 5)² and unsuccessfully attempts to defend P10’s failure to disclose its
10 own declarants (Paragraphs 2-4).³ The Mausner Declaration also improperly
11 proffers substantive arguments and evidence (which plainly could have been timely
12 submitted in P10’s opposition materials, but were not) regarding (1) the alleged
13 qualifications of one of P10’s declarants (Paragraph 9), and (2) what Mr. Mausner
14 refers to as a “check the box” tool (Paragraph 10).⁴ Further, the Mausner

15
16 ¹ That same day, P10 also filed an additional Declaration of Norman Zada
17 which is similarly objectionable. *See* Google Inc.’s Evidentiary Objections to Decl.
18 of Dr. Norman Zada, filed concurrently.

19 ² P10’s accusation is incorrect. Google designated all three of the challenged
20 declarants as persons most knowledgeable about certain topics under Rule
21 30(b)(6)—Ms. Poovala and Mr. Haahr by letter dated August 28, 2008 (nearly 14
22 months ago) and Mr. Brougher by letter dated October 26, 2006 (nearly three years
23 ago). Mr. Mausner personally deposed each of them—Mr. Brougher on January 11,
24 2007, and Ms. Poovala and Mr. Haahr in November of 2008. *See* Mausner Decl. ¶¶
25 6 & 7. Thus, Google properly disclosed these witnesses prior to submitting their
26 declarations on summary judgment. *See Moore v. Computer Associates Intern.,*
27 *Inc.*, 2009 WL 2870213, at *3-4 (D. Ariz. 2009) (denying motion to strike affidavit
28 when moving party’s affiant “was a corporate witness, designated under Federal
Rule of Civil Procedure 30(b)(6), and thus Rule 26 disclosure was not required.”).

³ P10 gives no explanation or justification for its supposed late “discovery” of
these witnesses.

⁴ P10’s claim that Google was ordered to establish a “Notification System”
using a “check-the-box” tool is both irrelevant and incorrect. *See* P10’s Response to
(footnote continued)

1 Declaration also attaches over 100 pages of additional documentary exhibits. This
2 entire submission constitutes an improper sur-reply filed without the required leave,
3 and should be disregarded and/or stricken in its entirety. Local Rule 7-10; *Spalding*
4 *Labs.*, 2008 WL 2227501, at *1 n.2; *DISC Intellectual Properties*, 2007 WL
5 4973849, at *1 n.1.

6 **II. PORTIONS OF THE MAUSNER DECLARATION ARE**
7 **INADMISSIBLE UNDER THE RULES OF EVIDENCE**

8 The Mausner Declaration is objectionable for the additional reason that it is
9 inadmissible in several respects. Evidence submitted to the Court on motion
10 practice must meet all requirements for admissibility of evidence at the time of trial.
11 *Beyene v. Coleman Sec. Services, Inc.*, 854 F.2d 1179, 1181-1182 (9th Cir. 1988).
12 *See also* Fed. R. Evid. 101 (Rules of Evidence apply to all proceedings in the courts
13 of the United States); Fed. R. Evid. 1101 (listing exceptions to Rule 101). Such
14 evidence must be relevant to the claims and defenses of the case. Fed. R. Evid. 401;
15 403; *McCormick v. City of Lawrence, Kan.*, 2007 WL 38400, at *3 (D. Kan. 2007).
16 Testimonial evidence must be based on the personal knowledge of the witness
17 offering the evidence. Fed. R. Evid. 602. Hearsay evidence is inadmissible unless it
18 has been defined as non-hearsay or the proponent establishes eligibility for one or
19 more exceptions under the Rules. Fed. R. Evid. 801-804. Testimony requiring
20 scientific, technical, or other specialized knowledge may be given only by an expert
21 witness with the requisite knowledge, skill, experience, training, or education. Fed.
22 R. Evid. 701, 702. The Mausner Declaration fails to meet one or more of these
23 criteria, as specified below.

24

25 _____
26 Objections to Mausner Decl. (Docket No. 568) at 1-3. At the preliminary injunction
27 stage, the parties were ordered to discuss such a mechanism—which they did—but
28 that portion of the Court’s ruling was later superseded by the Ninth Circuit’s ruling
that P10 was unlikely to overcome Google's fair use defense.

	PROFFERED EVIDENCE	GOOGLE'S OBJECTION
1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12.	Mausner Decl. at ¶¶ 2-5 & 10	<u>Fed. R. Evid. 401, 402, 403, 602, 701</u> The statements are argumentative, irrelevant, are improper opinion testimony, and lack foundation as to the source of Mr. Mausner's knowledge regarding when and how P10 became aware of undisclosed witnesses Newton, O'Connor, McPhatter, Hoffman, Schwartz and Eden. Without this information, P10 has failed to demonstrate that its failure to disclose these witnesses was excused or justified, rendering these statements irrelevant. <i>See</i> Google Inc.'s Evidentiary Objections to the Declarations of Newton, O'Connor, McPhatter, Hoffman, Schwartz and Eden (Docket Nos. 509-10 & 512-15).
13. 14. 15.	Mausner Decl. Exh. DD	<u>Fed. R. Evid. 401, 402, 403, 602, 801-04</u> The evidence is irrelevant, lacks foundation, and constitutes inadmissible hearsay.
16. 17.	Mausner Decl. Exh. EE	<u>Fed. R. Evid. 401, 402, 403, 602</u> The evidence is irrelevant and lacks foundation.

DATED: November 23, 2009

Respectfully submitted,

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By 

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