

1 Jeffrey N. Mausner (State Bar No. 122385)  
 2 Law Offices of Jeffrey N. Mausner  
 3 Warner Center Towers  
 4 21800 Oxnard Street, Suite 910  
 5 Woodland Hills, California 91367-3640  
 6 Email: Jeff@mausnerlaw.com  
 7 Telephone: (310) 617-8100, (818) 992-7500  
 8 Facsimile: (818) 716-2773

9 Attorneys for Plaintiff Perfect 10, Inc.

10 UNITED STATES DISTRICT COURT  
 11 CENTRAL DISTRICT OF CALIFORNIA

12 PERFECT 10, INC., a California  
 13 corporation,

14 Plaintiff,

15 v.

16 GOOGLE. INC., a corporation; et.  
 17 al.,

18 Defendants.

19 AND CONSOLIDATED CASE.

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

**Before Judge Stephen J. Hillman**

**PLAINTIFF PERFECT 10, INC.’S  
 EVIDENTIARY OBJECTIONS TO  
 THE REPLY DECLARATION OF  
 RACHEL HERRICK KASSABIAN  
 IN SUPPORT OF DEFENDANT  
 GOOGLE INC.’S MOTION FOR A  
 DOCUMENT PRESERVATION  
 ORDER TO PREVENT  
 SPOILIATION OF EVIDENCE BY  
 PERFECT 10, INC.**

Date: January 15, 2010  
 Time: 10:00 a.m.  
 Place: Courtroom 550, Courtroom of  
 Honorable Stephen J. Hillman

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

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 Plaintiff Perfect 10, Inc.’s Evidentiary Objections to the Reply Declaration of Rachel Herrick  
 Kassabian In Support Of Defendant Google Inc.’s Motion for Document Preservation Order

1 Plaintiff Perfect 10, Inc. (“Perfect 10”) objects to, and requests that this  
2 Court strike, the Reply Declaration of Rachel Herrick Kassabian in Support of  
3 Defendant Google Inc.’s Motion for a Document Preservation Order to Prevent  
4 Further Spoliation of Evidence by Perfect 10, filed by Google on January 6,  
5 2010 (under seal) (the “Kassabian Reply Declaration”).

6 This Court should strike the Kassabian Reply Declaration in its entirety  
7 for two separate reasons. First, the Kassabian Reply Declaration consists  
8 entirely of new matters that Google could have raised, but failed to raise, in its  
9 moving papers – the conduct of third-party models and actresses over whom  
10 Perfect 10 has no control, and Perfect 10’s alleged failure to produce certain  
11 financial documents. Because Google did not raise these issues in the Joint  
12 Stipulation that Google filed on December 11, 2009, this Court should not  
13 consider the Kassabian Reply Declaration. *See* authorities cited in Section I and  
14 footnote 1, below.

15 Second, Paragraph 6 of the Kassabian Reply Declaration incorrectly  
16 asserts that Perfect 10 did not produce certain financial documents, when in fact  
17 ***Perfect 10 provided them to Google almost three months ago.*** The actual  
18 documents prove the truth, and Ms. Kassabian’s incorrect statements should be  
19 stricken pursuant to the Best Evidence Rule. *See* Section I, below. Moreover,  
20 Perfect 10’s accountant, Bruce Hersh, is able to go back and generate any  
21 monthly financial statements that did not previously exist, since 2003. Perfect  
22 10 intends to have these statements generated and produce them at least ten  
23 days before Mr. Hersh’s deposition.

24 Google’s last minute allegations of document destruction thus are  
25 completely without merit. These incorrect assertions are just another attempt  
26 by Google to use false testimony to divert this Court from focusing on the key  
27 issue before it: Google’s violations of Court Orders and massive obstruction of  
28 discovery that are the subject of Perfect 10’s pending Motion for Evidentiary

1 and Other Sanctions (the “Sanctions Motion”).

2 **I. THIS COURT SHOULD STRIKE PARAGRAPH 6 OF THE**  
3 **KASSABIAN REPLY DECLARATION BECAUSE IT RAISES**  
4 **NEW ISSUES AND IS SIMPLY INCORRECT.**

5 Paragraph 6 of the Kassabian Reply Declaration discusses Perfect 10’s  
6 alleged failure to produce certain financial documents in response to this  
7 Court’s October 6, 2009 Order. Perfect 10 produced financial documents in  
8 response to the Court’s Order on October 15, 2009. Declaration of Jeffrey N.  
9 Mausner in Support of Plaintiff Perfect 10’s Evidentiary Objections to the  
10 Reply Declaration of Rachel Herrick Kassabian in Support of Defendant  
11 Google Inc.’s Motion for a Document Preservation Order, filed concurrently  
12 herewith (“Mausner Decl.”), ¶¶2-4 and Exhs. 1-3. If Google wanted to raise the  
13 issue of Perfect 10’s alleged failure to produce certain financial documents in  
14 connection with its Motion for a Document Preservation Order, it should have  
15 included that issue in the Joint Stipulation it filed on or about December 11,  
16 2009, more than eight weeks later. Google’s failure to raise this issue until the  
17 Kassabian Reply Declaration, and Google’s accompanying Reply, compels this  
18 Court to disregard Paragraph 6 of the Kassabian Reply Declaration. *See, e.g.,*  
19 *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (“district court need not  
20 consider arguments raised for the first time in a reply brief”); *Irese v. Axure*  
21 *Software Solutions, Inc.*, 2009 WL 3615973, \*3, fn. 3 (C.D. Cal., July 30, 2009)  
22 (“The Court need not consider new arguments raised for the first time in a  
23 movant’s reply brief.”)<sup>1</sup>

24 \_\_\_\_\_  
25 <sup>1</sup> As a leading treatise explains: “Reply papers should be limited to matters  
26 raised in the opposition papers. It is improper for the moving party to ‘shift  
27 gears’ and introduce new facts or different legal arguments in the reply brief  
28 than presented in the moving papers.” *W. Schwarzer, A. Tashima & J. Wagstaffe*, California Practice Guide: Federal Civil Procedure Before Trial (TRG 2009) ¶ 12:107. The only exception to this general rule – that a district court has discretion to address new matters which were reasonably unforeseen at the time of movant’s opening brief [*id.*, ¶ 12:107.1] – is inapplicable here.

1           Furthermore, Ms. Kassabian’s testimony, and the corresponding portions  
2 of Google Inc.’s Reply in Support of its Motion for a Document Preservation  
3 Order (“Google’s Reply”), is incorrect. The best evidence of the matters about  
4 which Ms. Kassabian seeks to testify, the documents produced by Perfect 10  
5 themselves, demonstrates that Paragraph 6 of the Kassabian Reply Declaration  
6 is untrue. Paragraph 6 of the Kassabian Reply Declaration states:

7                       On October 6, 2009, this Court ordered Perfect 10 to  
8                       produce certain financial documents, including Perfect 10's  
9                       missing monthly financial reports (to the extent such documents  
10                      exist). ... ***However, Perfect 10 did not produce any of those***  
11                      ***missing financial reports in response to the Court's Order.***

12 Kassabian Reply Declaration, ¶6 (emphasis added). Attached to the Kassabian  
13 Reply Declaration is a chart listing the monthly financial reports that Ms.  
14 Kassabian contends Perfect 10 failed to produce. *Id.*, Exh. F, pages 33-34, Exh.  
15 G, page 36. The same chart is included at pages 5-6 of Google’s Reply. *See*  
16 *also* Google’s Reply, page 5 (Perfect 10 “has failed to produce monthly  
17 financial statements for the following months”).

18           In fact, on October 15, 2009, Perfect 10 produced 2,601 pages of  
19 financial statements and tax returns to Google, ***including 22 of the monthly***  
20 ***financial statements that Ms. Kassabian and Google now incorrectly claim***  
21 ***were not produced.*** *See* Mausner Decl., ¶¶2-4 and Exhs. 1-3. The following  
22 chart, which is also included in the Mausner Declaration, identifies those  
23 financial statements which Perfect 10 produced but Ms. Kassabian incorrectly  
24 stated that Perfect 10 did not produce, and the page range in the Adobe PDF file

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25 Google clearly could have foreseen the new facts and arguments it raises  
26 regarding the financial documents, since it had these documents for eight  
27 weeks. Indeed, Google’s attorney raised this very issue with counsel for Perfect  
28 10 in a November 4, 2009 letter and a November 25, 2009 email, well before  
Google filed the Joint Stipulation. *See* Kassabian Reply Declaration, Exh. G,  
pp. 39-42.

1 produced by Perfect 10 where those financial statements are found:<sup>2</sup>

Month & Year of Statement	Page range in PDF file of October 15, 2009 Production re Financial Statements
September 1997	2137-2139
October 1997	2134-2136
November 1998	2021-2023
April 1999	1932-1942
May 1999	1921-1931
June 1999	1910-1920
July 1999	1896-1909
August 1999	1885-1895
November 1999	1874-1884
January 2000	1857-1860
April 2000	1849-1852
May 2000	1845-1848
June 2000	1835-1844
July 2000	1826-1834
August 2000	1817-1825
September 2000	1808-1816
October 2000	1799-1807
March 2001	1784-1798
April 2001	1775-1783
May 2001	1766-1774
March 2004	1171-1196
April 2004	1143-1170

17 The remaining monthly statements identified in the chart set out in the  
18 Kassabian Declaration and in Google's Reply were not produced to Google  
19 because they do not exist. Therefore, they were not called for by the Court's  
20 Order, which only required Perfect 10 to produce financial statements "to the  
21 extent such documents exist." Kassabian Reply Declaration, Exh. F, page 30,  
22 line 14. Perfect 10 informed Google of this fact six weeks ago. *See, e.g.*, email  
23 from Jeffrey N. Mausner to Rachel Herrick Kassabian, dated November 23,  
24

25 <sup>2</sup> Ms. Kassabian's statement is only the latest example of false and misleading  
26 statements regarding significant issues made by Google and its attorneys in  
27 declarations submitted to the Court in this action. Perfect 10 discusses other  
28 such incorrect statements in its Reply Memorandum in Support of P 10's  
Motion for the Imposition of a Preservation Order Against Google to Prevent  
Spoliation of Evidence by Google, lodged under seal on January 6, 2010, at  
pages 7-8.

1 2009, found at *id.*, Exh. G, pages 39-40: “With regard to financial statements  
2 that Perfect 10 did not produce for relatively recent years (for example 2007),  
3 those documents don’t exist because they were not generated.”

4 Google’s entire argument is a red herring. Perfect 10 has produced  
5 what it has – 2,601 pages of financial documents and tax returns. That  
6 Perfect 10 does not have financial statements for every month is not  
7 evidence of document destruction. As Perfect 10 explained to Google, “[a]  
8 financial statement is not generated by Perfect 10’s accountant every  
9 month.” *See* email from Jeffrey N. Mausner to Rachel Herrick Kassabian,  
10 dated January 5, 2010, found at *id.*, Exh. G, page 37. As far as Perfect 10  
11 can determine, Perfect 10’s accountant, Bruce Hersh, did not generate  
12 financial statements for any of the missing months, at least since 2003.  
13 Furthermore, when there is no monthly statement, *the year to date figures in*  
14 *the statements for subsequent months include the figures from the missing*  
15 *month*. Finally, Mr. Hersh is able to generate any monthly statements that  
16 did not previously exist, going back to 2003. These statements will be  
17 created and produced at least ten days before Mr. Hersh’s deposition.

18 Google has failed to identify any information regarding Perfect 10’s  
19 finances that it allegedly lacks because of the few monthly financial  
20 statements that do not currently exist. In an email to Ms. Kassabian, counsel  
21 for Perfect 10 specifically stated:

22 A financial statement is not generated by Perfect 10’s  
23 accountant every month. Once again, Perfect 10 produced  
24 statements for the previous and subsequent months. Have  
25 Google’s accountants/experts identified something specific they  
26 believe is missing?

27 *See* Kassabian Reply Declaration, Exh. G, page 37. Google has not  
28 answered this question. Nevertheless, as stated above, Mr. Hersh will

1 generate the missing statements and they will be produced.

2 Google is belatedly providing false evidence of document destruction  
3 in a desperate, last-minute attempt to buttress the insufficient evidence in its  
4 Joint Stipulation. In addition, Google is submitting Ms. Kassabian's  
5 untimely and untruthful testimony to divert attention from the critical issue  
6 that should be the focus of this Court's January 15, 2010 hearing, when it  
7 addresses Perfect 10's Sanctions Motion: whether Google has violated  
8 Court Orders and/or destroyed documents relevant to Google's pending  
9 summary judgment motions. Accordingly, for all of the reasons discussed  
10 above, this Court should strike Paragraph 6 of the Kassabian Reply  
11 Declaration, and the corresponding portion of Google's Reply, on the  
12 grounds that Ms. Kassabian's testimony: (i) violates the Best Evidence Rule:  
13 oral testimony inadmissible to prove contents of a writing (Fed. R. Evid.  
14 1002); (ii) lacks personal knowledge and lacks foundation (Fed. R. Evid.  
15 602); (iii) constitutes demonstrably false statements; and (iv) improper  
16 attempt to raise new issues and evidence in a reply.<sup>3</sup>

17 **II. THIS COURT SHOULD STRIKE PARAGRAPHS 2 THROUGH 5**  
18 **AND EXHIBITS A, B, D, AND E OF THE KASSABIAN REPLY**  
19 **DECLARATION BECAUSE THEY IMPROPERLY SEEK TO**  
20 **RAISE NEW ISSUES AND ARE IRRELEVANT.**

21 This Court should also strike Paragraphs 2 through 5 of the Kassabian  
22 Reply Declaration, and Exhibits A, B, D, and E to that declaration, because they

23 \_\_\_\_\_  
24 <sup>3</sup> Perfect 10 has produced all its existing financial statements and tax returns,  
25 which relate solely to the question of actual damages. The key issue before the  
26 Court at this time is that raised by Perfect 10's Sanctions Motion: whether  
27 Google has violated Court orders regarding discovery and/or destroyed  
28 documents that are directly relevant to Google's pending summary judgment  
motions seeking a safe-harbor affirmative defense. This issue should be the  
focus of the January 15, 2010 hearing, not Google's belated attempt to use false  
testimony to manufacture an issue regarding financial statements, particularly  
since the 2,601 pages of documents produced by Perfect 10 include all of the  
existing monthly financial statements generated by Perfect 10's accountant.

1 likewise seek to raise new issues that Google should have raised in its portions  
 2 of the Joint Stipulation, which it filed on December 11, 2009. *See* authorities  
 3 cited in Section I and footnote 1, *supra*. Ms. Kassabian’s testimony in  
 4 Paragraphs 2 through 5, and Exhibits A, B, D, and E, involve the depositions of  
 5 third-party witnesses Nadine Schoenweitz, Amy Weber, and Amber Smith,  
 6 taken on October 16, November 11, and November 19, 2009, respectively.  
 7 Accordingly, Google could have raised any issues regarding the preservation of  
 8 documents by these witnesses in its moving papers. Its failure to timely raise  
 9 these issues compels this Court to strike these portions of the Kassabian Reply  
 10 Declaration.

11 Moreover, this Court should strike these portions of the declaration  
 12 because they are irrelevant. Ms. Schoenweitz, Ms. Weber, and Ms. Smith are  
 13 third party actresses and models who have no obligation to keep paperwork  
 14 from other entertainment industry jobs that they had. Furthermore, Perfect  
 15 10 has absolutely no control over what these actresses/models do with their  
 16 unrelated records long after they participate in a photo shoot for Perfect 10.

17 In summary, this Court should strike the following portions of the  
 18 Kassabian Reply Declaration, for all of the reasons discussed herein:

<b>Proffered Statement of Declaration and Exhibits Thereto</b>	<b>Objections</b>
1. Paragraph 2 in its entirety, at page 1, lines 7-8, and Exhibit A thereto.	Objections: Improper attempt to raise new issues and evidence in a Reply; irrelevant.
2. Paragraph 3 in its entirety, at page 1, lines 9-17, and Exhibit B thereto.	Objections: Improper attempt to raise new issues and evidence in a Reply; irrelevant.
3. Paragraph 4 in its entirety, at page 1, lines 18-19, and Exhibit D thereto.	Objections: Improper attempt to raise new issues and evidence in a Reply; irrelevant.
4. Paragraph 5 in its entirety, at page 1, lines 20-21, and Exhibit E thereto.	Objections: Improper attempt to raise new issues and evidence in a Reply; irrelevant.



1 5. Paragraph 6 in its entirety, at  
2 page 1, line 22 to page 2, line 8.

3 Objections: Best Evidence Rule: oral  
4 testimony inadmissible to prove contents  
5 of a writing (Fed. R. Evid. 1002); lack of  
6 personal knowledge and lack of  
7 foundation (Fed R. Evid. 602);  
8 demonstrably false statements: Perfect 10  
9 produced many financial statements that  
10 Google claims it did not produce. (*See*  
11 *Mausner Decl.*, ¶¶ 2-4 and Exhs. 1-3);  
12 improper attempt to raise new issues and  
13 evidence in a Reply; irrelevant.

14 Dated: January 11, 2010

LAW OFFICES OF JEFFREY N. MAUSNER

15 By: Jeffrey N. Mausner

16 Jeffrey N. Mausner,

17 Attorney for Plaintiff Perfect 10, Inc.