

1 QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP

2 Michael T. Zeller (Bar No. 196417)

3 michaelzeller@quinnemanuel.com

4 865 South Figueroa Street, 10th Floor

5 Los Angeles, California 90017-2543

6 Telephone: (213) 443-3000

7 Facsimile: (213) 443-3100

8 Charles K. Verhoeven (Bar No. 170151)

9 charlesverhoeven@quinnemanuel.com

10 50 California Street, 22nd Floor

11 San Francisco, California 94111

12 Rachel Herrick Kassabian (Bar No. 191060)

13 rachelherrick@quinnemanuel.com

14 555 Twin Dolphin Drive, 5th Floor

15 Redwood Shores, California 94065

16 Attorneys for Defendant Google Inc.

17 UNITED STATES DISTRICT COURT

18 CENTRAL DISTRICT OF CALIFORNIA

19 PERFECT 10, INC., a California
20 corporation,

21 Plaintiff,

22 vs.

23 GOOGLE INC., a corporation; and
24 DOES 1 through 100, inclusive,

25 Defendants.

26 AND COUNTERCLAIM

27 PERFECT 10, INC., a California
28 corporation,

Plaintiff,

vs.

AMAZON.COM, INC., a corporation;
A9.COM, INC., a corporation; and
DOES 1 through 100, inclusive,

Defendants.

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

**GOOGLE INC.'S EVIDENTIARY
OBJECTIONS TO THE
DECLARATION OF MARK
MCDEVITT SUBMITTED IN
SUPPORT OF PERFECT 10, INC.'S
MOTION FOR EVIDENTIARY
AND OTHER SANCTIONS**

Hon. Stephen J. Hillman

Date: January 15, 2010

Time: 10:00 a.m.

Place: Courtroom 550

Discovery Cut-off: None Set

Pre-trial Conference: None Set

Trial Date: None Set

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1 Google Inc. hereby submits the following objections to the Declaration of
2 Mark McDevitt submitted in support of Perfect 10, Inc.'s Motion for Evidentiary
3 And Other Sanctions Against Google And/Or For The Appointment Of A Special
4 Master ("Sanctions Motion") (Dkt. No. 682). The McDevitt Declaration is
5 objectionable for several reasons, and should be disregarded in its entirety.

6 **I. THE MCDEVITT DECLARATION SHOULD BE STRICKEN**
7 **BECAUSE P10 FAILED TO DISCLOSE MR. MCDEVITT IN ITS**
8 **RULE 26(A) DISCLOSURES OR DISCOVERY RESPONSES.**

9 The McDevitt Declaration should be disregarded in its entirety because P10
10 never disclosed Mr. McDevitt in its Rule 26 Initial Disclosures or its interrogatory
11 responses as a person having knowledge of facts relevant to this case. A party
12 cannot rely on evidence at summary judgment that the party failed to provide during
13 discovery. *Wolk v. Green*, 2008 WL 298757, *3 (N.D. Cal. Feb. 1, 2008); *Guang*
14 *Dong Light Headgear Factory Co., Ltd. v. ACI Intern., Inc.*, 2008 WL 53665, *1 (D.
15 Kan. Jan. 2, 2008). P10's failure to disclose Mr. McDevitt as a witness deprived
16 Google of the opportunity to depose him prior to P10's submission of his
17 declaration. The McDevitt Declaration should be stricken in its entirety. Fed. R.
18 Civ. P. 26, 33, 37; *see also Guang Dong Light Headgear Factory*, 2008 WL 53665,
19 *1 (granting motion to strike affidavit because witness identity and testimony not
20 properly disclosed during discovery).

21 **II. THE MCDEVITT DECLARATION IS INADMISSIBLE UNDER THE**
22 **FEDERAL RULES OF EVIDENCE.**

23 Evidence submitted to the Court on motion practice must meet all
24 requirements for admissibility of evidence if offered at the time of trial. *Beyene v.*
25 *Coleman Sec. Services, Inc.*, 854 F.2d 1179, 1181-82 (9th Cir. 1988); *Travelers Cas.*
26 *& Sur. Co. of America v. Telstar Const. Co., Inc.*, 252 F. Supp. 2d 917, 923 (D.
27 Ariz. 2003). *See also* Fed. R. Evid. 101 (Rules of Evidence apply to all proceedings
28

1 in the courts of the United States); Fed. R. Evid. 1101 (listing exceptions to Rule
2 101). The McDevitt Declaration does not meet these requirements.

3 **Relevance.** Evidence must be relevant to the claims and defenses of the case
4 to be admissible. Fed. R. Evid. 401; 403. The McDevitt Declaration is not relevant
5 to P10's Sanctions Motion because (among other things) it references only
6 purported DMCA notices related to [REDACTED]. However, P10 has not served
7 discovery requests seeking Blogger DMCA Notices, nor has P10 obtained a Court
8 order compelling them. See Google's Opposition to P10's Motion for Evidentiary
9 and Other Sanctions at 9-10 (Dkt. No. 647).

10 **Personal Knowledge.** Testimonial evidence must be based on the personal
11 knowledge of the witness offering the evidence. Fed. R. Evid. 602. The McDevitt
12 Declaration contains testimony regarding [REDACTED]
13 [REDACTED]

14 [REDACTED] but fails to establish that Mr. McDevitt has drafted,
15 reviewed, or otherwise has personal knowledge with respect to each of them.

16
17 DATED: January 13, 2010

QUINN EMANUEL URQUHART OLIVER &
HEDGES, LLP

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19 By *Rachel Herrick Kassabian*
20 Rachel Herrick Kassabian
21 Attorneys for Defendant GOOGLE INC.
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