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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 SHEENA  
CHOU IN SUPPORT OF PERFECT  
10, INC.'S MOTION FOR  
EVIDENTIARY AND OTHER  
SANCTIONS AND/OR FOR THE  
APPOINTMENT OF A SPECIAL  
MASTER**

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

1 Google hereby submits the following objections to the Declaration of Sheena  
2 Chou, Submitted in Support of Perfect 10's Motion for Evidentiary and Other  
3 Sanctions against Google and/or for the Appointment of a Special Master. The  
4 Chou Declaration is objectionable for several reasons, and should be disregarded in  
5 its entirety.

6 **I. SHEENA CHOU'S DECLARATION IS IRRELEVANT TO THE ISSUE**  
7 **OF EVIDENTIARY SANCTIONS.**

8 Ms. Chou's declaration is irrelevant to Perfect 10's Motion for Evidentiary and  
9 Other Sanctions against Google and/or for the Appointment of a Special Master.  
10 Ms. Chou's declaration claims to address Perfect 10's allegations regarding whether  
11 Google has processed certain of Perfect 10's DMCA notices to Perfect 10's  
12 satisfaction, and whether Google qualifies for DMCA safe harbor, in Perfect 10's  
13 view. As the Court is aware, Google's summary judgment motions regarding its  
14 qualification for DMCA safe harbor are currently under submission with Judge  
15 Matz. Ms. Chou's testimony has nothing to do with Perfect 10's disputes concerning  
16 the adequacy of Google's document production in response to Court Orders, and  
17 should be disregarded.

18 **II. SHEENA CHOU WAS NEVER IDENTIFIED AS AN EXPERT, YET**  
19 **IMPROPERLY ATTEMPTS TO OFFER EXPERT TESTIMONY IN**  
20 **THIS MATTER.**

21 In her Declaration, Ms. Chou repeatedly offers improper opinion testimony,  
22 including a detailed purported evaluation of Google's DMCA compliance program  
23 and an explanation of her preferred methodology for identifying allegedly infringing  
24 web sites. This testimony should be excluded on multiple grounds. First, Perfect 10  
25 failed to disclose Chou as an expert witness in this matter. Further, at no point does  
26 Chou tie her qualifications—she claims to "have a degree in Economics from UCLA  
27 and [be] quite familiar with computers and the Internet"—to Google's search engine  
28 or services. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993)

1 ("[requirement of fit] goes primarily to relevance," and an expert's testimony must  
2 "aid the jury in resolving a factual dispute."); *see also Kumho Tire Co. v.*  
3 *Carmichael*, 526 U.S. 137, 147-48 (1999) (expert must have some form of  
4 specialized knowledge). Quite simply, having an college degree in an unrelated  
5 field and "familiarity" with computers does not make one an expert in search  
6 engines, the DMCA or other Internet services. As Chou appears to lack the  
7 necessary qualifications to testify regarding the subjects in her declaration, again,  
8 her testimony should be stricken.

9 **II. THE ENTIRETY OF THE EVIDENCE OFFERED BY PERFECT 10 IN**  
10 **THE DECLARATION OF SHEENA CHOU IS INADMISSIBLE AND**  
11 **SHOULD BE DISREGARDED.**

12 The Declaration of Sheena Chou similarly should be disregarded for purposes  
13 of Perfect 10's Motion for Evidentiary and Other Sanctions against Google and/or  
14 for the Appointment of a Special Master, because it is inadmissible under the  
15 Federal Rules of Evidence.

16 Evidence submitted to the Court on motion practice must meet all  
17 requirements for admissibility of evidence if offered at the time of trial. *Beyene v.*  
18 *Coleman Sec. Services, Inc.*, 854 F.2d 1179, 1181-1182 (9th Cir. 1988); *Travelers*  
19 *Cas. & Sur. Co. of America v. Telstar Const. Co., Inc.*, 252 F. Supp. 2d 917, 923 (D.  
20 Ariz. 2003). *See also* Fed. R. Evid. 101 (Rules of Evidence apply to all proceedings  
21 in the courts of the United States); Fed. R. Evid. 1101 (listing exceptions to Rule  
22 101). Such evidence must be relevant to the claims and defenses of the case. Fed.  
23 R. Evid. 401; 403; *McCormick v. City of Lawrence, Kan.*, 2007 WL 38400, at \*3 (D.  
24 Kan. Jan. 5, 2007). Testimonial evidence must be based on the personal knowledge  
25 of the witness offering the evidence. Fed. R. Evid. 602. Testimony requiring  
26 scientific, technical, or other specialized knowledge may be given only by an expert  
27 witness with the requisite knowledge, skill, experience, training, or education, and  
28 opinion testimony is not permitted of a lay person. Fed. R. Evid. 701, 702; *see also*

1 *U.S. Aviation Underwriters, Inc. v. Yellow Freight Sys., Inc.*, 296 F. Supp. 2d 1322,  
2 1331 (S.D. Ala. 2003) (unqualified expert opinions inadmissible at summary  
3 judgment). The Chou Declaration fails to meet one or more of these criteria.

|    | <u>Proffered Evidence</u> | <u>Google's Objection</u>   |
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| 5  |                           |   |
| 6  | 1. <b>Chou Decl. ¶ 2</b>  | <u>Fed. R. Evid. 401, 402, 403, 602</u><br>The statements are irrelevant,<br>7<br>8 argumentative, speculative, lack<br>9 foundation, are not within the witness's<br>10 personal knowledge, constitute<br>11 improper legal opinion, and are<br>12 improper opinion testimony.<br>13 Ms. Chou's testimony has nothing to do<br>14 with Perfect 10's disputes concerning<br>15 the adequacy of Google's document<br>16 production in response to Court Orders.            |
| 17 | 2. <b>Chou Decl. ¶ 3</b>  | <u>Fed. R. Evid. 401, 402, 403, 602, 701,</u><br>18 <u>702, Fed. R. Civ. P. 26</u><br>19 The statements are irrelevant,<br>20 argumentative, mischaracterize the<br>21 documents, speculative, lack<br>22 foundation, are not within the witness's<br>23 personal knowledge, constitute<br>24 improper legal opinion, and are<br>25 improper opinion testimony. Ms. Chou<br>26 has never been disclosed by P10 as an<br>27 expert in this case, nor does she appear<br>28 |

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|    |                       | to have the necessary expertise to provide such expert testimony. <i>See Daubert v. Merrell Dow Pharms., Inc.</i> , 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i> , 526 U.S. 137, 147-48 (1999).   |
| 3. | <b>Chou Decl. ¶ 4</b> | <u>Fed. R. Evid. 401, 402, 403, 602, 701, 702, Fed. R. Civ. P. 26</u><br>The statements are irrelevant, argumentative, mischaracterize the documents, speculative, lack foundation, are not within the witness's personal knowledge, constitute improper legal opinion, and are improper opinion testimony. Ms. Chou has never been disclosed by P10 as an expert in this case, nor does she appear to have the necessary expertise to provide such expert testimony. <i>See Daubert v. Merrell Dow Pharms., Inc.</i> , 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i> , 526 U.S. 137, 147-48 (1999). |
| 4. | <b>Chou Decl. ¶ 5</b> | <u>Fed. R. Evid. 401, 402, 403, 602, 701, 702, Fed. R. Civ. P. 26</u><br>The statements are irrelevant, argumentative, mischaracterize the   |

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DATED: January 15, 2010

QUINN EMANUEL URQUHART OLIVER &  
HEDGES, LLP

By   
\_\_\_\_\_  
Rachel Herrick Kassabian  
Attorneys for Defendant GOOGLE INC.