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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)]

**GOOGLE INC.'S EVIDENTIARY
OBJECTIONS TO THE
DECLARATION OF JEFFREY
MAUSNER IN SUPPORT OF
PERFECT 10'S SECOND MOTION
FOR A PRELIMINARY
INJUNCTION**

Hon. A. Howard Matz

Date: April 5, 2010

Time: None Set

Place: Courtroom 14

Discovery Cut-off: None Set

Pre-trial Conference: None Set

Trial Date: None Set

19 AND COUNTERCLAIM

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

22 Plaintiff,

23 vs.

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

26 Defendants.

1 Google hereby submits the following objections to the Declaration of Jeffrey
2 Mausner (“Mausner Declaration”), Submitted in Support of P10’s Second Motion for
3 a Preliminary Injunction (“Second PI Motion”). The Mausner Declaration is
4 objectionable for several reasons, and should be disregarded or accorded little or no
5 weight in the determination of Perfect 10’s Second PI Motion.

6 **I. PORTIONS OF THE MAUSNER DECLARATION ARE**
7 **INADMISSIBLE AND SHOULD BE DISREGARDED.**

8 The Mausner Declaration should be disregarded for purposes of the Perfect
9 10’s Second PI Motion because it is inadmissible under the Federal Rules of
10 Evidence.

11 The Federal Rules of Evidence apply to evidence submitted to the Court on
12 motion practice. Fed. R. Evid. 101 (Rules of Evidence apply to all proceedings in the
13 courts of the United States); Fed. R. Evid. 1101 (listing exceptions to Rule 101).
14 While courts have some discretion to consider inadmissible evidence when a
15 preliminary injunction is urgently needed to prevent irreparable harm before a full
16 resolution on the merits is possible, courts routinely decline to consider, or afford any
17 weight to, such inadmissible evidence in appropriate circumstances. See Beijing
18 Tong Ren Tang (USA) Corp. v. TRT USA Corp., --- F.Supp.2d ----, 2009 WL
19 5108580, at *3 (N.D. Cal. Dec. 18, 2009) (upholding evidentiary objections and
20 denying preliminary injunction); U.S. v. Guess, 2004 WL 3314940, at *4 (S.D. Cal.
21 Dec. 15, 2004) (“conditional inferences, innuendo, and even strong suspicions do not
22 satisfy [the movant’s] burden”); Kitsap Physicians Service v. Washington Dental
23 Service, 671 F.Supp. 1267, 1269 (W.D. Wa. 1987) (refusing to consider affidavits
24 “that would have been inadmissible under the Federal Rules of Evidence” and
25 denying preliminary injunction). Because P10 has had nearly *six years* to obtain
26 evidence regarding its Second PI Motion, it is particularly appropriate to hold P10’s
27 evidence to the usual standards of admissibility for motion practice.

1 Such evidence must be relevant to the claims and defenses of the case. Fed. R.
 2 Evid. 401; 403; Beijing Tong Ren Tang, 2009 WL 5108580, at *3 (striking irrelevant
 3 evidence). Testimonial evidence must be based on the personal knowledge of the
 4 witness offering the evidence. Fed. R. Evid. 602. Testimony requiring scientific,
 5 technical, or other specialized knowledge may be given only by an expert witness
 6 with the requisite knowledge, skill, experience, training, or education, and opinion
 7 testimony is not permitted of a lay person. Fed. R. Evid. 701, 702. The Mausner
 8 Declaration fails to meet one or more of these criteria, as set forth below.

	<u>Proffered Evidence</u>	<u>Objection</u>
10 11 12 13 14 15 16 17 18 19 20	1. Mausner Dec. at ¶¶ 2-13 and Exhs. A & AA	<u>Fed. R. Evid. 401, 402, 403, 602, 701</u> The statements are irrelevant because no injunction employing a “check the box” mechanism ultimately was entered, so the referenced correspondence (all of which pre-dates the Ninth Circuit’s May 2007 decision in this case) has no bearing here. The statements are also irrelevant and argumentative because Mr. Mausner’s personal opinions have no bearing on P10’s probability of success on its claims).
21 22 23 24 25 26 27 28	2. Mausner Dec. at ¶ 14 (“Google incorrectly stated: ‘[T]here is nothing that Google can do to remove the offending content without the cooperation of the site administrator. . . . Only an	<u>Fed. R. Evid. 401, 402, 403, 602, 701</u> The statement is argumentative, improper opinion testimony and irrelevant because Mr. Mausner’s personal opinions regarding the accuracy of statements concerning subjects about which he has no personal knowledge have no bearing on P10’s probability of

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	administrator can, by including code that blocks our robots or placing a request with us, prevent his/her page from being list. Without administrator cooperation we cannot exclude material available on the Internet from our index.”)	success on its claims. The statement is also speculative, does not appear to be based upon the witness’s personal knowledge, and lacks foundation.
3.	Mausner Dec. at ¶ 15 (“This letter makes clear that Google takes the position that it does not have to remove or disable access to usenet sites (paysites), not matter what notice Perfect 10 gives . . .”)	<u>Fed. R. Evid. 401, 402, 403, 602, 701</u> The statement is argumentative, irrelevant and improper opinion testimony because Mr. Mausner’s personal interpretation of Google’s correspondence has no bearing on P10’s probability of success on its claims. The statement is also speculative and lacks foundation.
4.	Mausner Dec. at ¶ 16 and Ex. C	<u>Fed. R. Evid. 401, 402, 403, 602, 801-04</u> The evidence is irrelevant, lacks foundation, and constitutes inadmissible hearsay.
5.	Mausner Dec. at ¶¶ 17, 18 & 20, and Exs. D, E, G	<u>Fed. R. Evid. 401, 402, 403, 801-04</u> The evidence is irrelevant and constitutes inadmissible hearsay.
6.	Mausner Dec. at ¶ 21 (“ . . . in which Google admits certain aspects of what Perfect 10 has claimed regarding	<u>Fed. R. Evid. 401, 402, 403, 602, 701</u> The statement is argumentative, irrelevant and improper opinion testimony, because Mr. Mausner’s personal interpretation of Mr.


1 2 3 4	Google’s failure to remove or disable access in Image Search.”)	Brougher’s Rebuttal Declaration has no bearing on P10’s probability of success on its claims. The statement is also speculative and lacks foundation.
5 6 7 8 9 10 11 12 13 14 15 16 17	7. Mausner Dec. at ¶ 28 (“Attached hereto as Exhibit I are true and correct copies of emails between Valerie Kincaid, an attorney for Perfect 10, and Tom Nolan, an attorney for Google, in which Google takes the position that it can and will continue to publicize Perfect 10’s DMCA notices on Chillingeffects.org.”)	<u>Fed. R. Evid. 401, 402, 403, 602, 701</u> The statement is argumentative, irrelevant and improper opinion testimony, because Mr. Mausner’s personal interpretation regarding the import of Google’s correspondence has no bearing on P10’s probability of success on its claims. The statement is also speculative, mischaracterizes the document referenced, and lacks foundation.
18 19 20 21 22	8. Mausner Dec. at ¶ 29 and Ex. J.	<u>Fed. R. Evid. 401, 402, 403</u> The evidence is irrelevant, because Mr. Schwartz’s claimed DMCA notices have no bearing on P10’s probability of success on its claims.
23 24 25 26 27 28	9. Mausner Dec. at ¶ 30	<u>Fed. R. Evid. 401, 402, 403</u> The statements are argumentative and irrelevant. That Google redacted portions of documents it produced based upon the attorney-client privilege and attorney work

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		product doctrine has no bearing on P10's probability of success on its claims.
10.	Mausner Dec. at ¶ 32, 34, & 35 and Exs. N, O, P	<u>Fed. R. Evid. 401, 402, 403, 602, 801-04</u> The evidence is irrelevant, lacks foundation, and constitutes inadmissible hearsay.

DATED: March 15, 2010

QUINN EMANUEL URQUHART &
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By 
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