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11 UNITED STATES DISTRICT COURT
 12 CENTRAL DISTRICT OF CALIFORNIA

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

15 Plaintiff,

16 vs.

17 GOOGLE INC., a corporation; and
 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 MELANIE
 POBLETE 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;
 A9.COM, INC., a corporation; and
 25 DOES 1 through 100, inclusive,

26 Defendants.

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

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

8 The Poblete Declaration should be disregarded for purposes of P10’s Second
9 PI Motion because it is inadmissible under the Federal Rules of Evidence.

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

27 Such evidence must be relevant to the claims and defenses of the case. Fed. R.
28 Evid. 401; 403; Beijing Tong Ren Tang, 2009 WL 5108580, at *3 (striking irrelevant

1 evidence). Testimonial evidence must be based on the personal knowledge of the
2 witness offering the evidence. Fed. R. Evid. 602. Testimony requiring scientific,
3 technical, or other specialized knowledge may be given only by an expert witness
4 with the requisite knowledge, skill, experience, training, or education, and opinion
5 testimony is not permitted of a lay person. Fed. R. Evid. 701, 702. The Poblete
6 Declaration fails to meet one or more of these criteria, as set forth below.

7 **A. The Poblete Declaration Concerns “The Sample” And Is Irrelevant.**

8 The Poblete Declaration discusses a purported “Sample” of images utilized in
9 the Zada Declaration. This “Sample” contains 12 images used for “illustrative
10 purposes,” and fails to address the vast majority of P10’s copyright infringement
11 claims. See, e.g., Poblete Dec. ¶¶ 2-15. P10’s Second PI Motion claims probable
12 success on the *entirety* of P10’s copyright claims, and seeks a sweeping injunction
13 covering all of those claims. Thus, the portions of the Poblete Declaration discussing
14 this miniscule subset of 12 images cannot establish probable success on the merits of
15 P10’s claims, and are irrelevant to P10’s Second PI Motion. See Fed. R. Evid. 401,
16 402, 403; see, e.g., Dugan v. R.J. Corman R.R. Co., 344 F.3d 662, 669 (7th Cir.
17 2003); cf. Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc., 924 F. Supp.
18 1559, 1562 (S.D. Cal. 1996), aff’d, 109 F.3d 1394 (9th Cir. 1997) (Plaintiff has
19 “burden of showing a likelihood of success on the merits” to obtain injunction.).

20 **B. The Poblete Declaration Does Not Concern Alleged Publicity Rights**
21 **For The “Nine Models” At Issue And Is Thus Irrelevant.**

22 The Poblete Declaration also references sub-folders of purported “Model
23 Releases” and “Rights of Publicity assignments.” Poblete Dec. ¶ 3. Neither folder
24 contains a complete set of documentation for the nine models on which P10 bases its
25 publicity claim. Compare P10’s Second Amended Complaint (Dkt. No. 303-2), Ex. 8
26 (listing models Amber Smith, Amy Weber, Aria Giovanni, Irina Voronina, Monika
27 Zsibrita, Nataskia Maren, Sasha Brinkova, Shannon Hobbs, Talia Harvalik) to Zada
28 Dec. in Support of P10’s Second PI Motion, Ex. 9 (sub-folders to “The Sample”

1 folder referencing models, “Model Releases” and “Rights of publicity”). More
 2 specifically, these folders contain documentation for models on which P10 does not
 3 base its claim, such as Erica Campbell, and are therefore irrelevant. They also fail to
 4 contain documentation for models on which P10 *does* base its claim, such as Shannon
 5 Hobbs and Sasha Brinkova. Because P10’s Second PI Motion claims probable
 6 success on the entirety of P10’s publicity claims with respect to all nine models, the
 7 portions of Poblete Declaration discussing an incorrect and incomplete list of P10
 8 models is irrelevant and cannot establish probable success on the merits of P10’s
 9 publicity claims. See Fed. R. Evid. 401, 402, 403.

10 **C. Additional Portions of the Poblete Declaration Are Inadmissible.**

11 Additional portions of the Poblete Declaration are inadmissible and should be
 12 disregarded in the determination of P10’s Second PI Motion, as set forth below.

	<u>Proffered Evidence</u>	<u>Objection</u>
14 15 16 17 18 19 20 21	1. Poblete Dec. at ¶ 2 (“I have verified that Perfect 10 has in its deposit material for copyright registrations filed with the U.S. Copyright Office, over 45,000 unique images”)	<u>Fed. R. Evid. 401, 403, 602, 1002</u> The statement is irrelevant, conclusory, lacks foundation, and does not appear to be within the witness’s personal knowledge. The statement also violates the Best Evidence Rule, because copies of the deposit material for P10’s copyright registrations (which P10 claims to have records of) are the best evidence of the contents of those deposit materials.

1 DATED: March 15, 2010

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

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