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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
 18 DOES 1 through 100, inclusive,
 19 Defendants.

CASE NO. CV 04-9484 AHM (SHx)

**GOOGLE INC.'S EVIDENTIARY
 OBJECTIONS TO THE
 DECLARATION OF SEAN
 CHUMURA IN SUPPORT OF
 PERFECT 10, INC.'S SECOND
 MOTION FOR PRELIMINARY
 INJUNCTION AGAINST GOOGLE**

Hon. A. Howard Matz

Date: April 5, 2010
 Time: 10:00 a.m.
 Place: Courtroom 14

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 Sean
2 Chumura ("Chumura Declaration"), Submitted in Support of Perfect 10's Second
3 Motion for Preliminary Injunction Against Google ("Second PI Motion").¹ The
4 Chumura Declaration is objectionable for several reasons, and should be disregarded
5 or accorded little or no weight in the determination of Perfect 10's Second PI
6 Motion.

7 **I. THE CHUMURA DECLARATION SHOULD BE STRICKEN**
8 **BECAUSE CHUMURA IS NOT QUALIFIED AS AN EXPERT.**

9 The Chumura Declaration should be disregarded because Mr. Chumura does
10 not have the necessary qualifications to testify as an expert in this matter. Mr.
11 Chumura does not tie his qualifications and purported expertise, which involve
12 federal law enforcement and other governmental agency work, to Google's search
13 engine or services. See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 591
14 (1993) (an expert's testimony must "aid the jury in resolving a factual dispute.");
15 see also Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147-48 (1999) (expert must
16 have some form of specialized knowledge). He identifies no specialized
17 knowledge or expertise whatsoever that would qualify him to opine on the subjects
18 set forth in his declaration, including (1) the inner workings of search engine
19 technology, including Google's proprietary Image and Web Search services
20 specifically, (2) what information Google would or would not need for its internal
21 processing team to locate and suppress or take down alleged infringing links or
22 content, and (3) whether Google's DMCA instructions are "necessary" in Mr.
23 Chumura's opinion. Because Chumura lacks the necessary qualifications to testify
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26 ¹ The Chumura Declaration is the same declaration, with the same signature
27 date, that P10 submitted from Mr. Chumura in support of its opposition to Google's
28 DMCA Motions (Dkt No. 479), with an updated caption reflecting the title of the
(footnote continued)

1 as an expert on these subjects, his declaration should be disregarded, or in the
2 alternative, his testimony should be accorded no evidentiary weight.

3 **II. PORTIONS OF THE CHUMURA DECLARATION SHOULD BE**
4 **DISREGARDED.**

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

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

26 _____
27 present motion. Google filed objections to this declaration in connection with its
28 (footnote continued)

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

	<u>Proffered Evidence</u>	<u>Objection</u>
10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	1. Chumura Dec. at ¶ 3 and Ex. 1 ("I have examined Exhibit 1 which is attached to this declaration, which I obtained from Jeff Mausner. Page 1 of Exhibit 1 is the output of a computer program that I created under the direction of Dr. Norman Zada. The program allows Perfect 10 to select images from Google Image Search by checking a box that the program makes available next to each Google thumbnail. The program places the date the Google search was done in the upper right corner, and puts the three links offered by Google for each image in the block	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702, Fed. R. Civ. P. 26</u> The statements are irrelevant to P10's probability of success on its claims. The statements also lack foundation. Further, Exhibit 1 is not properly authenticated, and should be disregarded because the alleged program referenced was not produced to Google in discovery. Further, the statements constitute improper opinion testimony because Mr. Chumura does not appear to have the necessary expertise to provide such expert testimony.

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DMCA Motions on September 8, 2009. See Dkt. No. 508.

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	<u>Proffered Evidence</u>	<u>Objection</u>
	corresponding to that image. The first URL after the term “Image” is the URL associated with Google’s “See full-size image” link; the second URL after the term “Site” is the link Google provides to the underlying third party website (often called a Web Page URL); and the bottom URL after the term “Thumbnail” is the link to the location at which the “thumbnail” resides on Google’s server. The program also has a Web Search option which allows Perfect 10 to save selected Google Web Search results.”)	
2.	Chumura Dec. at ¶¶ 4-8 and Exs. 1-2	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statements are irrelevant because Mr. Chumura’s personal opinions on the referenced subjects have no bearing on P10’s probability of success on its claims. Further, Exhibit 1 is not properly authenticated, and should be disregarded because the alleged program referenced was not produced

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	<u>Proffered Evidence</u>	<u>Objection</u>
		to Google in discovery. Further, the statements constitute improper opinion testimony because Mr. Chumura does not appear to have the necessary expertise to provide expert testimony on the referenced subjects. This evidence is also speculative, argumentative, lacks foundation, and is not within the witness's personal knowledge. Further, the statements mischaracterize the documents referenced.

DATED: March 16, 2010

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

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