

1 QUINN EMANUEL URQUHART & SULLIVAN, 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 rachelkassabian@quinnemanuel.com  
 14 555 Twin Dolphin Drive, 5th Floor  
 15 Redwood Shores, California 94065  
 16 Attorneys for Defendant Google Inc.

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 BENNETT  
 MCPHATTER 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 Bennett  
2 McPhatter (“McPhatter Declaration”), Submitted in Support of Perfect 10’s Second  
3 Motion for Preliminary Injunction Against Google (“Second PI Motion”).<sup>1</sup> The  
4 McPhatter Declaration is objectionable for several reasons, and should be  
5 disregarded or accorded little or no weight in the determination of Perfect 10’s  
6 Second PI Motion.

7 **I. THE MCPHATTER DECLARATION SHOULD BE STRICKEN**  
8 **BECAUSE MCPHATTER WAS NOT DISCLOSED AS A PERCIPIENT**  
9 **WITNESS OR AS AN EXPERT.**

10 Perfect 10 failed to disclose McPhatter as a person having knowledge of the  
11 facts relevant to the case, or as a potential expert witness. Instead, P10 has sprung  
12 the McPhatter Declaration upon Google, without first allowing Google a fair  
13 opportunity to depose McPhatter.<sup>2</sup> The McPhatter Declaration should be stricken on  
14 that basis.

15 In addition, at no point does McPhatter tie his qualifications and purported  
16 expertise, which involve doing work for federal law enforcement, to Google’s  
17 search engine or services. See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579,  
18 591 (1993) (an expert’s testimony must “aid the jury in resolving a factual  
19 dispute.”); see also Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147-48 (1999)

---

22 <sup>1</sup> The McPhatter Declaration is the same declaration, with the same signature  
23 date, that P10 submitted from Mr. McPhatter in support of its opposition to  
24 Google’s DMCA Motions (Dkt No. 481), with an updated caption reflecting the title  
25 of the present motion. Google filed objections to this declaration in connection with  
its DMCA Motions on September 8, 2009. See Dkt. No. 512.

26 <sup>2</sup> Because P10 has refused to agree to Google’s request that, given the numerous  
27 models and other witnesses implicated by this case, the parties be permitted to take  
28 more than ten depositions per side, Google has not been able to depose Mr.  
McPhatter since his first declaration was filed in August 2009. On July 27, 2009,  
(footnote continued)

1 (expert must have some form of specialized knowledge). He identifies no  
2 specialized knowledge or expertise whatsoever that would qualify him to opine on  
3 the subjects set forth in his declaration, including (1) the inner workings of search  
4 engine technology, and (2) what information Google would or would not need for its  
5 internal processing team to locate and suppress or take down alleged infringing links  
6 or content. Because McPhatter plainly lacks the necessary qualifications to testify  
7 as an expert on these subjects, his declaration should be disregarded, or in the  
8 alternative, his testimony should be accorded no evidentiary weight.

9 **II. PORTIONS OF THE MCPHATTER DECLARATION SHOULD BE**  
10 **DISREGARDED.**

11 The McPhatter Declaration should be disregarded for purposes of the Perfect  
12 10's Second PI Motion for the additional reason that it is inadmissible under the  
13 Federal Rules of Evidence.

14 The Federal Rules of Evidence apply to evidence submitted to the Court on  
15 motion practice. Fed. R. Evid. 101 (Rules of Evidence apply to all proceedings in  
16 the courts of the United States); Fed. R. Evid. 1101 (listing exceptions to Rule 101).  
17 While courts have some discretion to consider inadmissible evidence when a  
18 preliminary injunction is urgently needed to prevent irreparable harm before a full  
19 resolution on the merits is possible, courts routinely decline to consider, or afford  
20 any weight to, such inadmissible evidence in appropriate circumstances. See  
21 Beijing Tong Ren Tang (USA) Corp. v. TRT USA Corp., --- F.Supp.2d ----, 2009  
22 WL 5108580, at \*3 (N.D. Cal. Dec. 18, 2009) (upholding evidentiary objections and  
23 denying preliminary injunction); U.S. v. Guess, 2004 WL 3314940, at \*4 (S.D. Cal.  
24 Dec. 15, 2004) (“conditional inferences, innuendo, and even strong suspicions do  
25 not satisfy [the movant’s] burden”); Kitsap Physicians Service v. Washington

26 \_\_\_\_\_  
27 Google filed a motion seeking leave to take additional depositions (Dkt No. 471).  
28 (footnote continued)

1 Dental Service, 671 F.Supp. 1267, 1269 (W.D. Wa. 1987) (refusing to consider  
 2 affidavits “that would have been inadmissible under the Federal Rules of Evidence”  
 3 and denying preliminary injunction). Because P10 has had nearly *six years* to  
 4 obtain evidence regarding its Second PI Motion, it is particularly appropriate to hold  
 5 P10’s evidence to the usual standards of admissibility for motion practice.

6 Such evidence must be relevant to the claims and defenses of the case. Fed.  
 7 R. Evid. 401; 403; Beijing Tong Ren Tang, 2009 WL 5108580, at \*3 (striking  
 8 irrelevant evidence). Testimonial evidence must be based on the personal  
 9 knowledge of the witness offering the evidence. Fed. R. Evid. 602. Testimony  
 10 requiring scientific, technical, or other specialized knowledge may be given only by  
 11 an expert witness with the requisite knowledge, skill, experience, training, or  
 12 education, and opinion testimony is not permitted of a lay person. Fed. R. Evid.  
 13 701, 702. The McPhatter Declaration fails to meet one or more of these criteria, as  
 14 set forth below.

	<u>Proffered Evidence</u>	<u>Objection</u>
16 17 18 19 20 21 22 23 24 25	1. <b>McPhatter Decl., at ¶ 3</b> (“I have sufficient expertise in computer science and the Internet to determine whether the various portions of notices attached as Exhibit 1 would provide a search engine such as Google with enough information to locate the infringing image(s) or link(s).”)	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statement is irrelevant, argumentative, conclusory, speculative and lacks foundation. Mr. McPhatter’s opinions regarding his own qualifications are irrelevant and unsubstantiated. Mr. McPhatter has never been disclosed by P10 as an expert in this case, nor does he appear

26  
 27 The Court has not yet ruled on Google’s motion.  
 28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

to have the necessary expertise to provide such expert testimony.

2. **McPhatter Decl., at ¶¶ 4-6 and Ex. 1** Fed. R. Evid. 401, 402, 403, 602, 701, 702  
The statements are irrelevant, argumentative, and improper opinion testimony. Mr. McPhatter’s personal opinions regarding methods for processing DMCA notices have no bearing on P10’s probability of success on the merits. This evidence is also speculative, lacks foundation, and is not within the witness’s personal knowledge. The statements further mischaracterize the document referenced, and Exhibit 1 is not properly authenticated. Mr. McPhatter has never been disclosed by P10 as an expert in this case, nor does he appear to have the necessary expertise to provide such expert testimony.

DATED: March 16, 2010 QUINN EMANUEL URQUHART & SULLIVAN, LLP  
By *Rachel Herrick Kassabian*  
Michael Zeller  
Rachel Herrick Kassabian  
Attorneys for Defendant GOOGLE INC.