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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PERFECT 10, INC., a California corporation,
 	
    Plaintiff,
 	
  vs.
 	
GOOGLE INC., a corporation; and DOES 1 through 100, inclusive,
 	
    Defendants.
	CASE NO. CV 04-9484 AHM (SHx)
	
	GOOGLE INC.'S EVIDENTIARY OBJECTIONS TO THE DECLARATION OF DAVID O'CONNOR 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

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GOOGLE INC.'S EVIDENTIARY OBJECTIONS TO THE DECLARATION OF DAVID O'CONNOR

Google hereby submits the following objections to the Declaration of David O'Connor ("O'Connor Declaration"), Submitted in Support of Perfect 10's Second Motion for Preliminary Injunction Against Google ("Second PI Motion").[1] The O'Connor Declaration is objectionable for several reasons, and should be disregarded or accorded little or no weight in the determination of Perfect 10's Second PI Motion.

I. THE O'CONNOR DECLARATION SHOULD BE STRICKEN BECAUSE O'CONNOR WAS NOT DISCLOSED.

P10 failed to disclose O'Connor as a person having knowledge of the facts relevant to the case, or as a potential expert witness. Instead, P10 has sprung the O'Connor Declaration upon Google, without first allowing Google a fair opportunity to depose O'Connor.[2] The O'Connor Declaration should be stricken on this basis.

In addition, at no point does O'Connor tie his qualifications and purported expertise, which involve doing work for federal law enforcement, to Google's search engine or services. See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 591 (1993) (an expert's testimony must "aid the jury in resolving a factual dispute."); see also Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147-48 (1999) (expert must have some form of specialized knowledge). He identifies no specialized knowledge or expertise whatsoever that would qualify him to opine on the subjects set forth in his

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[1] The O'Connor Declaration is the same declaration, with the same signature date, that P10 submitted from Mr. O'Connor in support of its opposition to Google's DMCA Motions (Dkt No. 480), with an updated caption reflecting the title of the present motion. Google filed objections to this declaration in connection with its DMCA Motions on September 8, 2009. See Dkt. No. 514.

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

declaration, including (1) the inner workings of search engine technology, and (2) what information Google would or would not need for its internal processing team to locate and suppress or take down alleged infringing links or content. Because O'Connor plainly lacks the necessary qualifications to testify as an expert on these subjects, his declaration should be disregarded, or in the alternative, his testimony should be accorded no evidentiary weight.

II. PORTIONS OF THE O'CONNOR DECLARATION SHOULD BE DISREGARDED.

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

The Federal Rules of Evidence apply to evidence submitted to the Court on motion practice. Fed. R. Evid. 101 (Rules of Evidence apply to all proceedings in the courts of the United States); Fed. R. Evid. 1101 (listing exceptions to Rule 101). While courts have some discretion to consider inadmissible evidence when a preliminary injunction is urgently needed to prevent irreparable harm before a full resolution on the merits is possible, courts routinely decline to consider, or afford any weight to, such inadmissible evidence in appropriate circumstances. See Beijing Tong Ren Tang (USA) Corp. v. TRT USA Corp., --- F.Supp.2d ----, 2009 WL 5108580, at *3 (N.D. Cal. Dec. 18, 2009) (upholding evidentiary objections and denying preliminary injunction); U.S. v. Guess, 2004 WL 3314940, at *4 (S.D. Cal. Dec. 15, 2004) ("conditional inferences, innuendo, and even strong suspicions do not satisfy [the movant's] burden"); Kitsap Physicians Service v. Washington Dental Service, 671 F.Supp. 1267, 1269 (W.D. Wa. 1987) (refusing to consider affidavits "that would have been inadmissible under the Federal Rules of Evidence" and

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Google filed a motion seeking leave to take additional depositions (Dkt No. 471). (footnote continued)

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GOOGLE INC.'S EVIDENTIARY OBJECTIONS TO THE DECLARATION OF DAVID O'CONNOR

denying preliminary injunction). Because P10 has had nearly *six years* to obtain evidence regarding its Second PI Motion, it is particularly appropriate to hold P10's evidence to the usual standards of admissibility for motion practice.

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

	Proffered Evidence	Google's Objection
1.	**O'Connor Decl., at ¶ 3** ("In my opinion, 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).")	Fed. R. Evid. 401, 402, 403, 602, 701, 702 The statement is irrelevant, argumentative, conclusory, speculative and lacks foundation. Mr. O'Connor's opinions regarding his own qualifications are irrelevant and unsubstantiated. Mr. O'Connor has never been disclosed by P10 as an expert in this case, nor does he appear to have the necessary expertise to

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The Court has not yet ruled on Google's motion.

		provide such expert testimony.
2.	**O'Connor Decl., at ¶¶ 4-6 and Ex. 1**	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statements are irrelevant, argumentative, and improper opinion testimony. Mr. O'Connor'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. O'Connor 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_____

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