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10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA

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

14 Plaintiff,

15 v.

16 GOOGLE, INC., a corporation; and
17 DOES 1 through 100, inclusive,

18 Defendant.

19 Case No. CV 04-9484 AHM (SHx)

20 **Before Judge A. Howard Matz**

21 **RESPONSE OF PLAINTIFF
 22 PERFECT 10, INC. TO
 23 DEFENDANT GOOGLE INC.'S
 24 EVIDENTIARY OBJECTIONS TO
 25 THE DECLARATIONS OF SEAN
 26 CHUMURA, BENNETT
 27 MCPHATTER AND DAVID
 28 O'CONNOR RE: PERFECT 10'S
 MOTION FOR PRELIMINARY
 INJUNCTION AGAINST GOOGLE**

**[Declaration Of Jeffrey N. Mausner
 In Support Of Perfect 10's Responses
 To Google's Evidentiary Objections
 Re Perfect 10's Motion For
 Preliminary Injunction Against
 Google, Filed Concurrently
 Herewith]**

Date: April 5, 2010
 Time: 10:00 a.m.
 Place: Courtroom 14, Courtroom of the
 Honorable A. Howard Matz

Discovery Cut-Off Date: None Set
 Pretrial Conference Date: None Set
 Trial Date: None Set

1 Plaintiff Perfect 10, Inc. (“Perfect 10”) hereby responds to Defendant
2 Google Inc.’s (“Google”) Evidentiary Objections to the following three
3 declarations submitted by Perfect 10 on March 3, 2010 in connection with
4 Perfect 10’s Motion for Preliminary Injunction against Google (Docket No. 791)
5 (the “PI Motion”):

6 1. Declaration of Sean Chumura (Docket No. 780) (the “Chumura
7 Declaration”);

8 2. Declaration of Bennett McPhatter (Docket No. 782) (the
9 “McPhatter Declaration”); and

10 3. Declaration of David O’Connor (Docket No. 781) (the “O’Connor
11 Declaration”).¹

12 **I. GOOGLE IMPROPERLY ASSERTS THAT MCPHATTER AND**
13 **O’CONNOR WERE NOT DISCLOSED.**

14 The Chumura, McPhatter and O’Connor Declarations are identical to
15 earlier declarations of those same three witnesses submitted by Perfect 10 on
16 August 9, 2009 in connection with Perfect 10’s opposition to Google’s Motions
17 for Summary Judgment Re DMCA Safe Harbor for its Web and Image Search,
18 Blogger Service, and Caching Feature (Docket Nos. 479-481) (the “DMCA
19 Motions”). Google again raises almost the same objections to the Chumura,
20 McPhatter and O’Connor Declarations as it did to the earlier versions of these
21 declarations. Once again, these objections are baseless.

22 First, Google once again raises the same mistaken objection to the
23 McPhatter and O’Connor Declarations. Google asserts that this Court should
24 strike both declarations because Perfect 10 did not disclose Mr. McPhatter or
25 Mr. O’Connor in discovery as a percipient witness or as an expert witness.

26 _____
27 ¹ Google’s separate Evidentiary Objections to the Chumura Declaration,
28 the McPhatter Declaration, and the O’Connor Declaration, all filed on March 16,
2010 (collectively, the “Evidentiary Objections”), are Docket Nos. 811, 812, and
813, respectively.

1 Instead, Google contends that Perfect 10 “sprung” these declarations on Google
2 without allowing Google the opportunity to depose Mr. McPhatter or Mr.
3 O’Connor. *See Evidentiary Objections* at 1.²

4 This objection is even more unreasonable now, since Google has known
5 of these declarants for months. Google’s objection that Perfect 10 did not timely
6 disclose Mr. McPhatter or Mr. O’Connor never had any basis, because Perfect
7 10 did not know of these declarants until just before or just after Google filed its
8 DMCA Motions on July 2, 2009. In particular, counsel for Perfect 10, Jeffrey
9 N. Mausner (“Mausner”), first knew about David O’Connor on or about June 10,
10 2009, and first spoke with him on or about June 11, 2009. Mr. O’Connor’s
11 declaration was obtained on June 16, 2009 and provided to Google on July 6,
12 2009. (Docket Nos. 443, 480.) Mausner first knew about and spoke with
13 Bennett McPhatter on or about July 5, 2009. Mr. McPhatter’s declaration was
14 obtained on July 9, 2009 and provided to Google on August 9, 2009. (Docket
15 No. 481.) *See Mausner Evidentiary Objections Decl.* ¶4.³

16 Therefore, Perfect 10 timely disclosed these witnesses to Google by
17 providing Google with their declarations, shortly after Perfect 10 became aware
18 of the witnesses.⁴ Google has had more than six months to depose Mr.

20 ² Google does not raise this objection to the Chumura Declaration. Mr.
21 Chumura was disclosed in Perfect 10’s August 2008 updated Rule 26
22 disclosures, but Google has not attempted to depose him. Declaration of Jeffrey
23 N. Mausner in Support of Perfect 10’s Responses to Google’s Evidentiary
24 Objections Re Perfect 10’s Motion for Preliminary Injunction, filed concurrently
25 herewith (“Mausner Evidentiary Objections Decl.”), ¶5.

23 ³ *See Perfect 10’s Response to Google, Inc.’s Evidentiary Objections to*
24 *the Declarations of Sean Chumura, Bennett McPhatter and David O’Connor Re:*
25 *Google’s Motions for Summary Judgment*, filed on October 12, 2009 (Docket
No. 565).

26 ⁴ Furthermore, the McPhatter and O’Connor Declarations rebut claims
27 made by Google’s witness, Shantal Rands Poovala, that Perfect 10’s notices did
28 not provide sufficient information for Google to locate the infringing material or
were otherwise deficient. Mr. McPhatter and Mr. O’Connor therefore fall within
the exception for disclosure of impeachment witnesses set forth in Rule
26(a)(1)(A)(i) of the Federal Rules of Civil Procedure.

1 O'Connor and Mr. McPhatter or to propound discovery regarding these
2 witnesses, but has failed to do so. Consequently, Google has no basis for its
3 objections.

4 **II. GOOGLE'S OBJECTION THAT PERFECT 10 HAS NOT**
5 **DESIGNATED MCPHATTER AND O'CONNOR AS EXPERT**
6 **WITNESSES IS PREMATURE AND INAPPLICABLE.**

7 Google also objects that Perfect 10 did not timely disclose Mr. McPhatter
8 and Mr. O'Connor as expert witnesses. *See* Evidentiary Objections at 1, 3-4.
9 This objection fails as well.

10 **A. Rule 26 Allows The Disclosure Of Expert Testimony Up Until**
11 **90 Days Before Trial.**

12 Rule 26(2)(C) of the Federal Rules of Civil Procedure only requires that a
13 party designate its expert witnesses within 90 days of trial, unless otherwise
14 ordered by the court. It states, in pertinent part:

15 (C) *Time to Disclose Expert Testimony.* A party must make these
16 disclosures at the times and in the sequence that the court orders.

17 Absent a stipulation or a court order, the disclosure must be made:

18 (i) at least 90 days before the date set for trial or for the case to be
19 ready for trial.

20 Here, no trial date has been set for this action, and the Court has not
21 entered an order setting a date for the disclosure of expert witnesses.

22 Accordingly, the time by which Perfect 10 must designate Mr. Chumura, Mr.
23 McPhatter, or Mr. O'Connor as experts has yet to arrive.

24 Moreover, this Court denied a similar motion brought by defendant
25 A9.com, Inc. to strike a different declaration of Sean Chumura filed by Perfect
26 10 in *Perfect 10 v. Amazon.com, Inc., et al.*, on the ground that Mr. Chumura
27 allegedly had not been disclosed as an expert at that time. *See Perfect 10 v.*
28 *Amazon.com, Inc., et al.*, Case No. CV 05-4753, Minute Order of October 6,

1 2008 (Docket No. 169).⁵ Furthermore, Google has not disclosed its expert
2 witnesses. For these reasons, the Court should deny Google’s request to strike
3 the McPhatter and O’Connor Declarations.

4 **III. THE CHUMURA, MCPHATTER, AND O’CONNOR**
5 **DECLARATIONS ARE VERY RELEVANT TO THE CASE AND**
6 **DIRECTLY CONTRADICT STATEMENTS MADE BY GOOGLE.**

7 Google further asserts that the Chumura, McPhatter, and O’Connor
8 Declarations are irrelevant. According to Google, the personal opinions of these
9 declarants regarding methods for processing DMCA notices “have no bearing on
10 [Perfect 10’s] probability of success on the merits.” Evidentiary Objections at 4.
11 As explained below, Google is incorrect. The Chumura, McPhatter, and
12 O’Connor Declarations are relevant for multiple reasons.

13 **A. The Declarations Conclusively Prove That Perfect 10’s Notices**
14 **Allowed Google To Locate The Infringing Material.**

15 Exhibit 1 to the Chumura, McPhatter, and O’Connor Declarations
16 contains examples of various types of DMCA notices sent by Perfect 10 to
17 Google that are similar or identical to the sample notices submitted by Perfect 10
18 in connection with its PI Motion. *See* Declaration of Dr. Norman Zada In
19 Support of Perfect 10’s Motion for Preliminary Injunction Against Google, Inc.
20 (Docket Nos. 790, 795-797) (the “Zada Declaration”), Exhs. 47, 48, 31. 32. 50,
21 39, 15, 11.

22 For example, Page 1 of Exhibit 1 to the Chumura, McPhatter and
23 O’Connor Declarations is similar to Exhibit 47 to the Zada Declaration in
24 Support of Preliminary Injunction. Page 2 of Exhibit 1 is the same style of
25 notice as Exhibit 48 to the Zada Declaration. Page 3 of Exhibit 1 is the same
26 style of notice as the notices that appear on Page 3 of Exhibit 31 to the Zada

27 _____
28 ⁵ The Court only excluded small portions of Mr. Chumura’s declaration
on other unrelated grounds.

1 Declaration and Page 3 of Exhibit 32 to the Zada Declaration. Page 5 of Exhibit
2 1 is the same style of notice that appears on Page 1 of Exhibit 50 to the Zada
3 Declaration. Page 4 of Exhibit 1 is similar to Perfect 10's Web Search Group C
4 Adobe-style notices. Page 6 of Exhibit 1 was contained in Perfect 10's July 2,
5 2007 DMCA notice and identifies an infringing *blogger.com* URL. It is the
6 same image that appears on Page 3 of Exhibit 39 to the Zada Declaration. Page
7 7 of Exhibit 1 is similar to Perfect 10's *blogspot.com* notices that were created
8 by following Google's Web Search instructions. Page 11 of Exhibit 1 to the
9 McPhatter and O'Connor Declarations is an example of Perfect 10's Group B
10 notices, and is similar to the notice attached as Exhibit 15 to the Zada
11 Declaration. Page 8 of Exhibit 1 to the McPhatter and O'Connor Declarations is
12 the same as the Sample Notice which appears on Page 4 of Exhibit 11 to the
13 Zada Declaration.

14 Messrs. Chumura, McPhatter, and O'Connor all testify that each and
15 every one of Perfect 10's DMCA notices attached as part of Exhibit 1 to their
16 respective declarations provided Google with sufficient information to locate the
17 infringing material. *See* Chumura Decl. ¶¶3-5; McPhatter Decl. ¶¶3-6;
18 O'Connor Decl. ¶¶3-6. This testimony is relevant because it supports Perfect
19 10's claims that Perfect 10's DMCA notices were compliant and it undermines
20 Google's assertion that it is entitled to a DMCA safe harbor affirmative defense
21 that bars Perfect 10 from obtaining injunctive relief.

22 **B. The Chumura, McPhatter, and O'Connor Declarations Refute**
23 **The Testimony Of Shantal Rands Poovala.**

24 The Chumura, McPhatter, and O'Connor Declarations are relevant for the
25 additional reason that they refute the testimony of Shantal Rands Poovala, the
26 key witness on whom Google relies in opposing Perfect 10's PI Motion.
27 Google's Opposition to the PI Motion largely depends on Ms. Poovala's
28 declaration, in which she claims that all of Perfect 10's DMCA notices were

1 deficient. *See* Declaration of Shantal Rands Poovala in support of Defendant
2 Google’s Motions for Summary Judgment Re: Google’s Entitlement to Safe
3 Harbor Under 17 U.S.C. § 512 (the “Poovala Declaration”). (Google submitted
4 the Poovala Declaration as part of Exhibit A to the Declaration of Rachel
5 Herrick Kassabian in opposition to the PI Motion. Ms. Kassabian’s declaration
6 also improperly included every pleading that Google had previously submitted
7 in connection with the three DMCA Motions Google filed in July 2009). Ms.
8 Poovala admittedly has no technical background, however, and even refused to
9 answer questions in her deposition regarding the sufficiency of DMCA notices,
10 claiming that “I’m not an engineer.” *See, e.g.*, Poovala Deposition, page 57 lines
11 18-21, page 58 lines 8-10, page 60 lines 2-4, which is contained in Exhibit AA
12 to Docket No. 588 (filed under seal), entitled Exhibits AA and BB to the
13 Declaration of Jeffrey N. Mausner in Support of Perfect 10’s Evidentiary
14 Objections and Response to Google’s Evidentiary Objections, and included in
15 Exhibit R, a disk, to the Reply Declaration of Jeffrey N. Mausner in Support of
16 Perfect 10’s Motion for Preliminary Injunction, Docket No. 827).

17 Ms. Poovala makes various extremely important, completely unsupported,
18 and wholly incorrect claims in her declaration, including the assertion that “[t]he
19 Group C Notices also failed to identify the location of any allegedly infringing
20 material.” Poovala Decl. ¶51. The Chumura, McPhatter, and O’Connor
21 Declarations completely refute such testimony.

22 For example, Mr. Chumura explains in detail why each of Perfect 10’s
23 sample notices included in Exhibit 1 to the Chumura Declaration are sufficient
24 to locate the infringing material. Chumura Decl. ¶¶4-5. Then, Mr. Chumura
25 explains how URLs with ellipses can still be used to find full URLs. *Id.* ¶6.
26 Next, Mr. Chumura testifies that post URLs are not present on *blogger.com* web
27 pages. Mr. Chumura’s testimony demonstrates that Ms. Poovala’s claim that the
28 copyright holder must provide a post URL to identify infringing *blogger.com*

1 web pages makes no sense. The testimony further establishes that Google’s
2 insistence that a copyright holder provide a post URL when none exists is just
3 another example of Google’s unreasonable restrictions regarding the content of
4 DMCA notices. Such restrictions are not compatible with the DMCA.⁶
5 *Compare* Poovala Decl. ¶¶93 *with* Chumura Decl. ¶¶6-7. Mr. Chumura further
6 testifies that the URL on the blogger.com web page that Perfect 10 provided was
7 sufficient to locate the infringing material. Chumura Decl. ¶7. Finally, Mr.
8 Chumura explains why Google’s separate instructions for Image Search are
9 generally not “necessary or helpful in the vast majority of situations.” *Id.* ¶8.
10 He also explains why Perfect 10’s Web Search notices were sufficient to remove
11 images from Google’s Image Search results. *Id.* ¶8.

12 The testimony of both Mr. McPhatter and Mr. O’Connor likewise
13 confirms the sufficiency of Perfect 10’s sample notices set forth in Exhibit 1 to
14 their declarations. *See* McPhatter Decl. ¶¶3-6; O’Connor Decl. ¶¶3-6.
15 Accordingly, because the testimony of Messrs. Chumura, McPhatter, and
16 O’Connor directly refutes Ms. Poovala’s testimony regarding the alleged
17 deficiency of Perfect 10’s notices, the Chumura, McPhatter, and O’Connor
18 Declarations are clearly relevant to the issues raised by Perfect 10’s PI Motion.

19 **C. Google Fails To Provide Any Technical Declarations To Refute**
20 **The Chumura, McPhatter, or O’Connor Declarations.**

21 Google fails to provide a single technical declaration in connection with
22 its Opposition to Perfect 10’s PI Motion that contradicts the testimony given by
23 Messrs. Chumura, McPhatter, or O’Connor. If it was possible to contradict the

24 ⁶ Section 512(c)(3) of the DMCA requires either: (i) identification of the
25 reference or link, to material or activity claimed to be infringing, which Perfect
26 10 provided in its Group A, B, and C style notices; or (ii) in the case of hosting
27 or AdSense, identification of the material that is claimed to be infringing or the
28 subject of infringing activity, which Perfect 10 also provided when it submitted
a copy of the infringing web page to Google with the infringing P10 Images on
that page clearly identified. Zada Decl. ¶¶25-26, 49-84, 93, Exhs. 14-15, 33-63.
68. There is no requirement in the DMCA that the copyright holder specifically
provide a post URL, particularly when none exists.

1 Chumura, McPhatter and O'Connor Declarations, it should have been easy for
2 Google, a technological powerhouse, to provide declarations to refute the
3 testimony of these three witnesses. Instead, Google has provided nothing. In
4 fact, Google has not even explained why any of the copies of infringing web
5 pages contained in Exhibit 1 to the Chumura, McPhatter, and O'Connor
6 Declarations were not sufficient for Google to locate the infringing material.
7 Google also does not provide any technical declarations to contest the fact that
8 URLs could have been readily extracted from Perfect 10's Adobe-style notices,
9 at the rate of at least 300 per hour.

10 **IV. MESSRS. CHUMURA, MCPHATTER, AND O'CONNOR HAVE**
11 **SUFFICIENT EXPERTISE TO TESTIFY ABOUT THE MATTERS**
12 **IN THEIR DECLARATIONS.**

13 Google asserts, without further explanation or discussion, that Messrs.
14 Chumura, McPhatter, and O'Connor appear to lack the necessary qualifications
15 to support their testimony. Evidentiary Objections to McPhatter and O'Connor
16 Declarations at 3, 4; Evidentiary Objections to Chumura Declaration at 3, 5.
17 Google is mistaken as to each of these three witnesses.

18 First, Mr. McPhatter and Mr. O'Connor are computer experts and own a
19 company called Visual Analytics, which offers the ability to *search* databases,
20 documents, e-mail archives and *web sites* all at once. McPhatter Decl. ¶1;
21 O'Connor Decl. ¶1; Mausner Evidentiary Objections Decl. Exh. DD.

22 Second, both Mr. McPhatter and Mr. O'Connor are experts in the area of
23 search and if asked to testify at trial, they will be called as experts as to the
24 sufficiency of Perfect 10's notices. Mr. McPhatter has over "12 years of
25 experience developing large scale distributed systems, federated *search*, and
26 information sharing technologies" and created "DIG®", the "standard
27 information sharing application at a number of State, local and city law
28 enforcement agencies." McPhatter Decl., ¶¶1, 2 (emphasis added). Mr.

1 O'Connor is the co-founder, President, and Chief Technical Officer of Visual
2 Analytics, and has a B.S. in Computer Science and over 15 years experience
3 developing large scale distributed systems, data mining, visualization, and
4 artificial intelligence technologies. O'Connor Decl. ¶¶1, 2.

5 Third, both Mr. McPhatter and Mr. O'Connor testify that they have
6 "sufficient expertise in computer science and the Internet to determine whether
7 the various portions of notices attached as Exhibit 1 would provide a search
8 engine such as Google with enough information to locate the infringing
9 images(s) or link(s)." McPhatter Decl. ¶3; O'Connor Decl. ¶3.

10 Fourth, Mr. Chumura has sufficient expertise and qualifications to provide
11 the testimony in his declaration. Mr. Chumura has demonstrated that expertise
12 by writing a program which allowed Perfect 10 to provide to Google, in Perfect
13 10's DMCA notices, a copy of each infringing Google P10 thumbnail, along
14 with the Google Image URL, the URL of the web page containing the image,
15 and the Google thumbnail URL for that image. Chumura Decl. ¶3, Exh. 1.
16 Moreover, Mr. Chumura has "spent over a thousand hours using and analyzing
17 how the Google search engine functions" and has done much research and study
18 regarding search engine operation. Chumura Decl. ¶¶1-3. For all of these
19 reasons, the Chumura Declaration establishes that Mr. Chumura has a level of
20 knowledge far beyond what is needed to testify that Perfect 10's notices were
21 sufficient to enable Google to locate the infringing material identified by P10.⁷

22 _____
23 ⁷ Even if this Court has questions about the admissibility of portions of the
24 Chumura, McPhatter, or O'Connor Declarations, it should still consider these
25 declarations when ruling upon the PI Motion. Because a preliminary injunction
26 is not a trial, both appellate courts and leading treatises have stated that the rules
27 of evidence may be relaxed. *See, e.g., Sierra Club, Lone Star Chapter v. FDIC*,
28 992 F.2d 545, 551 (5th Cir.1993) ("at the preliminary injunction stage, the
procedures in the district court are less formal, and the district court may rely on
otherwise inadmissible evidence, including hearsay evidence"). As a leading
treatise has noted:

1 In contrast to Messrs. Chumura, McPhatter, and O'Connor, Ms. Poovala
2 has no technical expertise at all. In her deposition, Ms. Poovala even refused to
3 answer questions as to whether notices were sufficient, stating that she is "not an
4 engineer." See Docket No. 587 (filed under seal), Perfect 10's Evidentiary
5 Objections To: Declaration And Rebuttal Declaration Of Shantal Rands Poovala
6 In Support Of Google's Motions For Summary Judgment Re Google's
7 Entitlement To Safe Harbor, Sections I-III, which is also contained on Exhibit R,
8 a disk, to the Reply Declaration of Jeffrey N. Mausner in Support of Perfect 10's
9 Motion for Preliminary Injunction, Docket No. 827. Under these circumstances,
10 there is no basis whatsoever for Google to argue that the Chumura, McPhatter,
11 and O'Connor Declarations should be stricken, while the Poovala Declaration
12 should not.

13 **VI. CONCLUSION.**

14 For all of the foregoing reasons, this Court should disregard Google's
15 objections to the Chumura, McPhatter, and O'Connor Declarations, and should
16 consider these Declarations in their entirety in connection with Perfect 10's
17 Motion for Preliminary Injunction against Google.

18 Dated: March 24, 2010

Respectfully submitted,

Law Offices of Jeffrey N. Mausner

20 By: Jeffrey N. Mausner

21 Jeffrey N. Mausner

Attorney for Plaintiff Perfect 10, Inc.

22
23
24
25 [I]nasmuch as the grant of a preliminary injunction is
26 discretionary, the trial court should be allowed to give even
27 inadmissible evidence some weight when it is thought advisable to
28 do so in order to serve the primary purpose of preventing
irreparable harm before a trial can be had.

11A C. Wright, A. Miller & M. Kane, Federal Practice & Procedure: Civil
§ 2949, at 216-17 (2d ed.1995).