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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.

Case No. CV 04-9484 AHM (SHx)

**Before Judge A. Howard Matz**

**RESPONSE OF PLAINTIFF  
 PERFECT 10, INC. TO DEFENDANT  
 GOOGLE INC.'S EVIDENTIARY  
 OBJECTIONS TO THE  
 DECLARATION OF JEFFREY N.  
 MAUSNER RE: PERFECT 10'S  
 MOTION FOR PRELIMINARY  
 INJUNCTION AGAINST GOOGLE**

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 Declaration of Jeffrey N.  
3 Mausner In Support of Perfect 10’s Motion for Preliminary Injunction Against  
4 Google, Docket No. 773, filed on March 3, 2010 (the “Mausner Declaration”), as  
5 follows:

6 **I. MR. MAUSNER’S STATEMENTS ARE STATEMENTS OF FACT,**  
7 **NOT OPINION.**

8 Google’s Evidentiary Objections begin with its boilerplate paragraph setting  
9 forth general requirements for admissibility of evidence, which Google admits may  
10 not apply to the Mausner Declaration. Google then offers several unfounded  
11 specific objections to the Mausner Declaration, all of which have no merit.

12 Google objects to Paragraphs 2-13 and Exhs. A & AA of the Mausner  
13 Declaration as “irrelevant” because Mr. Mausner allegedly is expressing his  
14 “personal opinions.” Evidentiary Objections at 1. In fact, Paragraphs 2-13 of the  
15 Mausner Declaration express no opinion at all. They merely set forth, attach and  
16 authenticate correspondence between Perfect 10 and Google regarding Google’s  
17 lack of cooperation in setting up a Notification System as ordered by the Court.  
18 The *only* statement that possibly may be considered opinion, but is also a statement  
19 of fact, is Mr. Mausner’s statement that “Google’s willingness to cooperate to  
20 develop such a system extended no further than its Preliminary Injunction brief.”  
21 Mausner Decl., ¶4, page 1, lines 26-27. Even if the Court strikes this statement, it  
22 does not alter the remaining facts and correspondence about which Mr. Mausner  
23 testifies in Paragraphs 2-13 of the Mausner Declaration.

24 **II. MR. MAUSNER’S STATEMENTS ARE RELEVANT.**

25 Mr. Mausner’s statements and authenticated exhibits are also *relevant*. The  
26 fact that Google could have, but failed to, set up a notification system that would  
27 have streamlined and expedited the removal of infringing material from its search  
28 results is relevant to the issue of whether Google has taken simple measures to

1 reduce the damage to the copyrighted works of Perfect 10 and other copyright  
2 owners. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007)  
3 (“Applying our test, Google could be held contributorily liable if it had knowledge  
4 that infringing Perfect 10 images were available using its search engine, could take  
5 simple measures to prevent further damage to Perfect 10's copyrighted works, and  
6 failed to take such steps.”). Mr. Mausner’s testimony establishes that Google  
7 failed to set up such a notification system even when it was under an Order from  
8 this Court to do so. Google has set up a check-the-box type notification tool to  
9 report offensive images, but not one to report infringing images. Declaration of  
10 Jeffrey N. Mausner, Docket No. 571, ¶8, Exh. EE.

11 The details of Google’s refusal or failure to assist in creating a notification  
12 system are also relevant to determining whether Google has “adopted and  
13 reasonably implemented ... a policy that provides for the termination of ... repeat  
14 infringers.” 17. U.S.C §512(i). If Google had set up such a notification tool,  
15 Google would now have computerized records of thousands of images allegedly  
16 infringed by websites from which it copies images, many of which are AdSense or  
17 Blogger affiliates. This tool would have given Google a straightforward method of  
18 keeping track of, and terminating, repeat infringers. It also would have given  
19 Google the ability to stop copying images for its Image Search results from known  
20 infringers. Google’s failure to implement such a notification tool or maintain  
21 anything more than a fragmentary DMCA log is directly relevant to Google’s  
22 eligibility for safe harbor under the DMCA.

23 **III. GOOGLE’S OTHER OBJECTIONS ARE NEGLIGIBLE AND DO**  
24 **NOT ALTER THE MAUSNER DECLARATION OR THE**  
25 **UNDERLYING FACTS.**

26 Google’s remaining objections to the Mausner Declaration are without  
27 merit. First, Google’s objections that certain statements of Mr. Mausner are  
28 argumentative and/or irrelevant, including Paragraphs 14-15, 21, 28 and 30 of the

1 Mausner Declaration, are unsupported and negligible.

2 Second, Google’s objections to Paragraphs 14-18, 21, 28-30 and 32-35 of  
3 the Mausner Declaration are incorrect. Mr. Mausner’s statements in these  
4 paragraphs are based upon his personal knowledge, establish a sufficient  
5 foundation, are not speculative, and do not constitute improper opinion testimony.  
6 For example, in regard to paragraph 14, after litigating this case for over 5 years,  
7 Mr. Mausner has personal knowledge that the following statement made by Google  
8 in an email to him is not correct: “[T]here is nothing that Google can do to remove  
9 the offending content without the cooperation of the site administrator. . . . Only an  
10 administrator can, by including code that blocks our robots or placing a request  
11 with us, prevent his/her page from being listed. Without administrator cooperation  
12 we cannot exclude material available on the Internet from our index.” Google  
13 itself does not contest the fact that its statement is incorrect.

14 Third, Google’s objections to the exhibits to the Mausner Declaration lack  
15 substance. The correspondence and letters attached as exhibits – all of which are  
16 authenticated by Mr. Mausner – lay a foundation for facts relevant to the Motion  
17 for Preliminary Injunction: Google’s position on certain matters or Google’s  
18 action or lack of action on certain matters. For example, Paragraph 17 of the  
19 Mausner Declaration authenticates a letter establishing Google’s position that it  
20 does not have to remove or disable access to usenet sites (pay sites) upon receiving  
21 notice of infringement. Paragraph 28 of the Mausner Declaration establishes that  
22 Google stated that it will continue to publicize Perfect 10’s DMCA notices on  
23 Chillingeffects.org. In short, Google’s assertion that certain language in the  
24 Mausner Declaration may be argumentative does not alter the underlying facts  
25 evidenced by the correspondence that Mr. Mausner authenticates in his declaration,  
26 or their relevance.

27 Fourth, Exhibits C, D, E, and G to the Mausner Declaration, to which  
28 Google also objects, are admissible under the standard for seeking a preliminary

1 injunction. In particular, portions of depositions in the consolidated  
2 *Google/Amazon* case, in which Google’s attorney was present (Exhibits E and G),  
3 are clearly admissible. Exhibit E, in fact, is from the deposition of Google’s own  
4 expert in this case. A portion of the deposition taken in the *Microsoft* case (Exhibit  
5 D) is also admissible. Exhibit C is also admissible under the less formal standard  
6 for seeking a preliminary injunction, and it shows that admissible evidence could  
7 be introduced at trial; furthermore, the evidence in Exhibit C is to some extent  
8 duplicative of clearly admissible evidence set forth in the Declarations of Margaret  
9 Jane Eden (Docket No. 778), Les Schwartz (Docket No. 779), Dean Hoffman  
10 (Docket No. 776), and C.J. Newton (Docket No. 777).<sup>1</sup>

11 **IV. CONCLUSION.**

12 For the foregoing reasons, this Court should consider the entire Mausner  
13 Declaration and the exhibits authenticated thereby, in ruling on Perfect 10’s  
14 Motion for Preliminary Injunction.

15 Dated: March 28, 2010

Respectfully submitted,

LAW OFFICES OF JEFFREY N. MAUSNER

By: Jeffrey N. Mausner

Jeffrey N. Mausner

Attorney for Plaintiff Perfect 10, Inc.

19 <sup>1</sup> Even if this Court has questions about the admissibility of portions of the  
20 Mausner Declaration, it should still consider the Declaration when ruling upon the  
21 PI Motion. Because a preliminary injunction is not a trial, both appellate courts  
22 and leading treatises have stated that the rules of evidence may be relaxed. *See,*  
23 *e.g., Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545, 551 (5th Cir.1993)  
24 (“at the preliminary injunction stage, the procedures in the district court are less  
25 formal, and the district court may rely on otherwise inadmissible evidence,  
26 including hearsay evidence”). As a leading treatise has noted:

[I]nasmuch as the grant of a preliminary injunction is  
discretionary, the trial court should be allowed to give even  
inadmissible evidence some weight when it is thought advisable to 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).