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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 DR. NORMAN
 ZADA IN SUPPORT OF 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

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1 Plaintiff Perfect 10, Inc. (“Perfect 10”) hereby responds to Defendant
2 Google Inc.’s (“Google”) Evidentiary Objections to the Declaration of Dr. Norman
3 Zada in Support of Perfect 10’s Motion for Preliminary Injunction Against
4 Defendant Google Inc. (Docket No. 797) (the “Zada Declaration” or “Zada
5 Decl.”), submitted by Perfect 10 on March 3, 2010 in connection with Perfect 10’s
6 Motion for Preliminary Injunction against Google (Docket No. 772) (the “PI
7 Motion”).

8 Google’s Evidentiary Objections to the Zada Declaration (Docket No. 816)
9 are set forth in a highly repetitive, 57-page document, in which Google attempts to
10 raise every conceivable objection, whether justified or not. To avoid burdening the
11 Court with another unreasonably lengthy document, Perfect 10 will generally
12 address Google’s Evidentiary Objections and will not respond at this time to each
13 of the 83 separate paragraphs of specific objections raised by Google. The
14 discussion set forth below demonstrates that Google’s Evidentiary Objections lack
15 merit and should be overruled by the Court.¹ Nevertheless, if this Court believes
16 the discussion set forth below insufficiently responds to Google’s Evidentiary
17

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

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

27 11AC. Wright, A. Miller & M. Kane, *Federal Practice & Procedure: Civil*
28 § 2949, at 216-17 (2d ed.1995).

1 Objections, Perfect 10 is prepared, at the Court’s request, to file a Supplemental
2 Response that specifically addresses, paragraph by paragraph, each of the 83
3 paragraphs of objections raised by Google.

4 **I. INCORRECT OBJECTIONS THAT THE ZADA DECLARATION**
5 **LACKS PERSONAL KNOWLEDGE, IS SPECULATIVE, AND**
6 **LACKS FOUNDATION.**

7 Apparently aware that the Zada Declaration establishes that Perfect 10 is
8 likely to prevail on its copyright infringement and right of publicity claims, and
9 therefore is entitled to injunctive relief, Google asserts, without basis or support,
10 that portions of the Zada Declaration are speculative, lack foundation, and do not
11 appear to be based on Dr. Zada’s personal knowledge. The language of the Zada
12 Declaration itself compels this Court to reject Google’s meritless contentions.

13 First, Dr. Zada has been intimately involved in every aspect of this case. Dr.
14 Zada has testified that he has spent “at least 2,000 hours using Google’s search
15 engine to locate infringements of Perfect 10’s copyrighted works.” Zada Decl. ¶1.
16 Dr. Zada has produced Perfect 10’s documents to Google, attended all of the
17 depositions of Google employees conducted by Perfect 10, and reviewed all of the
18 documents produced by Google, all of Google’s ’s discovery responses, and the
19 declarations submitted by Google’s declarants in this action. Zada Decl. ¶3.
20 Moreover, in Paragraph 4 of the Zada Declaration, Dr. Zada testifies in detail about
21 his personal involvement in the downloading or creation of the exhibits to his
22 declaration:

23 The Exhibits attached hereto, except where otherwise noted, fall
24 into one of ten categories: (a) true and correct copies of documents
25 that I have downloaded as Adobe PDF files from the Internet – I have
26 personally downloaded each and every one of the Adobe files attached
27 to this declaration as printed exhibits; (b) true and correct copies of
28 snapshots of my computer screen, which I captured using the program

1 “snagit;” (c) true and correct copies of images that I downloaded from
2 various pay sites; (d) true and correct copies of Adobe PDF files
3 downloaded from the Internet and print screens of web pages captured
4 using the program “snagit” that are included in Exhibit 9. I personally
5 downloaded or print screened each of these documents unless
6 otherwise indicated; e) true and correct copies of DMCA notices that I
7 sent to Google (excluding attached disks, if any); (f) true and correct
8 copies of spreadsheets that I created, or that were created under my
9 supervision; (g) true and correct copies of emails or other
10 communications received from Google; (h) true and correct copies of
11 documents produced by Google in discovery. . . .

12 Zada Decl. ¶4.

13 It is unlikely that there have been many cases where the president of a
14 company has been as involved in every aspect of litigation as Dr. Zada has been
15 involved in this action. Because of Dr. Zada’s intimate involvement in every
16 aspect of this action, the statements in the Zada Declaration are based upon Dr.
17 Zada’s personal knowledge, have sufficient foundation, and are not speculative.
18 Dr. Zada’s testimony is certainly based upon greater personal knowledge than that
19 of Google’s declarant, Shantal Rands Poovala, who testifies about how Google
20 allegedly processed DMCA notices during years when she was not even working
21 for Google! (*See* Perfect 10’s Evidentiary Objections to the Declaration and
22 Rebuttal Declaration of Shantal Rands Poovala, attached as part of Exhibit R (a
23 disk) to the Reply Declaration of Jeffrey N. Mausner in support of the PI Motion,
24 (Docket No. 827) (“Perfect 10’s Evidentiary Objections to the Poovala
25 Declarations”), Section II.

26 Accordingly, for all of the reasons discussed above, this Court should
27 overrule Google’s objections that the Zada Declaration lacks foundation, lacks
28 personal knowledge, or is speculative.

1 **II. INCORRECT OBJECTIONS THAT THE ZADA DECLARATION**
2 **CONSTITUTES IMPROPER OPINION TESTIMONY AND IS**
3 **ARGUMENTATIVE.**

4 Google further objects to portions of the Zada Declaration on the grounds
5 that they are argumentative and constitute improper opinion testimony. In fact, the
6 Zada Declaration sets forth the necessary qualifications for Dr. Zada to render the
7 opinions set forth in his declaration. Dr. Zada: (i) received a Ph.D. in Operations
8 Research from the University of California at Berkeley; (ii) worked as a research
9 staff member in the main computer science department at IBM; (iii) taught as a
10 visiting professor of applied mathematics at Stanford University, UCLA, Columbia
11 University, and UC Irvine; (iv) has programmed computers for more than 20 years;
12 and (v) based upon his experience, is qualified to testify about search engines and
13 their ability to block search results. Zada Decl. ¶3.

14 Because the Zada Declaration demonstrates that Dr. Zada possesses the
15 necessary qualifications and expertise to testify about the matters set forth in his
16 declaration, Google's unsupported objections that the Zada Declaration includes
17 improper opinion testimony and is argumentative lack merit. In particular, Dr.
18 Zada's testimony regarding Google's inadequate response to the DMCA notices
19 submitted by him to Google on behalf of Perfect 10 is relevant to the PI Motion.
20 Moreover, Google has not submitted any testimony from technically competent
21 witnesses which contradicts Dr. Zada's testimony that it moves to strike. In
22 contrast, Perfect 10 has submitted corroborating evidence, from three technically
23 competent witnesses, Sean Chumura (Docket No. 780), David O'Connor (Docket
24 No. 781), and Bennett McPhatter (Docket No. 782). Accordingly, this Court
25 should overrule Google's objections that Dr. Zada's testimony is argumentative
26 and constitutes improper opinion testimony.

1 **III. INCORRECT OBJECTIONS REGARDING PERFECT 10’S DMCA**
2 **NOTICES.**

3 Google incorrectly states that the Zada Declaration selectively excerpts
4 portions of the DMCA notices sent by Perfect 10 to Google. Google’s Evidentiary
5 Objections at 3. This claim is incorrect for several reasons.

6 First, Perfect 10 submitted the entirety of at least 138 DMCA notices in its
7 PI Motion. It provided every one of its 43 spreadsheet style notices, and it
8 provided every one of its 95 shorter Adobe Style notices. Zada Decl. Exh. 9
9 (Docket No. 790), “DMCA notices” folder. Therefore, Google has no basis to
10 object to any of those notices.

11 Second, Perfect 10 attached the full versions of the remaining 11 larger
12 Adobe Style notices in Exhibit 86 (the hard drive) to the Reply Declaration of Dr.
13 Norman Zada in support of the PI Motion (“Zada Reply Decl.”) (Docket No. 826)
14 ¶3. Google had also previously attached those notices to its DMCA motions.
15 Therefore, the Court has the ability to look at the complete versions of those
16 notices if it wishes to do so.

17 Third, Perfect 10 has had to continue to send notices to Google, because
18 Google has failed properly process such notices and rid its system of infringement.
19 In fact, the infringement on Google’s system is now hundreds of times what it was
20 in 2004. Zada Decl. ¶17, Exh. 10. Perfect 10 should not be penalized for
21 Google’s inaction. Google has forced Perfect 10 to identify so many thousands of
22 infringing images on Google’s system, that it is not possible for any Court to
23 completely examine all of Perfect 10’s notices. As a result, there is no alternative
24 other than to examine a sample of notices.

25 Fourth, because Perfect 10 created its spreadsheet style notices by following
26 Google’s instructions, there should be no dispute as to the sufficiency of those
27 notices. So whether Perfect 10 used a few notices as samples should be irrelevant.
28 It is only because Google took so long to remove the links that Perfect 10

1 identified from Google's Web Search results (in some cases seventeen months),
2 and never removed those same links from Google's Image Search results, that
3 Google has tried to claim that all of Perfect 10's spreadsheet style notices are
4 deficient. But Google has never explained why such notices are deficient, or
5 provided an example of what it believes would constitute a compliant spreadsheet
6 style notice. Zada Decl. ¶¶25-36, Exhs. 14-22.

7 Fifth, Perfect 10's Adobe Style notices were all created using the same
8 general principle: Perfect 10 made a copy of the infringing webpage showing the
9 full URL, identified the infringing P10 Images on that page, and then sent that
10 page to Google as an attachment to a DMCA notice. Because Google has never
11 presented Perfect 10 with an actual example of what Google would consider to be
12 a compliant notice, Perfect 10 has sent Google several different types of Adobe
13 Style notices. But once the Court examines a sample of each type, it should not be
14 necessary for the Court to examine all other notices of the same type.

15 For example, to identify infringing thumbnails in Google's Image Search
16 results, one technique that Perfect 10 used was to do a Google Image Search, cross
17 out the non-P10 thumbnails, and send a copy of that web page to Google as part of
18 the DMCA notice. (See for example, Zada Decl. ¶68, Exh. 48.) Perfect 10 stated
19 in its notice that all of the thumbnails that were not crossed out were copyrighted
20 by Perfect 10. A full version of this same type of notice was included among the
21 95 shorter Adobe Style DMCA notices included in Exhibit 9 (the disk) to the Zada
22 Declaration. (See for example, the notice in Exhibit 9 (the disk) determined by the
23 path \DMCA notices\95 smaller DMCA notices\110809 notices\1.) The Court can
24 determine, by examining either the excerpt from the larger notice, or the complete
25 version of one of the smaller notices, whether that type of notice provided by
26 Perfect 10 is sufficient for Google to locate the infringing material. The Court
27 need not examine every other similar notice. Google has refused to process this
28 type of notice, even though it can obviously locate its own web page when given a

1 copy of that page, particularly when the URL of the page is shown at the bottom
2 and the search term used to obtain the page is clearly indicated. Zada Decl. ¶69,
3 Exh. 49.

4 Perfect 10 also identified infringing P10 thumbnails using a “check the
5 infringing image” program created by Perfect 10, whereby Perfect 10 provided a
6 copy of the infringing Google created P10 thumbnail along with each of the three
7 URLs that Google provided with that thumbnail (the Image URL, the Web page
8 URL, and the thumbnail URL). *See*, for example, Zada Decl. ¶67. Exh. 47.
9 Perfect 10 provided similar types of complete notices in Exhibit 9 (the disk). *See*
10 for example, the notice in Exhibit 9 determined by the path \DMCA notices\95
11 smaller DMCA notices\110409 notices\4. Once again, the Court need only
12 examine one such notice to see if it provides Google with sufficient information to
13 locate the infringing material. Also, in this case, Google processed the notice that
14 Perfect 10 sent to it on November 4, 2009 but did not process the earlier similar
15 notice shown in Exhibit 47 to the Zada Declaration. The fact that Google
16 processed one of the notices indicates that it provided Google with sufficient
17 information to locate the infringing material.

18 Sixth, Google appears to be complaining that Perfect 10 did not attach a full
19 Adobe Style notice as a printed exhibit. However, such notices are so large
20 (because of all the infringement on Google’s system) that it would not be practical
21 to do so. Perfect 10 did include full copies of such notices in Exhibit 86 (the hard
22 drive), should the Court wish to examine them.

23 Seventh, Perfect 10 provided Google and the Court with an excel
24 spreadsheet which contained more than 32,000 URLs of the infringing web pages
25 identified in Perfect 10’s Adobe Style notices, along with roughly 8,000 URLs
26 identified in Perfect 10’s spreadsheet style notices. Zada Decl. ¶97, Exh. 9
27 “Identified infringing URLs” folder. This spreadsheet identified most of the
28 infringing URLs identified by Perfect 10 in its 167 DMCA notices to Google.

1 Eighth, Perfect 10 provided Google and the Court with copies of at least
2 3,800 full-size P10 Images stored on Google’s blogger.com servers, that were
3 contained in Perfect 10’s Adobe Style notices, along with an excel spreadsheet
4 listing those URLs. Zada Decl. ¶¶54, 60, Exh. 9 (the “Blogger up 2010” folder.)

5 Ninth, the safe harbor provisions of the DMCA are an affirmative defense
6 for which Google bears the burden. Therefore, in order to show that Google is not
7 likely to succeed on this affirmative defense, Perfect 10 only needs to show that it
8 submitted one or more substantially compliant DMCA notices to Google, which
9 Google failed to expeditiously process. Accordingly, it is both reasonable and
10 appropriate for Perfect 10 to demonstrate the sufficiency of a sample of its DMCA
11 notices which Google failed to expeditiously process.

12 By contrast, in order to demonstrate that it is likely to prevail on its DMCA
13 safe harbor affirmative defense, Google must affirmatively demonstrate that all of
14 Perfect 10’s DMCA notices that Google failed to expeditiously process were
15 substantially non-compliant. To satisfy this burden, Google must, at a minimum,
16 demonstrate that each and every one of the DMCA notices contained in Perfect
17 10’s moving papers in support of the PI Motion was substantially non-compliant or
18 was expeditiously and completely processed.

19 Here, however, Google has failed even to discuss Perfect 10’s sample
20 notices, let alone establish that any are deficient. Its lone technical expert, Paul
21 Haahr, does not testify that any of Perfect 10’s notices are deficient. Google has
22 not selected its own sample of Perfect 10 notices and demonstrated that each such
23 notice is substantially non-compliant. Instead, Google improperly seeks to rely
24 solely upon blanket statements made by Shantal Rands Poovala that all of Perfect
25 10’s DMCA notices are deficient, even though Ms. Poovala: (i) has no technical
26 qualifications; (ii) was not involved in the processing of many of Perfect 10’s
27 notices; and (iii) testified at deposition that she essentially knew nothing about
28 Perfect 10’s DMCA notices. *See* Perfect 10’s Evidentiary Objections to the

1 Poovala Declarations, Sections I-V, Docket No. 587, a copy of which is contained
2 on Exhibit R (a disk) to the Mausner Reply Declaration (Docket No. 827).

3 For all of these reasons, the Court should overrule Google’s objections to
4 Dr. Zada’s testimony regarding Perfect 10’s DMCA notices found in the Zada
5 Declaration.

6 **IV. INCORRECT OBJECTIONS REGARDING THE “SAMPLE”**
7 **SUBMITTED BY PERFECT 10**

8 Google mistakenly contends that the sample of 12 images submitted by
9 Perfect 10 in support of Perfect 10’s PI Motion (the “Sample”), described both in
10 the Zada Declaration and the Declaration of Melanie Poblete, is irrelevant because
11 “this miniscule subset of 12 images cannot establish probable success on the merits
12 of P10’s claims ...” Google’s Evidentiary Objections at 4.

13 Perfect 10 used a sample to make this motion less complicated and less time
14 consuming. Perfect 10 understands that the Court has advocated using a sample to
15 simplify the case. In fact, even though “The Sample” only consists of 12 images,
16 because Google has infringed those images so many times in so many different
17 ways, those 12 images should be sufficient to demonstrate how Google has
18 infringed P10 Images, as well as Google’s failure to remove or disable access to
19 such infringements.²

20 For example, Perfect 10 provides evidence in its PI Motion that the sample
21 image of Vibe Sorenson was identified to Google at *least 80 separate times* in
22 Perfect 10’s DMCA notices. Zada Decl. ¶2, Exh. 9, (the “Vibe DMCA notices”
23 folder). In order for Google to succeed in its DMCA defense, it must show why all
24 of those notices are deficient. However, Google has not shown why *any* of those
25 notices are deficient.

26 As a second example, Perfect 10 also provided in its PI Motion copies of

27 ² Other images are included in the PI Motion as well for which Perfect 10
28 has provided evidence that it owns the copyrights. Zada Reply Decl. ¶6.

1 infringing blogspot.com and blogger.com web pages attached to Perfect 10's July
2 2, 2007 DMCA notice that infringed "The Sample" image of Zita Gorocs. Zada
3 Decl. ¶50, Exh. 34, pages 5, 11. Perfect 10 also showed that Google still has not
4 removed those identified infringing full-size P10 Images from its own servers as of
5 March 2010. Zada Decl. ¶55, Exh. 36; Zada Reply Decl. Exh. 86 (the folder
6 entitled "Not removed or suppressed").

7 Perfect 10 also provided evidence that Google displayed the same sample
8 image of Vibe Sorenson at *least 40 times* in Google's Image Search results, and
9 that Google placed ads around that image at *least 28 times*. Zada Decl. Exhibit 9,
10 ("Vibe Sorenson Image Search" folder and "Vibe ads" folder). In fact, in the
11 20,000 P10 Thumbnails that Perfect 10 included in Exhibit 9 (the disk), there are
12 hundreds of examples of Google's infringement of the 12 P10 Images from "The
13 Sample." Zada Decl. Exh. 9 ("20,000 P10 Thumbnails" folder).

14 Accordingly, Google's objections to the Sample are incorrect; the discussion
15 of the Sample in the Zada Declaration establishes that Google did not
16 expeditiously and completely process a sample of Perfect 10's DMCA notices
17 which identified infringements of those 12 images. Consequently, Google is not
18 likely to prevail on its safe harbor affirmative defense.

19 Finally, the fact that the Zada Declaration focuses on the Sample does not
20 make such testimony inadmissible or irrelevant to the issues raised by the PI
21 Motion. This is especially true here, where Perfect 10 has submitted the copyright
22 certificates and deposit materials covering tens of thousands of images, and
23 demonstrating Perfect 10's ownership of all (or virtually all) of the images attached
24 to the Zada Decl., that are the subject of the PI Motion, either as part of Exhibit 9
25 to the Zada Declaration (a disk) or as part of the hard drive (Exhibit 86) submitted
26 with Dr. Zada's Reply Declaration in support of the PI Motion. Zada Reply Decl.
27 ¶6, Exh. 86. Accordingly, for all of these reasons, Google's objections to Dr.
28 Zada's testimony regarding the Sample lack merit and should be overruled.

1 **V. INCORRECT OBJECTIONS BASED ON GOOGLE’S CLAIM**
2 **THAT PERFECT 10 NEVER SENT IT A VALID DMCA NOTICE.**

3 Google objects to portions of the Zada Declaration as irrelevant, on the
4 ground that Perfect 10 allegedly never sent Google a valid DMCA notice. *See,*
5 *e.g.,* Google’s Evidentiary Objections, ¶21. This is not a legitimate evidentiary
6 objection. Rather, whether Perfect 10 sent valid DMCA notices to Google is a
7 disputed issue in the case. Moreover, Google has failed to provide any support for
8 this objection. Indeed, Google has failed to explain why any of Perfect 10’s
9 sample notices do not comply with the DMCA. Furthermore, Google has not
10 refuted any of the testimony of Perfect 10’s technical experts – Sean Chumura,
11 David O’Connor, and Bennett McPhatter (Docket Nos. 780, 781, 782) – that
12 Perfect 10’s notices allowed Google to readily locate the infringing material.
13 Finally, Google has never provided Perfect 10 or this Court with a single example
14 of what it believes constitutes a valid DMCA notice. For all of these reasons,
15 Google’s relevance objection lacks any basis, and this Court should overrule all
16 such objections to the Zada Declaration.

17 **VI. INCORRECT OBJECTIONS REGARDING DR. ZADA’S**
18 **TESTIMONY THAT GOOGLE FAILED TO PROCESS PERFECT**
19 **10’S DMCA NOTICES.**

20 Google objects to certain testimony in the Zada Declaration that Google
21 failed to process Perfect 10’s DMCA notices, on the grounds that such testimony is
22 speculative and lacks foundation. Once again, these objections are baseless. Dr.
23 Zada certainly has the personal knowledge and the foundation sufficient to testify
24 that emails that Google sent to Perfect 10 did not mention any deficiencies in the
25 actual URLs included in Perfect 10’s DMCA notices. These emails are found at
26 Exhibits 12, 14, 16, 58 to the Zada Declaration.

27 Dr. Zada also has the personal knowledge sufficient to testify that Google
28 did not suppress an image or a URL that contained infringing material identified by

1 Perfect 10 in its DMCA notices. Dr. Zada himself checked to see if the infringing
2 material was removed after he sent the DMCA notice. In the Zada Declaration, Dr.
3 Zada specifically demonstrates Google’s lack of action by comparing the contents
4 of Perfect 10’s DMCA notices with screen captures of the same identified
5 infringements taken months or years later. *See* Zada Decl., ¶¶29-36, 39, 47-81,
6 Exhs.17-22, 25, 31-60.

7 For these reasons, Dr. Zada’s testimony regarding Google’s failure to
8 process Perfect 10’s DMCA notices is neither speculative nor lacks foundation.
9 Accordingly, this Court should overrule Google’s objections to Dr. Zada’s
10 testimony in the Zada Declaration concerning this issue.

11 **VII. INCORRECT OBJECTIONS TO DR. ZADA’S TESTIMONY THAT**
12 **GOOGLE’S INSTRUCTIONS WERE UNUSABLE,**
13 **UNNECESSARILY BURDENSOME, OR WERE FOLLOWED BY**
14 **PERFECT 10.**

15 Google objects to Dr. Zada’s testimony regarding Google’s DMCA
16 instructions on the grounds that it is irrelevant and speculative, lacks foundation,
17 and lacks personal knowledge. These objections lack merit.

18 First, Dr. Zada’s testimony that Google’s “instructions” regarding Blogger
19 are not usable is neither irrelevant nor speculative. Dr. Zada testifies that, although
20 Google requires the identification of a “post URL” in DMCA notices, such URLs
21 do not exist on thousands of *blogger.com* web pages that infringe full-size Perfect
22 10 images. This testimony has sufficient foundation because Dr. Zada provides
23 actual examples of *blogger.com* web pages that do not have post URLs. Zada
24 Decl. Exhs. 34-40, 44. Google did not submit any evidence that contradicts Dr.
25 Zada’s statements. Moreover, Dr. Zada’s testimony regarding this issue is
26 supported by the Declarations of Sheena Chou and Sean Chumura in support of the
27 PI Motion. *See* Declaration of Sheena Chou in support of Perfect 10’s PI Motion
28 (Docket No. 774) (“Chou Decl.”), ¶¶13-14; Declaration of Sean Chumura in

1 support of Perfect 10's PI Motion (Docket No. 780) ("Chumura Decl."), ¶7 and
2 Exh. 2.

3 Second, Dr. Zada's testimony that Google's DMCA instructions are
4 incompatible with the DMCA itself is neither irrelevant nor speculative. Dr. Zada
5 properly states that: (i) Google cannot require that DMCA notices be submitted to
6 it only by fax or mail, when the DMCA statute itself requires that an agent provide
7 a street address, fax number, and email address (*see* Zada Decl., Exh. 14, page 1);
8 and (ii) Google cannot require that users send their DMCA notices to a fax number
9 that is not listed at the Copyright Office, or to the attention of a department not
10 listed at the Copyright Office (*see id.*, Exh. 14, page 1). In any case, Google does
11 not dispute the fact that it received Perfect 10's DMCA notices.

12 Third, Dr. Zada's testimony that Google keeps changing its DMCA
13 instructions clearly is relevant. Google has cited to its 2009 instructions in a
14 misleading attempt to claim that DMCA notices sent by Perfect 10 to Google in
15 **2004** are deficient. *See, e.g.*, Defendant Google's Reply In Support Of Motion for
16 Summary Judgment Re: Google's Entitlement to Safe Harbor Under 17 U.S.C.
17 §512(d) for Web and Image Search (Docket No. 529), page 12, lines 17-18. In
18 fact, as Dr. Zada explains, Perfect 10's notices sent to Google in 2004 followed
19 Google's 2004 instructions. Dr. Zada's testimony has sufficient foundation
20 because he submits a copy of Google's 2004 DMCA instructions as evidence.
21 Zada Decl. ¶25, Exh. 14, pages 1-2. Accordingly, this Court should overrule
22 Google's objections to Dr. Zada's testimony regarding its DMCA instructions.

23 **VIII. INCORRECT OBJECTIONS TO DR. ZADA'S TESTIMONY**
24 **REGARDING *RAPIDSHARE.COM*, *GIGANEWS.COM* AND**
25 ***THEPIRATEBAY.ORG*.**

26 Google asserts that Dr. Zada's testimony regarding massive infringing
27 paysites such as *rapidshare.com*, *giganews.com*, and *thepiratebay.org* is
28 "irrelevant." Google is incorrect. Perfect 10 alleges that Google improperly links

1 to, receives payments from, places ads on, and/or hosts websites that provide
2 download links for these infringing websites. *See* Zada Decl. ¶17, Exh. 10.
3 Google must prove that it expeditiously ended business dealings with, and disabled
4 access to, these infringing websites upon receiving knowledge of their infringing
5 conduct. Thus, evidence that Google failed to so act is clearly relevant.
6 Accordingly, this Court should overrule Google’s objections to Dr. Zada’s
7 testimony about such massive infringing paysites.

8 **IX. INCORRECT OBJECTIONS REGARDING DR. ZADA’S**
9 **TESTIMONY CONCERNING THE FUNCTIONALITY OF ADOBE**
10 **PROFESSIONAL SOFTWARE.**

11 Google also raises baseless objections to Dr. Zada’s testimony regarding the
12 functionality of Adobe Professional software. During the course of this action,
13 Google has advanced the completely unsupported assertion that DMCA notices
14 sent by Perfect 10 using Adobe Professional software are necessarily deficient and
15 unreasonably burdensome. Dr. Zada’s testimony rebuts this mistaken contention.
16 Dr. Zada provides evidence that Adobe files are searchable, that URLs can be
17 extracted, and that infringing images can be check marked. These features, as well
18 as many others, make a DMCA notice submitted using Adobe vastly superior to
19 handwritten DMCA notices sent by mail, which nevertheless are acceptable under
20 the DMCA. Zada Decl. ¶94.

21 Moreover, Dr. Zada’s testimony regarding the superiority of using Adobe
22 Professional to create DMCA notices, is supported by the Declarations of Sheena
23 Chou and Sean Chumura. *See* Chou Decl. (Docket No. 774) ¶¶7-8, Exh. 9;
24 Chumura Decl. (Docket No. 780) ¶¶4-5, Exh. 1. Accordingly, this Court should
25 overrule Google’s objections to Dr. Zada’s testimony, regarding the functionality
26 of Adobe Professional software.

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1 **X. INCORRECT OBJECTIONS TO DR. ZADA’S DESCRIPTIONS OF**
2 **GOOGLE’S FRAGMENTED LOGS AND GARBLED DMCA**
3 **DOCUMENTS.**

4 Google mistakenly objects to certain testimony by Dr. Zada regarding
5 Google’s fragmented DMCA “logs” and garbled DMCA documents. Dr. Zada
6 specifically testifies that he has reviewed all of the documents produced by both
7 Perfect 10 and Google in this action. *See* Zada Decl. ¶3. Under these
8 circumstances, Dr. Zada certainly has the capability to testify regarding the
9 contents of a particular “log” fragment -- that the log fragment does not contain
10 dates, identify the infringer, contain URLs identified by Perfect 10, identify who
11 processed the notice, or when it was processed. Dr. Zada can also testify that
12 DMCA notices that Google produced to Perfect 10 in discovery as part of its
13 “DMCA log” were hopelessly garbled. Finally, Dr. Zada can testify regarding the
14 number of rows in Google’s Adsense “log” that was produced to Perfect 10 in
15 discovery. The documents that Dr. Zada was testifying about were attached as
16 exhibits to his declaration, or to the declaration of Shantal Rands Poovala, and all
17 of his statements can be verified. Google did not submit any evidence to contradict
18 these statements. Accordingly, this Court should overrule Google’s objections to
19 Dr. Zada’s testimony regarding these matters.

20 **XI. INCORRECT OBJECTIONS THAT DR. ZADA**
21 **MISCHARACTERIZED DOCUMENTS.**

22 Google repeatedly objects, without any explanation at all, to large portions
23 of the Zada Declaration on the ground that Dr. Zada mischaracterizes documents.
24 For example, Google objects to Paragraphs 50-60 and Exhibits 9 and 34-40 of the
25 Zada Declaration on the basis that Dr. Zada “mischaracterizes the documents,”
26 without even indicating which documents were mischaracterized or why. Because
27 Google fails to establish that Dr. Zada has mischaracterized any documents, this
28 Court should overrule Google’s objections on this ground.

1 **XII. INCORRECT OBJECTIONS TO DR. ZADA’S TESTIMONY**
2 **REGARDING THE INFRINGEMENT OF THOUSANDS OF P10**
3 **IMAGES IN GOOGLE’S BLOGGER PROGRAM.**

4 Google objects, in a scatter-shot fashion, to Dr. Zada’s testimony, set forth at
5 various points in the Zada Declaration, that Google has hosted at least 565
6 websites in Google’s blogspot.com program, that have infringed, in total, more
7 than 11,000 P10 Images, and that more than 4,000 of those infringing P10 Images
8 were on blogspot.com sites that displayed Google AdSense ads. Google also
9 objects to Dr. Zada’s testimony that Google is storing at least 3,837 full-size P10
10 Images on its blogger.com servers. *See, e.g.,* Zada Decl. ¶¶60-64, Exhs. 41-44, 9.
11 Perfect 10 provides evidence of such infringement in Exhibit 9, including copies of
12 all 3,837 full-size P10 Images on Google’s servers. Exhibit 9 (Docket No. 790),
13 folder entitled “Blogger up 2010.” Google does not refute this evidence. There is
14 no basis for Google’s scatter-shot type of objections.

15 Dr. Zada’s testimony regarding the infringement of P10 Images in Google’s
16 Blogger program is based upon his own personal knowledge and actual copies of
17 such infringing images which were included with the PI Motion. Accordingly,
18 Google has no legitimate basis to strike this testimony and this Court should
19 overrule Google’s objections.

20 **XIII. CONCLUSION.**

21 For all of the foregoing reasons, this Court should disregard Google’s
22 objections to the Zada Declaration and the exhibits thereto and should consider the
23 Zada Declaration in its entirety.

24 Dated: March 28, 2010

Respectfully submitted,
LAW OFFICES OF JEFFREY N. MAUSNER

26 By: *Jeffrey N. Mausner* _____
27 Jeffrey N. Mausner
28 Attorney for Plaintiff Perfect 10, Inc.