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11 UNITED STATES DISTRICT COURT
 12 CENTRAL DISTRICT OF CALIFORNIA

13 PERFECT 10, INC., a California
 corporation,
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 Plaintiff,
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 vs.
 16 GOOGLE INC., a corporation; and
 17 DOES 1 through 100, inclusive,
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 Defendants.

CASE NO. CV 04-9484 AHM (SHx)
**GOOGLE INC.'S EVIDENTIARY
 OBJECTIONS TO THE REPLY
 DECLARATION OF JEFFREY N.
 MAUSNER IN SUPPORT OF
 PERFECT 10'S SECOND MOTION
 FOR PRELIMINARY INJUNCTION
 AGAINST DEFENDANT GOOGLE
 INC.**

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 submits the following objections to the Reply Declaration of Jeffrey
2 Mausner ("Mausner Reply Declaration"), submitted in support of Perfect 10's ("P10")
3 Second Motion for Preliminary Injunction Against Google Inc. ("Second PI
4 Motion"). The Mausner Reply Declaration is objectionable for several reasons, and
5 should be disregarded or accorded little or no weight in the determination of Perfect
6 10's Second PI Motion.

7 **I. THE PORTIONS OF THE MAUSNER REPLY DECLARATION**
8 **CONTAINING NEW EVIDENCE THAT IS NOT RESPONSIVE TO**
9 **GOOGLE'S OPPOSITION PAPERS SHOULD BE STRICKEN.**

10 The Mausner Reply Declaration contains a significant amount of evidence that
11 (1) was not included in P10's moving papers, and (2) is not responsive to the
12 arguments and authorities in Google's Opposition to P10's Second PI Motion. For
13 example, the Mausner Reply Declaration includes testimony and documents
14 regarding:

- 15 • The *Viacom v. YouTube* litigation (¶ 2 and Ex. Q);
- 16 • P10's unfounded allegations of discovery misconduct by Google (which
17 allegations previously have been rejected by Judge Hillman) (¶ 2);
- 18 • P10's improper demand to re-depose Google witness Shantal Rands
19 Poovala (¶ 6); and
- 20 • Additional alleged copyright registration materials located on a hard
21 drive attached as an exhibit to the Zada Reply Declaration (¶ 3).

22 This newly-submitted evidence should be disregarded. The Court's April 25,
23 2007 Scheduling and Case Management Order ("Case Management Order") clearly
24 informs P10 of the consequences of including such new evidence in its reply papers:
25 "Reply papers shall be limited to argument and/or authorities responsive to the
26 opposition papers. The Court will ignore new matter that was improperly
27 introduced." Case Management Order at 4:20-22; see also Zamani v. Carnes, 491
28 F.3d 990, 997 (9th Cir. 2007) ("The district court need not consider arguments raised

1 for the first time in a reply brief."). Because Google has no opportunity to fully and
2 fairly respond to this new evidence, Google would be prejudiced were the Court to
3 consider it. Accordingly, the Court should disregard P10's new evidence introduced
4 for the first time in the Mausner Reply Declaration. Alternatively, should the Court
5 elect to consider P10's new reply evidence, Google respectfully requests the
6 opportunity to file a sur-reply memorandum to address it.

7 **II. THE PORTIONS OF THE MAUSNER REPLY DECLARATION**
8 **CONTAINING LEGAL ARGUMENT (AS OPPOSED TO EVIDENCE)**
9 **SHOULD BE STRICKEN.**

10 The purpose of a declaration is to submit evidence; it is improper to use a
11 declaration to present legal argument from an attorney. See, e.g., Silver v. Executive
12 Car Leasing Long-Term Disability Plan, 466 F.3d 727, 731 n.2 (9th Cir. 2006)
13 (affirming district court's exclusion of a declaration from plaintiff's counsel because it
14 "contains legal argument that was not appropriate for a declaration, as well as
15 analysis of complex [facts] as to which [plaintiff's] attorney would not have been
16 competent to testify"); Lira v. Cate, 2010 WL 727979, at *4 n.5 (N.D. Cal. Feb. 26,
17 2010) (striking portions of declaration containing legal argument).

18 Here, the Mausner Reply Declaration consists largely of legal argument, not
19 actual evidence. For example, Mausner purports to "declare" that:

- 20 • "Google's motions for summary judgment cannot be decided until Google
21 produces all of the relevant documents. In the meantime, a preliminary
22 injunction should be in place to stop Google from contributing to infringement
23 of Perfect 10's copyrighted images." (Mausner Reply Decl. at 4:14-5:3);
- 24 • "Google's submission of all these pleadings in opposing the PI Motion violates
25 Local Rule 11-6, which states that memoranda of points and authorities in
26 connection with a motion may not exceed 25 pages. Accordingly, Perfect 10
27 requests that the Court disregard or strike the eight additional briefs that
28 Google has submitted, along with Google's three undisputed statements of facts

1 and other supporting documents. ... Perfect 10 believes it is improper for
2 Google to submit pleadings relating to other matters in opposition to this
3 motion" (Mausner Reply Decl. at 6:25-7:12).

4 See also Mausner Reply Decl. at 6:1-17; 7:23-8:4.

5 Such legal argument is inappropriate for submission within an attorney's
6 declaration, and may only be made in P10's memorandum, which is already 25 pages
7 long. All such legal argument in the Mausner Reply Declaration should be stricken.
8 See Silver, 466 F.3d at 731 n.2; L.R. 11-6 ("No memorandum of points and
9 authorities, pre-trial brief, trial brief, or post-trial brief shall exceed 25 pages").

10 **III. PORTIONS OF THE MAUSNER REPLY DECLARATION ARE**
11 **INADMISSIBLE AND SHOULD BE DISREGARDED.**

12 The Mausner Reply Declaration should be disregarded for purposes of Perfect
13 10's Second PI Motion because it is inadmissible under the Federal Rules of
14 Evidence. The Federal Rules of Evidence apply to evidence submitted to the Court
15 on 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 any
20 weight to, such inadmissible evidence in appropriate circumstances. See Beijing
21 Tong Ren Tang (USA) Corp. v. TRT USA Corp., --- F.Supp.2d ----, 2009 WL
22 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 not
25 satisfy [the movant's] burden"); Kitsap Physicians Service v. Washington Dental
26 Service, 671 F.Supp. 1267, 1269 (W.D. Wa. 1987) (refusing to consider affidavits
27 "that would have been inadmissible under the Federal Rules of Evidence" and
28 denying preliminary injunction). Because P10 has had nearly *six years* to obtain

1 evidence regarding its Second PI Motion, it is particularly appropriate to hold P10's
2 evidence to the usual standards of admissibility for motion practice.

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

	<u>Proffered Evidence</u>	<u>Objection</u>
11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	1. Mausner Reply Decl., ¶ 2 and Exh. Q	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702, 801-804, 1002, Case Management Order at 4:20-22</u> The statements and exhibit are argumentative, irrelevant, speculative, lack foundation, do not appear to be based on the witness's personal knowledge, and constitute improper lay opinion testimony and inadmissible hearsay. Mausner's personal commentary regarding a news article, Viacom's partial summary judgment motion in the <i>Viacom v. YouTube</i> case, and selected emails submitted with the Viacom summary judgment motion is argumentative and irrelevant. Mausner's personal opinions regarding Google's

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alleged discovery practices and intimation that P10 may seek to revisit issues from motions P10 has previously lost before Judge Hillman in this case are irrelevant to P10's Second PI Motion. Further, P10's Second PI Motion was not based on alleged discovery violations by Google, nor was it based on the *Viacom v. YouTube* case, and such new evidence and claims raised for the first time on reply should be disregarded. Mausner's personal opinion that Google's DMCA Motions "cannot be decided" until Google produces additional documents is irrelevant because, among other things, it is flatly contradicted by P10's representations and conduct in this case, including P10's declination to file a Rule 56(f) motion in opposition to Google's DMCA Motions. See Docket Nos. 495, 497, 498.

The news article is inadmissible hearsay and irrelevant.

The Viacom partial summary judgment motion is inadmissible hearsay, argumentative, speculative, lacking in foundation, and whatever miniscule probative value it might have here is

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		<p>outweighed by its prejudicial nature. It also is irrelevant for numerous reasons, including because the <i>Viacom</i> case involves different parties, different operative facts, and a Google service (YouTube) which is not at issue in P10's suit against Google.</p>
2.	<p>Mausner Reply Decl., ¶ 3 and Ex. 9 to the Declaration of Zada in Support of Perfect 10's 2nd Preliminary Injunction Motion [Dkt. No. 790] ("Zada Decl.") and Ex. 86 to the Reply Declaration of Zada in Support of Perfect 10's 2nd Preliminary Injunction Motion [Dkt. No. 826] ("Zada Reply Decl.") .</p>	<p><u>Fed. R. Evid. 401, 402, 403, 602, Case Management Order at 4:20-22</u></p> <p>The statements regarding the Copyright Registration Certificates alleged to be located on the hard drive previously submitted as Ex. 9 to the Zada Declaration are irrelevant and lack foundation. Neither this declaration nor the Zada Declaration identify the specific location of such documents on the hard drive, and the statements do not provide a basis for Mausner's personal knowledge regarding the previously undisclosed contents of the exhibit to another witness's declaration. Furthermore, the registration certificates allegedly enclosed on the referenced exhibits to the Zada Declaration and the Zada Reply Declaration are irrelevant because they have not been connected to any specific infringements alleged by P10.</p>

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		Mausner's belated identification of materials submitted by other declarants also violates this Court's Case Management Order.
3.	Mausner Reply Decl., ¶ 4	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 1002</u> The statements are argumentative (for example, what Mausner personally thinks is "absolutely outrageous" does not advance this case or assist the Court in any way). The statements are also speculative, irrelevant, and improper opinion testimony. For example, Mausner's personal opinions (including those regarding the alleged similarity of the "Adobe style notices,") and Mausner's personal beliefs and opinions regarding Google's DMCA procedures for forwarding DMCA notices to Chilling Effects have no bearing on P10's probability of success on its copyright claims. These statements also lack foundation because Mausner identifies no basis of his alleged knowledge regarding Google's actions. These statements also violate the Best Evidence Rule, because the referenced DMCA Notices themselves are the best evidence of

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		their contents. Mausner's personal opinion that a DMCA notice consisting of an entire hard drive or DVD (like P10's December 2005 and 2007 DMCA notices) is the same type of notice as a single emailed PDF file (like P10's late 2009 DMCA notices) is not the best evidence of the contents or format of those notices.
4.	Mausner Reply Decl., at ¶ 5	<u>Fed. R. Evid. 401, 402, 403, 602, 701</u> The statements are argumentative, irrelevant, and improper opinion testimony. Mausner's personal opinions (and his description of the "opinions" of his corporate client P10) regarding the propriety of Google's submitted exhibits, and his personal interpretation of Local Rule 11-6, have no bearing on P10's probability of success on its claims.
5.	Mausner Reply Decl., at ¶ 6 and Ex. S. ("Although Perfect 10 took a Rule 30(b)(6) deposition in which Ms. Poovala testified for approximately 3 hours in 2008, before Ms. Poovala submitted these two declarations, Perfect 10 has been trying unsuccessfully to take Ms.	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702, 1001, Case Management Order at 4:20-22</u> The statements are irrelevant, argumentative, mischaracterize the documents, and constitute improper opinion testimony. Mausner's argumentative allegations regarding P10's improper attempts to re-depose a Google witness whom it has already deposed,


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Poovala's deposition since October 2009. Perfect 10 has continuously met-and-conferred with Google regarding this issue for months, to no avail. Submitted under seal as Exhibit S are true and correct copies of correspondence between Perfect 10's attorneys (Valerie Kincaid and me) and Google's attorneys regarding this issue. As set forth in Exhibit S, Google still will not provide a deposition date or produce Ms. Poovala's documents, after five months of meeting and conferring.")

Shantal Rands Poovala, have no bearing on P10's probability of success on its claims. Further, P10's Second PI Motion was not based on alleged discovery violations by Google, and such new evidence and claims raised for the first time on reply should be disregarded. Additionally, multiple emails reproduced within Exhibit S may not accurately reflect the contents of the original data, as they reference messages included "below" that may have been repositioned or not included within the exhibit. See Ex. S at 3, 11, 18, 20, 21, 22, 23, 24.

DATED: March 31, 2010

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By 
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