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 10 American Blind and Wallpaper Factory, Inc.

11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA

13 GOOGLE INC., a Delaware corporation,
 14 Plaintiff,

15 v.

16 AMERICAN BLIND & WALLPAPER
 17 FACTORY, INC., a Delaware corporation
 18 d/b/a decoratetoday.com, Inc., and DOES
 1-100, INCLUSIVE,
 19 Defendant.

CASE NO. C 03-5340

**AMERICAN BLIND & WALLPAPER
 FACTORY INC.'S RESPONSE TO
 GOOGLE'S OBJECTIONS TO EVIDENCE
 SUBMITTED BY ABWF IN OPPOSITION
 TO GOOGLE'S MOTION FOR
 SUMMARY JUDGMENT**

Date: February 16, 2007
 Courtroom: 3, 5th Floor
 Time: 9:00 a.m.
 Judge: Hon. Jeremy Fogel

21 AMERICAN BLIND & WALLPAPER
 22 FACTORY, INC., a Delaware corporation
 23 d/b/a decoratetoday.com, Inc.,

Counter-Plaintiff,

24 v.

25 GOOGLE, INC.,
 26 Counter-Defendant.
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1 Defendant and Counter-Plaintiff American Blind & Wallpaper Factory Inc. (“American
2 Blind”) hereby responds to Google’s objections to evidence submitted by American Blind in
3 opposition to Google’s Motion for Summary Judgment.

4 Google has moved to strike in part the Declaration of Jeffrey Alderman in Support of
5 American Blind & Wallpaper Factor Inc.’s Opposition to Google Inc.’s Motion for Summary
6 Judgment (Docket Item No. 266) (the “Alderman Declaration”) and Exhibits A and B to the
7 Alderman Declaration. Google argues that the challenged declaration and accompanying
8 exhibits lack foundation, relevance, constitute inadmissible hearsay, and/or violate the best
9 evidence rule. Google’s objections should be overruled because the testimony contained in the
10 Alderman Declaration is based on Mr. Alderman’s personal knowledge and first-hand
11 observations as the Director of Business Development and E-Commerce for American Blind, is
12 relevant insofar as it raises triable issues of fact regarding American Blind’s trademark rights,
13 and the best evidence rule does not apply.

14 Rule 56(e) of the Federal Rules of Civil Procedure provides that “affidavits shall be
15 made on personal knowledge, shall set forth such facts as would be admissible in evidence, and
16 shall show affirmatively that the affiant is competent to testify to the matters stated therein.”
17 Fed. R. Civ. P. 56(e). “Personal knowledge may be inferred from the declarant’s position and
18 the nature of his role.” *Kaypro v. Justus*, 218 F.3d 1070, 1075 (9th Cir. 2000) (credit manager’s
19 declaration was adequate where manager had held position for five years and he indicated that
20 he had personal knowledge of facts to which he testified); *Barthelemy v. Air Lines Pilots Ass’n*,
21 897 F.2d 999, 1018 (9th Cir. 1990) (corporate officer’s personal knowledge of various corporate
22 activities could be presumed); *Self-Realization Fellowship Church v. Ananda Church of Self-
23 Realization*, 206 F.3d 1322, 1330 (9th Cir. 2000) (same).

24 Mr. Alderman testifies that he has personal knowledge of the facts contained in his
25 declaration, and, as an employee of American Blind since 2001, currently as the Director of
26 Business Development and E-Commerce, he was in a position to have such knowledge. *See ¶ 1*
27 of Alderman Declaration. Mr. Alderman is one of the most senior executives at American
28 Blind. Mr. Alderman’s declaration is properly admitted because he meets the requisite standard

1 of personal knowledge under Federal Rule of Civil Procedure 56(e). Since he is testifying
2 regarding information within his personal knowledge, his testimony is not hearsay.

3 Google further objects that Mr. Alderman cannot testify about the manner and scope of
4 use of American Blind's trademarks in American Blind's catalogues, scripts, and e-mail
5 campaigns due to the best evidence rule contained in Federal Rule of Evidence 1002. This is
6 incorrect. Mr. Alderman is permitted to testify about the manner in which the American Blind
7 Marks have been used without requiring the submission of documentary evidence. *E.g., B. R.*
8 *Baker Co. v. Lebow Bros.*, 150 F.2d 580 (C.C.P.A. 1945) ("While the oral testimony of a single
9 interested witness must necessarily have its weaknesses, we know of nothing in trade-mark law
10 which justifies the rejection of such proof if it is sufficiently probative."); 2 McCarthy on
11 Trademarks § 16:20, p. 16-37 (2002) ("Oral testimony, even of a single witness, if 'sufficiently
12 probative,' may suffice to prove priority.") Nevertheless, Mr. Alderman's declaration is more
13 than simply "oral" testimony without corroborating documents — he has provided the Court
14 with exemplars of the catalogues, scripts, and e-mail campaigns that Mr. Alderman testifies
15 about. *See, e.g., Alderman Decl., Ex. A-G.* Certainly, nothing in the best evidence rule requires
16 that *every* example of use of a trademark be submitted into evidence. Thus, Mr. Alderman's
17 testimony is permitted, and the Court should overrule Google's objections.

18 As Google is well aware, most of the facts contained in the Alderman Declaration are
19 also established in deposition testimony taken by Google of three American Blind witnesses —
20 Mr. Alderman, Gerald Curran, and Michael Layne. Rather than burden the Court with
21 numerous deposition citations and exhibits, American Blind decided to efficiently summarize
22 the material facts in a declaration by the person with the most knowledge. If the Court is at all
23 inclined to sustain Google's objection, American Blind requests leave to supplement the record
24 to include the deposition evidence of American Blind's use of its marks that Google obtained
25 from Messrs. Alderman, Curran, and Layne. American Blind will have this alternative evidence
26 available at the summary judgment hearing in the event the Court wishes to receive it.

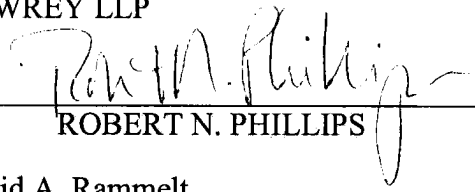
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Dated: February 13, 2007

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