

LESTER L. LEVY (Admitted *Pro Hac Vice*)
 MICHELE F. RAPHAEL (Admitted *Pro Hac Vice*)
 WOLF POPPER LLP
 845 Third Avenue
 New York, NY 10022
 Telephone: (212) 759-4600
 Facsimile: (212) 486-2093
 E-Mail: llevy@wolfdpopper.com
 E-Mail: mraphael@wolfdpopper.com

WILLIAM M. AUDET (117456)
 AUDET & PARTNERS, LLP
 221 Main Street, Suite 1460
 San Francisco, CA 94105-1938
 Telephone: (415) 568-2555
 Facsimile: (415) 568-2556
 E-Mail: waudet@audetlaw.com

MARC M. SELTZER (54534)
 SUSMAN GODFREY L.L.P.
 1901 Avenue of the Stars, Suite 950
 Los Angeles, CA 90067-6029
 Telephone: (310) 789-3100
 Facsimile: (310) 789-3150
 E-Mail: mseltzer@susmangodfrey.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION

CLRB HANSON INDUSTRIES, LLC d/b/a
 INDUSTRIAL PRINTING, and HOWARD
 STERN, on behalf of themselves and all others
 similarly situated,

Plaintiffs,

vs.

GOOGLE, INC.,

Defendant.

Case No. C 05-03649 JW

**PLAINTIFFS' OBJECTION TO THE
 DECLARATION OF HEATHER
 WILBURN IN SUPPORT OF GOOGLE
 INC.'S OPENING BRIEF REGARDING
 THE 120% RULE**

Date: February 25, 2008
 Time: 9:00 a.m.
 Place: Courtroom 8
 Hon. James W. Ware

814919v1/010480

**PLAINTIFFS' OBJECTION TO THE DECLARATION OF HEATHER WILBURN
 IN SUPPORT OF GOOGLE INC.'S OPENING BRIEF REGARDING THE 120% RULE**
 CASE NO. C 05-03649 JW

1 Plaintiffs CLRB Hanson Industries, LLC (Hanson) and Howard Stern (Stern) hereby
2 respectfully object to the admissibility or consideration of the Declaration of Heather Wilburn in
3 Support of Google Inc.'s Opening Brief Regarding the 120% Rule ("Wilburn Decl."), dated
4 January 29, 2008, and specifically to Paragraph 3 of the Wilburn Decl. and Exhibit A thereto on
5 the following grounds.

6 First, to the extent the Wilburn Decl. is sought to be used to support the proposition that
7 Exhibit A contains an image that appeared on the screen from the AdWords sign-up webpage in
8 2002, which is the sole apparent object of the declaration, it is inadmissible and cannot be
9 considered for that purpose. Rule 56(e) of the Federal Rules of Civil Procedure, which governs
10 motions for summary judgment, requires that "[a] supporting or opposing affidavit must be made
11 on personal knowledge, set out facts that would be admissible in evidence, and show that the
12 affiant is competent to testify on the matters stated." It is a fundamental precept of summary
13 judgment motion jurisprudence that an affidavit made on "information and belief" does not meet
14 this standard because it is not made on personal knowledge and that it therefore may not be
15 considered in deciding a summary judgment motion. *Automatic Radio Mfg., Inc. Co. v. Hazeltine*
16 *Research, Inc.*, 339 U.S. 827, 831 & n.4, 70 S.Ct. 894, 94 L.Ed. 1312, 1317 (1950) ("there is
17 nothing in the record to support the averment, since the affidavit in support thereof was made
18 upon information and belief and the relevant portion, at least, does not comply with Rule 56(e) of
19 the Federal Rules of Civil Procedure"); *Taylor v. List*, 880 F.2d 1040, 1045 & n.3 (9th Cir. 1989)
20 (an affidavit made on "information and belief" does not comply with F.R.Civ.P. 56(e) and may
21 not be considered on a motion for summary judgment); *Yanis v. United States*, 118 F.Supp.2d
22 1024, 1030 (C.D. Cal. 2000) ("Declarations on information and belief are insufficient to establish
23 a factual dispute for purposes of summary judgment.") (citing *Taylor v. List*).

24 Here, the statement at issue is expressly made on "information and belief." In Paragraph 1
25 of the Wilburn Decl., Ms. Wilburn states: "I have personal knowledge of the facts set forth below
26 except as to those matters stated on information and belief, and as to those matters, I believe them
27 to be true." (emphasis added). In Paragraph 3, she states, "I believe the screenshot image on this

1 printout is an accurate depiction of the “Specify your daily budget” screen from the AdWords
2 sign up webpages in 2002.” (emphasis added). The printout in question is attached as Exhibit A
3 to the Wilburn Decl.

4 There can be no question that under these circumstances this statement and the attached
5 exhibit cannot be considered in support of Google’s motion for summary judgment.

6 Second, putting aside the failure to meet the standard of F.R.Civ.P. 56(e), the very words
7 she chose to use suggest how unreliable this so-called evidence is to establish what was actually
8 displayed to prospective advertisers in 2002. The printout is itself undated, written by an
9 anonymous author, comes from a binder she describes as five years old which has not been
10 authenticated, with no indication as to when items may have been added to the binder, and
11 without any contemporaneous written statement that identifies the alleged screenshot image as an
12 image that was ever actually used by Google. Furthermore, the fact that the alleged screenshot
13 image apparently has a typographical error on its face suggests that it was never actually used.

14 In any event, the Court may not consider this newly proffered exhibit and Ms. Wilburn’s
15 testimony about it because that testimony is not based on personal knowledge.¹

16 Third, this new testimony and exhibit were never previously offered by Google, never
17 made part of the summary judgment record before the Court and never tested in discovery, and,
18 for these reasons alone, should not be considered at this time.

19
20 Dated: February 11, 2008.

21 Respectfully submitted,

22 LESTER L. LEVY (Admitted *Pro Hac Vice*)
23 MICHELE F. RAPHAEL (Admitted *Pro Hac Vice*)
24 WOLF POPPER LLP

25
26 ¹ A formal motion to strike the offending testimony and exhibit are not required; an objection to
27 their being considered suffices. *Lugue v. Hercules, Inc.*, 12 F.Supp. 1351, 1358 (S.D. Ga. 1997)
28 (“the nonmoving party is not required to make a motion to strike exhibits that do not conform
with the federal rules[;] all that is required is a timely objection that sets forth the grounds for the
objection”).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

WILLIAM M. AUDET
AUDET & PARTNERS, LLP

MARC M. SELTZER
SUSMAN GODFREY L.L.P.

By /s/ Marc M. Seltzer
Marc M. Seltzer
Attorneys for Plaintiff