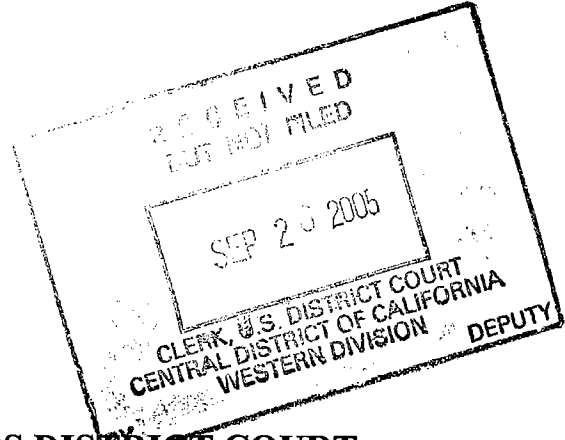


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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA

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15 PERFECT 10, INC., a California
16 Corporation

17 Plaintiff,

18 vs.

19 GOOGLE INC., a corporation; and
20 DOES 1 through 100, inclusive

21 Defendant.

22 Case No. CV04-9484 AHM (SHx)

23 **GOOGLE INC.'S MOTION TO
24 STRIKE DECLARATION OF
25 NORMAN ZADA**

26 Date: November 7, 2005
27 Time: 10:00 a.m.
28 Courtroom: 14

Google Inc. respectfully moves this Court to strike the portions described below in the Declaration of Norman Zada filed in support of Perfect 10, Inc.'s Motion for a Preliminary Injunction. First, Dr. Zada has not qualified himself as an expert on the matters which he testifies, yet his declaration contains opinion testimony on highly technical or specialized issues, such as the location of infringing material in cyberspace, how difficult or easy it would be to take down a link to a Web site or not display images from a Web site, the ranking of search results on Google and other search engines, and how Google's advertising program works among other matters. All of his testimony on such matters should be struck. Second, Dr. Zada's opinions are unreliable, misleading, and unsupported by personal knowledge and further should be struck on that basis. Perfect 10's use of Dr. Zada to introduce this expert testimony

1 under the guise of a layperson is impermissible and would allow Perfect 10 to evade
2 the reliability and disclosure requirements for experts.

3
4 **I. THE COURT MUST WEIGH DR. ZADA'S COMPETENCY,**
5 **PERSONAL KNOWLEDGE, AND CREDIBILITY IN LIGHT OF**
6 **EVIDENCE RULES**

7 Although declarations in support of preliminary injunctions are not
8 explicitly subject to the Federal Rules of Evidence, *Flynt Distrib. Co. Inc. v. Harvey*,
9 734 F.2d 1389, 1394 (9th Cir. 1984), the trial court must "determine the weight to be
10 given such evidence, taking into consideration the declarant's competency, personal
11 knowledge, and credibility." *Welker v. Cicerone*, 174 F.Supp.2d 1055, 1059, n.2
12 (C.D. Cal. 2001). Thus, courts have struck declarations submitted in connection with
13 motions for preliminary injunctions based on evidentiary objections, including
14 qualifications as an expert. *See, e.g., Sega Enterprises Ltd. v. MAPHIA*, 948 F.Supp.
15 923, 929 (N.D. Cal. 1996) (granting motion to strike computer expert's declaration in
16 support of opposition to preliminary injunction with respect to opinions expressed
17 outside this field).

18 Moreover, this Court has specifically recognized the importance of the
19 evidence rules in making this determination. Local Rule 7-7 states that "[d]eclarations
20 shall contain only factual, evidentiary matter and shall conform as far as possible to
21 the requirements of F.R.Civ.P 56(e)." Rule 56(e) then requires that affidavits be made
22 "on personal knowledge, shall set forth facts as would be admissible in evidence, and
23 shall show affirmatively that the affiant is competent to testify to the matters stated
24 therein." Fed. Rule Civ. Proc. 56 (e). Experts thus must back up their opinions with
25 specific facts and avoid conclusory allegations. *United States v. Various Slot*
26 *Machines*, 658 F.2d 697, 700 (9th Cir. 1981). The object of Rule 56(e) "is not to
27 replace conclusory allegations of the complaint or answer with conclusory allegations
28 of an affidavit." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990).

