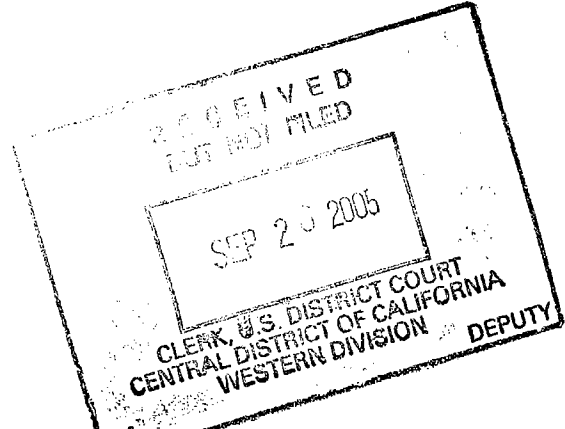


1 Andrew P. Bridges (SBN: 122761)
2 Jennifer A. Golinveaux (SBN: 203056)
3 WINSTON & STRAWN LLP
4 101 California Street
5 San Francisco, CA 94111-5894
6 Telephone: 415-591-1000
7 Facsimile: 415-591-1400

8 Attorneys for Defendant
9 GOOGLE INC.



10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**

12 Winston & Strawn LLP
13 101 California Street
14 San Francisco, CA 94111-5894

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

29 Google Inc. respectfully moves this Court to strike the portions described below
30 in the Declaration of Norman Zada filed in support of Perfect 10, Inc.'s Motion for a
31 Preliminary Injunction. First, Dr. Zada has not qualified himself as an expert on the
32 matters which he testifies, yet his declaration contains opinion testimony on highly
33 technical or specialized issues, such as the location of infringing material in
34 cyberspace, how difficult or easy it would be to take down a link to a Web site or not
35 display images from a Web site, the ranking of search results on Google and other
36 search engines, and how Google's advertising program works among other matters.
37 All of his testimony on such matters should be struck. Second, Dr. Zada's opinions
38 are unreliable, misleading, and unsupported by personal knowledge and further should
39 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).

1 **II. OPINION TESTIMONY ON TECHNICAL MATTERS MUST FALL**
2 **WITHIN RULE 702 AND THE *DAUBERT* TEST**

3 Federal Rule of Evidence 701 precludes lay witnesses from expressing an
4 opinion on "scientific, technical, or other specialized knowledge." Fed. R. Evid.
5 701(c). The purpose of the rule is to eliminate the risk that "reliability requirements
6 set forth in Rule 702 will be evaded" and ensure that "a party will not evade the expert
7 witness disclosure requirements." Fed. R. Evid. 701, Advisory Committee Notes to
8 2000 Proposed Rules.

9 "There is no more certain test for determining when experts may be used
10 than the common sense inquiry whether the untrained layman would be qualified to
11 determine intelligently and to the best possible degree that particular issue without
12 enlightenment from those having specialized understanding of the subject involved."
13 Fed. R. Evid. 702, Advisory Committee Notes to 1972 Proposed Rules (citation
14 omitted). Dr. Zada's declaration clearly expresses technical opinions outside the scope
15 of an untrained layman on the complex way that the Internet, and Google specifically,
16 function. Thus, in order for his opinion to be admissible, it must fall within Federal
17 Rule of Evidence 702 and the Supreme Court's decision in *Daubert v. Merrell Dow*
18 *Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and its progeny.

19 Rule 702 provides that a person qualified as an expert "by knowledge,
20 skill, experience, training, or education" may testify in the form of an opinion if: "(1)
21 the testimony is based upon sufficient facts or data, (2) the testimony is the product of
22 reliable principles and methods, and (3) the witness has applied the principles and
23 methods reliably to the facts of the case." Fed. R. Evid. 702.

24 In *Daubert*, the Supreme Court provided a non-exclusive list of factors
25 for courts to consider in making the Rule 702 inquiry: (1) "whether [a theory or
26 technique] can be (and has been) tested;" (2) "whether the theory or technique has
27 been subjected to peer review and publication;" (3) "the known or potential rate of
28 error;" (4) "the existence and maintenance of standards controlling the technique's

1 operation;" and (5) "general acceptance . . . of a relevant scientific community." 509
2 U.S. at 593-94 (citations omitted).

3
4 **III. THE COURT SHOULD STRIKE DR. ZADA'S OPINION TESTIMONY**

5 **A. DR. ZADA DOES NOT QUALIFY AS AN EXPERT, BUT IMPROPERLY**
6 **TESTIFIES REGARDING TECHNICAL MATTERS**

7 As a threshold matter, Dr. Zada has not established that he is qualified to
8 testify about the topics he discusses. Thus, the Court should strike all testimony on
9 technical and specialized matters solely on this basis.

10 Dr. Zada has provided no evidence of formal education that would allow
11 him to testify about the functioning of Web sites, Google, or the Internet. He states
12 that he received his Ph.D in Operations Research from the University of California at
13 Berkeley in 1972, a degree which on its face has nothing to do with the topics he
14 discusses, particularly since he received it in 1972 prior to the Internet. Zada Dec. ¶3.
15 Even now, U.C. Berkeley's current operations research degree involves the study of
16 the use of mathematical models to predict behavior or optimize performance -- not the
17 Internet and computer science related matters discussed by Zada. *See*
18 <http://www.ieor.berkeley.edu/AcademicPrograms/index.htm>. Dr. Zada's instruction of
19 applied mathematics at various universities also does not establish relevant
20 qualifications. Zada Dec. ¶ 4.

21 Nor does anything else in his stated training or experience qualify him as
22 an expert. The only computer-related experience he provides is working in the
23 research department of IBM for about one year over three decades ago, also before the
24 Internet, and writing computer code to solve applied mathematical problems. Zada
25 Dec. ¶ 3.

26 Despite the lack of qualifications required by Rule 702, Dr. Zada testifies
27 on technical matters outside the scope of an untrained layman and outside the scope of
28 his experience in applied mathematics. His testimony ranges from explaining what a

1 "pixel" is ("Each pixel corresponds to a colored dot, so that an image that is 96 x 140
2 pixels has 96 x 140 or 13,440 dots of different colors which make up the image - more
3 than an image which is 79 x 130 pixels.") to providing a detailed explanation and
4 "visual demonstration of how Image Search and the Google 'cache link' work." Zada
5 Dec. ¶¶ 22, 53. He explicitly explains procedures "from a computer programming
6 standpoint," describing how to not link to a Web site using "if.. then" instructions.
7 Zada Dec. ¶ 142. He also testifies as to subjects for which he has no first hand
8 knowledge, such as his opinion on how Google's advertising program works and how
9 Google profits from the program. See Zada Dec. ¶¶ 26, 70-71. Courts have struck
10 affidavits of executives testifying outside the scope of their qualifications in similar
11 circumstances. *See, e.g., Sefton v. Jew*, 201 F.Supp.2d 730, 741, n.4 (W.D. Tex.
12 2001) (striking affidavit of an adult Web site owner "containing information regarding
13 the Web site's mode of operation and level of interactivity" because the owner had
14 failed to establish himself as an expert in such matters).

15 **B. DR. ZADA'S OPINION TESTIMONY IS ALSO UNRELIABLE AND**
16 **UNSUPPORTED**

17 The Court should also strike Dr. Zada's "expert" testimony because it is
18 unreliable and deceptive. Dr. Zada makes broad, misleading allegations as to how he
19 believes Google and the Internet work, based only on his limited experience as a user.
20 He also makes improper conclusory allegations with respect to the ultimate legal
21 issues, particularly in relation to the balance of harms.

22 Although he makes these types of allegations throughout his declaration,
23 often using terms such as "almost always" or "virtually never" to describe how Google
24 functions, only a few of these allegations are highlighted here. For example,
25 throughout Paragraphs 27-47 and in Exhibit 8, which is a CD he had created to
26 illustrate "the Google Experience," Dr. Zada makes misleading statements about the
27 location of infringing material. In describing how he conducted an image search of a
28 particular model, he states that clicking on an image results in a display of the

1 infringing material in an additional window in which the "browser address bar at the
2 top of the page contains the term 'images.google.com.'" Zada Dec. ¶ 29, see also Zada
3 Dec. ¶¶ 33, 34, 38, 40, Exh. 8. However, this new material comes from the
4 underlying site, not Google. Levine Dec. ¶ 25. He repeats his misleading
5 representations in the CD demonstrating the same idea. Zada Dec. Ex. 8. By making
6 statements that he has been "able to view over one thousand full size Perfect 10
7 copyrighted images without leaving google.com," he is misleading the Court in
8 believing that Google is the source of all the infringing images. Zada Dec. ¶46

9 Dr. Zada makes similarly impermissible allegations in other portions of
10 the declaration, including:

- 11 • In Paragraphs 65-73, Dr. Zada makes allegations with no personal
12 knowledge that imply that Google profits from displaying infringing
13 material by ranking infringing Web sites that advertise with Google higher.
14 He supports this by making generalizations such as "[i]n some cases, *almost*
15 *all* of the listings that Google returns in its Web Search results *are for*
16 *infringing websites from which Google earns revenues.*" Zada Dec. ¶ 71
17 (emphasis in original). He also makes "observations" that "the number of
18 listings that Google returns for its AdSense affiliates are in many cases far
19 greater than the number of listings returned by other search engines." Zada
20 Dec. ¶ 70.
- 21 • Dr. Zada further created a spreadsheet attempting to illustrate this point
22 using a search, which he states "[b]ased on my experience, ...will restrict the
23 search results to web pages from that website." Zada Dec. ¶ 70; Exh. 34.
24 Dr. Zada does not provide any support that his techniques are used by others
25 for the same purpose or whether his methods are generally accepted. Any
26 such searches and spreadsheets to demonstrate how AdSense works should
27 be conducted by someone with experience in such matters.

- 1 • In Paragraphs 127-131, Dr. Zada discusses the request to remove all links to
2 infringing Web sites and states "I will illustrate why this is absolutely
3 necessary in order to stop the continuing unauthorized display and copying
4 of Perfect 10 images." He provides no basis as to why the Court should
5 consider his opinion on whether something is "absolutely necessary."
- 6 • Dr. Zada's declaration uses subtitles akin to a legal memorandum such as
7 "Google's Unauthorized Display of Thousands of Perfect 10 Copyrighted
8 Images and Hundreds of Perfect 10 Passwords is Causing Irreparable Harm"
9 and "The Balance of Hardships." He then makes conclusory allegations as
10 to the balance of harms. For example, he concludes that "there is absolutely
11 no reason why requiring Google to stop displaying infringing Perfect 10
12 copyrighted images and to stop linking to Web sites with infringing Perfect
13 10 copyrighted images or perfect10.com passwords should be considered a
14 'hardship.'" Zada Dec. ¶ 141. Such an opinion requires expert analysis with
15 explanation of what is technically required. Dr. Zada, however, only
16 supports this statement by explaining what he believes another search engine
17 was able to do.
- 18 • Dr. Zada similarly opines that it is "very easy to program a computer to **not**
19 link to a particular website or display images from a particular website" and
20 that it is "straightforward to program a computer to stop displaying
21 username/password combinations." Zada Dec. ¶¶ 142, 143. This likewise
22 requires a technical explanation based on expertise which Dr. Zada has not
23 established.

24 Thus, Dr. Zada's "expert" statements in his declaration are misleading or
25 unsupported. Where Dr. Zada has provided explanation for his "expert" statements,
26 he has not established that he has used any tested technique which may be considered
27 reliable. The Court should strike all such statements due to their unreliability and lack
28 of support.

1 **IV. CONCLUSION**

2 For the foregoing reasons, Google, Inc. respectfully requests that the
3 Court strike the opinion testimony contained in Dr. Zada's declaration as described
4 above.

5
6 September 26, 2005

WINSTON & STRAWN LLP

7
8 By: Andrew Bridges
9 ANDREW P. BRIDGES

10 Attorneys for Defendant
11 GOOGLE INC.

12 Winston & Strawn LLP
13 101 California Street
14 San Francisco, CA 94111-5894
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