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11 UNITED STATES DISTRICT COURT

12 CENTRAL DISTRICT OF CALIFORNIA

13 PERFECT 10, INC., a California  
corporation,

14 Plaintiff,

15 vs.

16 GOOGLE INC., a corporation; and  
17 DOES 1 through 100, inclusive,

18 Defendants.

19 AND COUNTERCLAIM

20 PERFECT 10, INC., a California  
21 corporation,

22 Plaintiff,

23 vs.

24 AMAZON.COM, INC., a corporation;  
A9.COM, INC., a corporation; and  
25 DOES 1 through 100, inclusive,

26 Defendants.

CASE NO. CV 04-9484 AHM (SHx)  
[Consolidated with Case No. CV 05-4753  
AHM (SHx)]

**GOOGLE INC.'S EVIDENTIARY  
OBJECTIONS TO THE  
DECLARATION OF MARGARET  
JANE EDEN IN OPPOSITION TO  
GOOGLE'S THREE MOTIONS FOR  
SUMMARY JUDGMENT RE DMCA  
SAFE HARBOR FOR ITS WEB AND  
IMAGE SEARCH, BLOGGER  
SERVICE, AND CACHING  
FEATURE (DOCKET NOS. 428, 427,  
AND 426)**

Hon. A. Howard Matz

Date: None Set (taken under  
submission)

Time: None Set

Place: Courtroom 14

Discovery Cut-off: None Set

Pre-trial Conference: None Set

Trial Date: None Set

1 Google hereby submits the following objections to the Declaration of  
2 Margaret Jane Eden, Submitted in Opposition to Google Inc.'s Motions for  
3 Summary Judgment Re: DMCA Safe Harbor for its Web and Image Search, Blogger  
4 Service, and Caching Feature. The Eden Declaration is objectionable for several  
5 reasons, and should be disregarded in its entirety.

6 **I. THE EDEN DECLARATION SHOULD BE STRICKEN BECAUSE P10**  
7 **FAILED TO DISCLOSE MS. EDEN IN ITS RULE 26(A)**  
8 **DISCLOSURES OR DISCOVERY RESPONSES.**

9 The Eden Declaration should be disregarded in its entirety because, although  
10 this case has been pending for close to five years, P10 never disclosed Ms. Eden in  
11 its Rule 26 Initial Disclosures or its interrogatory responses as a person having  
12 knowledge of facts relevant to this case. A party cannot rely on evidence at  
13 summary judgment that the party failed to provide during discovery.<sup>1</sup> *Wolk v.*  
14 *Green*, 2008 WL 298757, \*3 (N.D. Cal. 2008); *Guang Dong Light Headgear*  
15 *Factory Co., Ltd. v. ACIIIntern., Inc.*, 2008 WL 53665, \*1 (D. Kan. 2008). P10's  
16 failure to disclose Ms. Eden as a witness deprived Google of the opportunity to  
17 depose her prior to P10's submission of her self-serving declaration, which is  
18 demonstrably false in several respects. For example, the Eden Declaration  
19 mischaracterizes the facts with respect to Google's processing of her DMCA notices  
20 and her responses thereto (*see* Rebuttal Declaration of Shantal Poovala in Support of  
21 Google's Motions for Summary Judgment Re Entitlement to Safe Harbor Under the

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22  
23 <sup>1</sup> On April 10, 2008, Google propounded an interrogatory asking P10 to "State  
24 all facts which support YOUR contention, if YOU so contend, that GOOGLE has  
25 not adopted and reasonably implemented a policy for termination in the appropriate  
26 circumstances of subscribers and account holders who are repeat infringers, as  
27 described in 17 U.S.C. § 512(i)(I)(A), and IDENTIFY all PERSONS with  
28 knowledge of such facts and all DOCUMENTS that REFER OR RELATE TO such  
(footnote continued)

1 DMCA, ¶ 21), which facts Google would have established had it had the  
2 opportunity to depose Ms. Eden. The Eden Declaration should be stricken in its  
3 entirety. Fed. R. Civ. P. 26, 33, 37; *see also Guang Dong Light Headgear Factory*  
4 2008 WL 53665, \*1 (D. Kan. 2008) (granting motion to strike summary judgment  
5 affidavit because witness identity and testimony not properly disclosed during  
6 discovery).

7 **II. THE EDEN DECLARATION IS A SIDESHOW AND SHOULD BE**  
8 **DISREGARDED AS SUCH.**

9 Ultimately, P10's attempt to create a "case within a case" should be rejected.  
10 This suit is not about whether Google processed the DMCA notices of Eden—it is  
11 about P10's DMCA notices. These declarations are a sideshow and should be  
12 disregarded as such. *Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1186,  
13 1193 (10th Cir. 1997) (affirming district court exclusion of evidence that threatened  
14 a "trial within a trial"); *Jefferson v. Vickers, Inc.*, 102 F.3d 960, 963 (8th Cir. 1996)  
15 (same).

16 **III. VARIOUS PORTIONS OF EDEN DECLARATION ARE**  
17 **INADMISSIBLE UNDER THE FEDERAL RULES OF EVIDENCE.**

18 Even were the Court to consider the Eden Declaration, portions of it are  
19 inadmissible and should be disregarded. Evidence submitted to the Court on motion  
20 practice must meet all requirements for admissibility of evidence if offered at the  
21 time of trial. *Beyene v. Coleman Sec. Services, Inc.*, 854 F.2d 1179, 1181-82 (9th  
22 Cir. 1988); *Travelers Cas. & Sur. Co. of America v. Telstar Const. Co., Inc.*, 252 F.  
23 Supp. 2d 917, 923 (D. Ariz. 2003). *See also* Fed. R. Evid. 101 (Rules of Evidence  
24 apply to all proceedings in the courts of the United States); Fed. R. Evid. 1101  
25 (listing exceptions to Rule 101). Such evidence must be relevant to the claims and

26 \_\_\_\_\_  
27 facts." Interrogatory No. 12. P10 did not list Ms. Eden in its May 26, 2008  
28 (footnote continued)

defenses of the case. Fed. R. Evid. 401; 403; *McCormick v. City of Lawrence, Kan.*, 2007 WL 38400, at \*3 (D. Kan. Jan. 5, 2007). Testimonial evidence must be based on the personal knowledge of the witness offering the evidence. Fed. R. Evid. 602. Testimony requiring scientific, technical, or other specialized knowledge may be given only by an expert witness with the requisite knowledge, skill, experience, training, or education, and opinion testimony is not permitted of a lay person. Fed. R. Evid. 701, 702. The Eden Declaration fails to meet one or more of these criteria, as set forth below.

	<b><u>Proffered Evidence</u></b>	<b><u>Google's Objection</u></b>
1. 12 13 14 15 16 17 18	<b>Eden Decl., at ¶ 2</b> ("The book and dvd production segment of our business is suffering huge damage and loss due to massive on-line infringement of our videos and books.")	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statements are irrelevant, argumentative, speculative, lack foundation, are not within the witness's personal knowledge, constitute improper legal opinion, and are improper opinion testimony.
2. 20 21 22 23 24 25 26	<b>Eden Decl., at ¶ 2</b> ("I have found that in response to a Google search on my husband's name, Google provides its users with countless links that allow them to download infringing versions of our content, either for free or by purchase. As a	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statements are irrelevant, argumentative, speculative, lack foundation, are not within the witness's personal knowledge, constitute improper legal opinion, and are

response, nor in its May 29, 2009 updated response.

1		result, the life expectancy of our	improper opinion testimony.
2		products has been cut from years to a	
3		few months at best, by widespread,	
4		almost immediate infringement.")	
5	3.	<b>Eden Decl., at ¶ 2</b> ("To make up for	<u>Fed. R. Evid. 401, 402, 403, 602, 701,</u>
6		our losses due to Internet piracy, my	<u>702</u>
7		husband has been forced to do many	The statement is irrelevant,
8		additional seminars each year.")	argumentative, speculative, confuses
9			the issues, lacks foundation, and is
10			improper opinion testimony.
11	4.	<b>Eden Decl., at ¶ 3</b> ("Google's	<u>Fed. R. Evid. 401, 402, 403, 602, 701,</u>
12		procedures and practices for	<u>702</u>
13		responding to DMCA notices have	The statement is irrelevant,
14		made it essentially impossible for us	argumentative, speculative, lacks
15		to protect our property. Google	foundation, and is improper opinion
16		seems to be an adversary rather than	testimony.
17		someone trying to help.")	
18	5.	<b>Eden Decl. ¶¶ 4, 6, 7</b>	<u>Fed. R. Evid. 401, 403, 602, 701, 702,</u>
19			<u>1002</u>
20			The statements are irrelevant,
21			argumentative, mischaracterize the
22			document, speculative, lack foundation,
23			are not within the witness's personal
24			knowledge, constitute improper legal
25			opinion, and are improper opinion
26			testimony.
27	6.	<b>Eden Decl., at ¶ 8</b> ("I simply do not	<u>Fed. R. Evid. 401, 402, 403, 602, 701,</u>
28			

1	understand why Google does not	<u>702</u>
2	create a more copyright owner-	The statements are irrelevant,
3	friendly system which would make it	argumentative, speculative, lack
4	easier to get infringing websites	foundation, are not within the witness's
5	removed from Google's search	personal knowledge, constitute
6	results.")	improper legal opinion, and are
7		improper opinion testimony.
8	7. <b>Eden Decl., at ¶ 8</b> ("Unfortunately	<u>Fed. R. Evid. 401, 402, 403, 602, 701,</u>
9	no company our size has the time and	<u>702</u>
10	resources to challenge Google. My	The statements are irrelevant,
11	husband and I have created a body of	argumentative, speculative, lack
12	work over 14 years that I anticipated	foundation, are not within the witness's
13	would support us through retirement.	personal knowledge, are improper
14	Now we are on a treadmill to create	opinion testimony.
15	the 'next' thing that will in fact likely	
16	only support us for a few months.	
17	Not a month goes by that we don't	
18	look at each other and wonder how	
19	long we can keep it up.")	
20	8. <b>Eden Decl., at ¶ 8</b> ("If Google isn't	<u>Fed. R. Evid. 401, 402, 403, 602, 701,</u>
21	stopped from directing traffic to	<u>702</u>
22	websites that steal our products or	The statements are irrelevant,
23	either give them away or sell them	argumentative, speculative, lack
24	below market rate, we will be forced	foundation, are not within the witness's
25	to shut down the book and dvd	personal knowledge, constitute
26	segment of our business.")	improper legal opinion, and are
27		improper opinion testimony.
28		

