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10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA

12 PERFECT 10, INC., a California
 13 corporation,
 14 Plaintiff,
 15 vs.
 16 GOOGLE INC., a corporation; and
 DOES 1 through 100, inclusive,
 17 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 DEAN
 HOFFMAN IN OPPOSITION TO
 GOOGLE'S THREE MOTIONS
 FOR SUMMARY JUDGMENT RE
 DMCA SAFE HARBOR FOR ITS
 WEB AND IMAGE SEARCH,
 18 BLOGGER SERVICE, AND
 19 CACHING FEATURE (DOCKET
 NOS. 428, 427, AND 426)**

20 AND COUNTERCLAIM

21 PERFECT 10, INC., a California
 corporation,
 Plaintiff,
 22 vs.
 23 AMAZON.COM, INC., a corporation;
 24 A9.COM, INC., a corporation; and
 DOES 1 through 100, inclusive,
 25 Defendants.

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 Dean
2 Hoffman, Submitted in Opposition to Google Inc.'s Motions for Summary Judgment
3 Re: DMCA Safe Harbor for its Web and Image Search, Blogger Service, and
4 Caching Feature. The Hoffman Declaration is objectionable for several reasons, and
5 should be disregarded in its entirety.

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

9 The Hoffman Declaration should be disregarded in its entirety because,
10 although this case has been pending for close to five years, P10 never disclosed Mr.
11 Hoffman in its Rule 26 Initial Disclosures or its interrogatory responses as a person
12 having 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.¹ *Wolk v.*
14 *Green*, 2008 WL 298757, *3 (N.D. Cal. 2008); *Guang Dong Light Headgear*
15 *Factory Co., Ltd. v. ACIIntern., Inc.*, 2008 WL 53665, *1 (D. Kan. 2008). P10's
16 failure to disclose Mr. Hoffman as a witness deprived Google of the opportunity to
17 depose him prior to P10's submission of his self-serving declaration, which is
18 demonstrably false in several respects. For example, the Hoffman Declaration
19 mischaracterizes the facts with respect to Google's processing of his DMCA notices
20 and his 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

22
23 ¹ 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, ¶ 18), which facts Google would have established had it had the
2 opportunity to depose Mr. Hoffman. The Hoffman Declaration should be stricken in
3 its entirety. Fed. R. Civ. P. 26, 33, 37; *see also Guang Dong Light Headgear*
4 *Factory* 2008 WL 53665, *1 (D. Kan. 2008) (granting motion to strike summary
5 judgment affidavit because witness identity and testimony not properly disclosed
6 during discovery).

7 **II. THE HOFFMAN DECLARATION IS A SIDESHOW AND SHOULD**
8 **BE 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 Hoffman—it
11 is 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 HOFFMAN DECLARATION ARE**
17 **INADMISSIBLE UNDER THE FEDERAL RULES OF EVIDENCE.**

18 Even were the Court to consider the Hoffman 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 Mr. Hoffman in its May 26, 2008
28 (footnote continued)

1 defenses of the case. Fed. R. Evid. 401; 403; *McCormick v. City of Lawrence, Kan.*,
 2 2007 WL 38400, at *3 (D. Kan. Jan. 5, 2007). Testimonial evidence must be based
 3 on the personal knowledge of the witness offering the evidence. Fed. R. Evid. 602.
 4 Testimony requiring scientific, technical, or other specialized knowledge may be
 5 given only by an expert witness with the requisite knowledge, skill, experience,
 6 training, or education, and opinion testimony is not permitted of a lay person. Fed.
 7 R. Evid. 701, 702. The Hoffman Declaration fails to meet one or more of these
 8 criteria, as set forth below.

	<u>Proffered Evidence</u>	<u>Objection</u>
11 12 13 14 15 16 17 18 19 20 21 22 23 24	1. Hoffman Decl., at ¶ 2 ("The software sold by Strategic Trading was copyrighted. There were websites that copied the software and offered it for download on the Internet, without Strategic Trading's permission. Most of these websites charged for the download, and of course Strategic Trading did not receive any of this money. Google's search engine provided, and still provides, links to the websites offering the infringing downloads of our software.")	<u>Fed. R. Evid. 401, 402, 403, 602</u> The statement is argumentative, constitutes improper legal opinion, irrelevant, speculative, and lacks foundation.
25 26	2. Hoffman Decl. ¶¶ 3-6	<u>Fed. R. Evid. 401, 402, 403, 602, 701,</u>

27 response, nor in its May 29, 2009 updated response.
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		<u>702</u> The statements are irrelevant, argumentative, constitute improper legal opinion, speculative, lack foundation, and constitute improper opinion testimony.
3.	Hoffman Decl., at ¶ 7 ("At that point I gave up, because I realized that Google was not going to remove the infringing links, and any take-down notice would just be re-published by Google on Chilling Effects, so I was just wasting my time.")	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statements are irrelevant, argumentative, constitute improper legal opinion, speculative, lack foundation, and constitute improper opinion testimony.
4.	Hoffman Decl., at ¶ 7 ("I realized that Google did not want to take down the infringing links. I believe that Google punishes copyright owners for sending take-down notices by republishing the links on Chillingeffects.org, for anyone who would dare to submit a take-down notice to Google. I think Google operates punitively toward copyright owners. They have no intent to cooperate with copyright owners, because they merely re-publish the	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statements are irrelevant, argumentative, constitute improper legal opinion, speculative, lack foundation, and constitute improper opinion testimony.


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	infringing links on Chillingeffects.org, even in those few cases where they actually do remove some infringing links.")	
5.	Hoffman Decl., at ¶ 8 ("My experience is that Google made some attempt to take down links from the first couple of notices, but sent the notices to Chillingeffects.org to let the copyright owner know that it wasn't going to do them any good to send take-down notices. After the first couple of notices, when I had the nerve to send some more, Google just didn't do anything at all to remove the infringing links.")	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statements are irrelevant, argumentative, constitute improper legal opinion, speculative, lack foundation, and constitute improper opinion testimony.
6.	Hoffman Decl., at ¶ 9 ("Strategic Trading had to stop offering new software for sale, because we were unable to control infringement on the Internet. In other words, we were driven out of this line of business because of Google's refusal to remove infringing links from its search results and sending my take-down notices to Chillingeffects.org for publication on the Internet.")	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statements are irrelevant, argumentative, constitute improper legal opinion, speculative, lack foundation, and constitute improper opinion testimony.

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DATED: September 8, 2009

QUINN EMANUEL URQUHART OLIVER &
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By 
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