

1 QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP
 2 Michael T. Zeller (Bar No. 196417)
 3 michaelzeller@quinnemanuel.com
 4 865 South Figueroa Street, 10th Floor
 5 Los Angeles, California 90017-2543
 6 Telephone: (213) 443-3000
 7 Facsimile: (213) 443-3100
 8 Charles K. Verhoeven (Bar No. 170151)
 9 charlesverhoeven@quinnemanuel.com
 10 50 California Street, 22nd Floor
 11 San Francisco, California 94111
 12 Rachel Herrick Kassabian (Bar No. 191060)
 13 rachelherrick@quinnemanuel.com
 14 555 Twin Dolphin Drive, Suite 560
 15 Redwood Shores, California 94065
 16 Attorneys for Defendant Google Inc.

11 UNITED STATES DISTRICT COURT
 12 CENTRAL DISTRICT OF CALIFORNIA

13 PERFECT 10, INC., a California
 14 corporation,
 15 Plaintiff,

16 vs.

17 GOOGLE INC., a corporation; and
 18 DOES 1 through 100, inclusive,
 19 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 C.J. NEWTON
 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)**

19 AND COUNTERCLAIM

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

23 vs.

24 AMAZON.COM, INC., a corporation;
 25 A9.COM, INC., a corporation; and
 26 DOES 1 through 100, inclusive,
 27 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 C.J.
2 Newton, 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 Newton Declaration is objectionable for several reasons, and
5 should be disregarded in its entirety.

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

9 The Newton 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 Newton 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. ACIntern., Inc.*, 2008 WL 53665, *1 (D. Kan. 2008). P10's
16 failure to disclose Mr. Newton 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 Newton 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, ¶ 19), which facts Google would have established had it had the
2 opportunity to depose Mr. Newton. The Newton 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 NEWTON 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 Newton—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 NEWTON DECLARATION ARE**
17 **INADMISSIBLE UNDER THE FEDERAL RULES OF EVIDENCE.**

18 Even were the Court to consider the Newton 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. Newton 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 Newton Declaration fails to meet one or more of these
 8 criteria, as set forth below.

	<u>Proffered Evidence</u>	<u>Google's Objection</u>
11 12 13 14 15 16 17	1. Newton Decl., at ¶¶ 2, 3	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702, Fed. R. Civ. P. 26</u> The statements are irrelevant, argumentative, constitute improper legal opinion, speculative, lack foundation, and constitute improper opinion testimony.
18 19 20 21 22 23 24 25	2. Newton Decl., at ¶ 4 ("For example, one of the last notices I sent to Google, before giving up is attached as Exhibit 2. As of today, Google still has not removed or disabled access to the link set forth in that notice. In fact, the first search result Google provides in response to 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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 response, nor in its May 29, 2009 updated response.

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	noted search term is the very same infringing result from a search conducted on May 28, 2009, using the search term set forth in my September 17, 2007 notice.")	
3.	Newton Decl., at ¶ 5 ("Even though Google did not respond to my notices or remove links to the infringing articles from its search results, it sent copies of my notices to chilingeffects.org, a web site that published my notices on the Internet. My notices, which were then published, gave the location of where the infringing articles were located, so that was another way that people could find the infringing articles.")	<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.	Newton Decl. Exh. 1	<u>Fed. R. Evid. 401, 402, 403</u> The evidence is irrelevant.
5.	Newton Decl. Exh. 2-3	<u>Fed. R. Evid. 401, 402, 403, 602, 901</u> The evidence is irrelevant and is not properly authenticated.

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DATED: September 8, 2009

QUINN EMANUEL URQUHART OLIVER &
HEDGES, LLP

By *Rachel Herrick Kassabian*
Michael Zeller
Rachel Herrick Kassabian
Attorneys for Defendant GOOGLE INC.