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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.

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 LES
 SCHWARTZ 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**

19 AND COUNTERCLAIM

20 PERFECT 10, INC., a California
 corporation,
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 Plaintiff,
 22
 vs.
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 24 AMAZON.COM, INC., a corporation;
 A9.COM, INC., a corporation; and
 25 DOES 1 through 100, inclusive,
 26
 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 Les
2 Schwartz, 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 Schwartz Declaration is objectionable for several reasons,
5 and should be disregarded in its entirety.

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

9 The Schwartz 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 Schwartz 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. Schwartz 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 Schwartz 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, ¶ 20), which facts Google would have established had it had the
2 opportunity to depose Mr. Schwartz. The Schwartz Declaration should be stricken
3 in 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 SCHWARTZ 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 Schwartz—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 SCHWARTZ DECLARATION ARE**
17 **INADMISSIBLE UNDER THE FEDERAL RULES OF EVIDENCE.**

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

	<u>Proffered Evidence</u>	<u>Google's Objection</u>
10 11 12 13 14 15 16	1. Schwartz Decl., at ¶¶ 2, 3, 4	<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.
17 18 19 20 21 22 23 24	2. Schwartz Decl., at ¶ 5 ("I was very angry with the way Google was avoiding removing the pirated software of my company.")	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statement is irrelevant, argumentative, speculative, confuses the issues, lacks foundation, is not within the witness's personal knowledge, and is improper opinion testimony.
25	3. Schwartz Decl., at ¶ 6 ("Pirated	<u>Fed. R. Evid. 401, 402, 403</u>

27 response, nor in its May 29, 2009 updated response.
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	<p>copies of my company's software are still being offered on Google Groups, at http://groups.google.com/group/be/finance/browse_thread/thread/d1e316c832d03aff/, the same URL shown first on my June 17, 2008 email, Exhibit 4. Attached as Exhibit 5 is a download of the relevant pages from that URL, showing pirated copies of my company's software being offered for sale (see highlighted URLs) as of July 27, 2009.")</p>	<p>The statement is contradicted by the evidence to which it cites. Specifically, the Google Groups webpage Mr. Schwartz identifies (associated with the URL he references) does not sell Mr. Schwartz's DecisionBar software. The Google Groups webpage only mentions the DecisionBar software by name, and provides links to another webpage associated with an entity called Forex Club, which also does not sell the DecisionBar software. <i>See</i> Rebuttal Poovala Dec. ¶ 20. The statements are also irrelevant, argumentative, speculative, and lack foundation.</p>
4.	<p>Schwartz Decl., ¶ 7 ("Google kept giving me contradictory instructions, and even when I did what they asked, Google did not remove most of the infringing material. Google was being disingenuous in that it was saying that the material was not there when clearly it was. I got the impression that Google was just trying to make me jump through hoops, to make the process unnecessarily difficult, so that I</p>	<p><u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statements are irrelevant, mischaracterize the facts and documents referenced, argumentative, constitute improper legal opinion, speculative, lack foundation, are not within the witness's personal knowledge, and are improper opinion testimony.</p>

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	would stop sending notices. I sent Google approximately 35 to 50 notices, and as far as I can tell, Google did not remove more than a handful of the URLs I complained about. The pirated material, DecisionBar software, was obviously being offered on the sites, and yet Google claimed it couldn't find it.")	
5.	Schwartz Decl., at ¶ 8 ("Based on my experience with Google, I have come to the conclusion that Google's supposed DMCA procedure is nothing but a sham.")	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statement is irrelevant, argumentative, speculative, lacks foundation, is not within the witness's personal knowledge, and is improper opinion testimony.
6.	Schwartz Decl., Exhs. 1-4	<u>Fed. R. Evid. 401, 402, 403</u> The evidence is irrelevant.
7.	Schwartz Decl., Exh. 5	<u>Fed. R. Evid. 401, 403, 901</u> The evidence is irrelevant and not properly authenticated, and is mischaracterized in paragraph 6 of the Schwartz Declaration.

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DATED: September 8, 2009

QUINN EMANUEL URQUHART OLIVER &
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