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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 MELANIE
 POBLETE 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,
 21
 Plaintiff,
 22
 vs.
 23 AMAZON.COM, INC., a corporation;
 24 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 Melanie
2 Poblete, 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 Poblete Declaration is objectionable for several reasons, and
5 should be disregarded in its entirety.

6 **I. THE POBLETE DECLARATION CONCERNS "THE SAMPLE" AND**
7 **IS THUS IRRELEVANT.**

8 Poblete's Declaration discusses a purported "Sample" of images utilized in the
9 Zada Declaration. This "Sample" contains 12 images used for "illustrative
10 purposes," and fails to address all of the copyright infringement claims P10 has
11 alleged, as Google's DMCA Motions do. *See, e.g.*, Zada Decl. ¶¶ 1-2, Exh. 9.
12 Because Google's DMCA Motions address the *entirety* of P10's copyright claims
13 (grouped by the type of DMCA notice in which it was asserted), the extensive
14 discussions and exhibits in the Zada Declaration regarding this small subset of
15 images is irrelevant and cannot defeat summary judgment, particularly as to the
16 omitted purported claims. *See Dugan v. R.J. Corman R.R. Co.*, 344 F.3d 662, 669
17 (7th Cir. 2003) (relying on snippets of evidence rather than introducing evidence as
18 a whole violates the best evidence rule and rule of completeness, Fed. R. Evid. 106,
19 as it allows party to take evidence out of its proper context).

20 **II. PORTIONS OF THE EVIDENCE OFFERED BY PERFECT 10 IN THE**
21 **DECLARATION OF MELANIE POBLETE ARE INADMISSIBLE**
22 **AND SHOULD BE DISREGARDED.**

23 Portions of the Declaration of Melanie Poblete, submitted in opposition to
24 Google Inc's Motions for Summary Judgment Re: DMCA Safe Harbor for its Web
25 and Image Search, Blogger Service, and Caching Feature are inadmissible and
26 should be disregarded for purposes of the Motion.

27 Evidence submitted to the Court on motion practice must meet all
28 requirements for admissibility of evidence if offered at the time of trial. *Beyene v.*

1 *Coleman Sec. Services, Inc.*, 854 F.2d 1179, 1181-1182 (9th Cir. 1988); *Travelers*
 2 *Cas. & Sur. Co. of America v. Telstar Const. Co., Inc.*, 252 F. Supp. 2d 917, 923 (D.
 3 Ariz. 2003). *See also* Fed. R. Evid. 101 (Rules of Evidence apply to all proceedings
 4 in the courts of the United States); Fed. R. Evid. 1101 (listing exceptions to Rule
 5 101). Such evidence must be relevant to the claims and defenses of the case. Fed.
 6 R. Evid. 401; 403; *McCormick v. City of Lawrence, Kan.*, 2007 WL 38400, at *3 (D.
 7 Kan. Jan. 5, 2007). Testimonial evidence must be based on the personal knowledge
 8 of the witness offering the evidence. Fed. R. Evid. 602. Documentary evidence
 9 must be properly authenticated. Fed. R. Evid. 901. Hearsay evidence is
 10 inadmissible unless it has been defined as non-hearsay or the proponent establishes
 11 eligibility for one or more exceptions under the Rules. Fed. R. Evid. 801-804.
 12 Testimony requiring scientific, technical, or other specialized knowledge may be
 13 given only by an expert witness with the requisite knowledge, skill, experience,
 14 training, or education. Fed. R. Evid. 701, 702. The Poblete Declaration fails to
 15 meet one or more of these criteria, as specified below.

	<u>Proffered Evidence</u>	<u>Objection</u>
18	1. Poblete Decl., at ¶ 2 ("I have 19 verified that Perfect 10 has in its 20 deposit material for copyright 21 registrations filed with the U.S. 22 Copyright Office, over 19,000 23 unique images")	<u>Fed. R. Evid. 401, 403, 602</u> The statement is irrelevant, lacks foundation, and does not appear to be within the witness's personal knowledge.
24	2. Poblete Decl., at ¶ 2 ("In this 25 Declaration, I will reference images 26 contained in exhibits to the Zada 27 Declaration that constitute Perfect	<u>Fed. R. Evid. 401, 403, 602</u> The statement is irrelevant (<i>see</i> Part I, <i>supra</i>), lacks foundation, and is speculative.

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	10's 'Sample' of twelve images. The twelve images referenced in this Declaration which constitute Perfect 10's 'Sample' are contained in deposit materials for Perfect 10 copyright registrations with the U.S. Copyright Office.")	
3.	Poblete Decl., at ¶¶ 3-25	<u>Fed. R. Evid. 401, 402, 403, 602, 1002</u> These portions of the Poblete Declaration all make reference to Exhibit 9 of the Zada Declaration, a/k/a "the Sample." Such references are argumentative, violate the best evidence rule (P10 seeks to take the entirety of its defective notices out of context by cherry-picking only select, individual images), irrelevant (Google's motions go to the entirety of P10's copyright claims, <i>see</i> Section I, <i>supra</i>), speculative, and lack foundation, as no explanation is provided as to how or why "the Sample" was constructed.

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1 DATED: September 8, 2009

QUINN EMANUEL URQUHART OLIVER &
HEDGES, LLP

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