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UNITED STATES DISTRICT COURT

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CENTRAL DISTRICT OF CALIFORNIA

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PERFECT 10, INC., a California
corporation,

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Plaintiff,

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vs.

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

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Defendants.

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CASE NO. CV 04-9484 AHM (SHx)

**GOOGLE INC.'S EVIDENTIARY
OBJECTIONS TO THE
DECLARATION OF MARGARET
JANE EDEN IN SUPPORT OF
PERFECT 10'S SECOND MOTION
FOR A PRELIMINARY
INJUNCTION AGAINST GOOGLE**

Hon. A. Howard Matz

Date: April 5, 2010

Time: 10:00 a.m.

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 (“Eden Declaration”), Submitted in Support of Perfect 10’s
3 Second Motion for a Preliminary Injunction Against Google (“Second PI Motion”).¹
4 The Eden Declaration is objectionable for several reasons, and should be
5 disregarded or accorded little or no weight in the determination of Perfect 10’s
6 Second PI Motion.

7 **I. THE EDEN DECLARATION SHOULD BE STRICKEN BECAUSE**
8 **EDEN WAS NOT DISCLOSED.**

9 P10 failed to disclose Eden as a person having knowledge of the facts relevant
10 to the case. Instead, P10 has sprung Eden’s declaration upon Google, without first
11 allowing Google a fair opportunity to depose Eden.² The Eden Declaration should
12 be stricken on this basis.

13 **II. THE EDEN DECLARATION IS A SIDESHOW AND SHOULD BE**
14 **DISREGARDED AS SUCH.**

15 P10’s attempt to create a “case within a case” should be rejected. This suit is
16 not about whether Google processed the DMCA notices of Eden—it is about P10’s
17 claims of infringement of its images and its DMCA notices to Google. The Eden
18 Declaration, along with the declarations of Dean Hoffman, C.J. Newton, and Les
19 Schwartz, are a sideshow and should be disregarded as such. Unit Drilling Co. v.
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22 ¹ The Eden Declaration is the same declaration, with the same signature date,
23 that P10 submitted from Ms. Eden in support of its opposition to Google’s DMCA
24 Motions (Dkt No. 475), with an updated caption reflecting the title of the present
25 motion. Google filed objections to this declaration in connection with its DMCA
26 Motions on September 8, 2009. See Dkt No. 509.

27 ² Because P10 has refused to agree to Google’s request that, given the numerous
28 models and other witnesses implicated by this case, the parties be permitted to take
more than ten depositions per side, Google has not been able to depose Ms. Eden
since her first declaration was filed in August 2009. On July 27, 2009, Google filed
(footnote continued)

1 Enron Oil & Gas Co., 108 F.3d 1186, 1193 (10th Cir. 1997) (affirming district court
2 exclusion of evidence that threatened a “trial within a trial”); Jefferson v. Vickers,
3 Inc., 102 F.3d 960, 963 (8th Cir. 1996) (same).

4 **III. PORTIONS OF THE EVIDENCE OFFERED BY P10 IN THE EDEN**
5 **DECLARATION ARE INADMISSIBLE AND SHOULD BE**
6 **DISREGARDED.**

7 The Eden Declaration should be disregarded for purposes of P10’s Second PI
8 Motion for the additional reason that it is inadmissible under the Federal Rules of
9 Evidence.

10 The Federal Rules of Evidence apply to evidence submitted to the Court on
11 motion practice. Fed. R. Evid. 101 (Rules of Evidence apply to all proceedings in
12 the courts of the United States); Fed. R. Evid. 1101 (listing exceptions to Rule 101).
13 While courts have some discretion to consider inadmissible evidence when a
14 preliminary injunction is urgently needed to prevent irreparable harm before a full
15 resolution on the merits is possible, courts routinely decline to consider, or afford
16 any weight to, such inadmissible evidence in appropriate circumstances. See
17 Beijing Tong Ren Tang (USA) Corp. v. TRT USA Corp., --- F.Supp.2d ----, 2009
18 WL 5108580, at *3 (N.D. Cal. Dec. 18, 2009) (upholding evidentiary objections and
19 denying preliminary injunction); U.S. v. Guess, 2004 WL 3314940, at *4 (S.D. Cal.
20 Dec. 15, 2004) (“conditional inferences, innuendo, and even strong suspicions do
21 not satisfy [the movant’s] burden”); Kitsap Physicians Service v. Washington
22 Dental Service, 671 F.Supp. 1267, 1269 (W.D. Wa. 1987) (refusing to consider
23 affidavits “that would have been inadmissible under the Federal Rules of Evidence”
24 and denying preliminary injunction). Because P10 has had nearly *six years* to
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27 a motion seeking leave to take additional depositions (Dkt No. 471). The Court has
28 not yet ruled on Google’s motion.

1 obtain evidence regarding its Second PI Motion, it is particularly appropriate to hold
 2 P10's evidence to the usual standards of admissibility for motion practice.

3 Such evidence must be relevant to the claims and defenses of the case. Fed.
 4 R. Evid. 401; 403; Beijing Tong Ren Tang, 2009 WL 5108580, at *3 (striking
 5 irrelevant evidence). Testimonial evidence must be based on the personal
 6 knowledge of the witness offering the evidence. Fed. R. Evid. 602. Testimony
 7 requiring scientific, technical, or other specialized knowledge may be given only by
 8 an expert witness with the requisite knowledge, skill, experience, training, or
 9 education, and opinion testimony is not permitted of a lay person. Fed. R. Evid.
 10 701, 702. The Eden Declaration fails to meet one or more of these criteria, as set
 11 forth below.

	<u>Proffered Evidence</u>	<u>Google's Objection</u>
13 14 15 16 17 18 19 20	1. Eden Decl., at ¶ 2	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statements are irrelevant, argumentative, conclusory, speculative, lack foundation, are not within the witness's personal knowledge, and constitute improper opinion testimony of an unqualified layperson.
21 22 23 24 25 26 27 28	2. Eden Decl., at ¶ 3 (“Google’s procedures and practices for responding to DMCA notices have made it essentially impossible for us to protect our property. Google seems to be an adversary rather than someone trying to help.”)	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statement is irrelevant, argumentative, conclusory, speculative, lacks foundation, does not appear to be within the witness's personal knowledge, and constitutes improper

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		opinion testimony.
3.	Eden Decl. ¶¶ 4, 6, 7	<u>Fed. R. Evid. 401, 403, 602, 701, 702, 1002</u> The statements are irrelevant, argumentative, mischaracterize the document, speculative, lack foundation, are not within the witness's personal knowledge, constitute improper legal opinion, and are improper opinion testimony.
4.	Eden Decl., at ¶ 8	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statements are irrelevant, argumentative, conclusory, speculative, lack foundation, are not within the witness's personal knowledge, and constitute improper opinion testimony of a layperson.
5.	Eden Decl. Exhs. 1-3	<u>Fed. R. Evid. 401, 402, 403, 602</u> The evidence is irrelevant.

DATED: March 15, 2010

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