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9 Attorneys for Defendant Google Inc.

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  
 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 DEAN  
 HOFFMAN IN SUPPORT OF  
 PERFECT 10'S SECOND MOTION  
 FOR PRELIMINARY INJUNCTION  
 AGAINST GOOGLE**

19 AND COUNTERCLAIM

Hon. A. Howard Matz

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

Date: April 5, 2010  
 Time: None Set  
 Place: Courtroom 14

Discovery Cut-off: None Set  
 Pre-trial Conference: None Set  
 Trial Date: None Set

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1 Google hereby submits the following objections to the Declaration of Dean  
2 Hoffman (“Hoffman Declaration”), Submitted in Support of Perfect 10’s Second  
3 Motion for a Preliminary Injunction Against Google (“Second PI Motion”).<sup>1</sup> The  
4 Hoffman Declaration is objectionable for several reasons, and should be disregarded  
5 or accorded little or no weight in the determination of Perfect 10’s Second PI  
6 Motion.

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

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

13 **II. THE HOFFMAN DECLARATION IS A SIDESHOW AND SHOULD**  
14 **BE 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 Hoffman—it is about  
17 P10’s claims of infringement of its images and its DMCA notices to Google. The  
18 Hoffman Declaration, along with the declarations of C.J. Newton, Margaret Jane  
19 Eden, and Les Schwartz, are a sideshow and should be disregarded as such. Unit  
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22 <sup>1</sup> The Hoffman Declaration is the same declaration, with the same signature  
23 date, that P10 submitted from Mr. Hoffman in support of its opposition to Google’s  
24 DMCA Motions (Dkt No. 476), with an updated caption reflecting the title of the  
25 present motion. Google filed objections to this declaration in connection with its  
26 DMCA Motions on September 8, 2009. See Dkt No. 510.

27 <sup>2</sup> 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 Mr. Hoffman  
since his first declaration was filed in August 2009. On July 27, 2009, Google filed  
(footnote continued)

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

4 **III. PORTIONS OF THE HOFFMAN DECLARATION ARE**  
5 **INADMISSIBLE AND SHOULD BE DISREGARDED.**

6 The Hoffman Declaration should be disregarded for purposes of Perfect 10’s  
7 Second PI Motion for the additional reason that it is inadmissible under the Federal  
8 Rules of Evidence.

9 The Federal Rules of Evidence apply to evidence submitted to the Court on  
10 motion practice. Fed. R. Evid. 101 (Rules of Evidence apply to all proceedings in  
11 the courts of the United States); Fed. R. Evid. 1101 (listing exceptions to Rule 101).  
12 While courts have some discretion to consider inadmissible evidence when a  
13 preliminary injunction is urgently needed to prevent irreparable harm before a full  
14 resolution on the merits is possible, courts routinely decline to consider, or afford  
15 any weight to, such inadmissible evidence in appropriate circumstances. See  
16 Beijing Tong Ren Tang (USA) Corp. v. TRT USA Corp., --- F.Supp.2d ----, 2009  
17 WL 5108580, at \*3 (N.D. Cal. Dec. 18, 2009) (upholding evidentiary objections and  
18 denying preliminary injunction); U.S. v. Guess, 2004 WL 3314940, at \*4 (S.D. Cal.  
19 Dec. 15, 2004) (“conditional inferences, innuendo, and even strong suspicions do  
20 not satisfy [the movant’s] burden”); Kitsap Physicians Service v. Washington  
21 Dental Service, 671 F.Supp. 1267, 1269 (W.D. Wa. 1987) (refusing to consider  
22 affidavits “that would have been inadmissible under the Federal Rules of Evidence”  
23 and denying preliminary injunction). Because P10 has had nearly *six years* to  
24 obtain evidence regarding its Second PI Motion, it is particularly appropriate to hold  
25 P10’s evidence to the usual standards of admissibility for motion practice.

26 \_\_\_\_\_  
27 a motion seeking leave to take additional depositions (Dkt No. 471). The Court has  
28 (footnote continued)

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

	<u>Proffered Evidence</u>	<u>Objection</u>
1. 12 13 14 15 16 17 18 19 20 21 22 23 24 25	<b>Hoffman Decl., at ¶ 2</b> (“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 statements are argumentative, irrelevant, speculative, constitute improper legal opinions, and lacks foundation.

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 27 not yet ruled on Google’s motion.  
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1 2 3 4 5 6 7	2. <b>Hoffman Decl. ¶¶ 3-6</b>	<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.
8 9 10 11 12 13 14	3. <b>Hoffman Decl., at ¶ 7</b>	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statements are irrelevant, speculative, argumentative, lack foundation, constitute improper legal opinion, and constitute improper opinion testimony of a layperson.
15 16 17 18 19 20 21 22 23 24 25 26	4. <b>Hoffman Decl., at ¶ 8</b> (“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 of a layperson.
27 28	5. <b>Hoffman Decl., at ¶ 9</b> (“Strategic	<u>Fed. R. Evid. 401, 402, 403, 602, 701</u>

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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>702</u> The statements are irrelevant, argumentative, constitute improper legal opinion, speculative, lack foundation, and constitute improper opinion testimony of a layperson.
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DATED: March 15, 2010

QUINN EMANUEL URQUHART &  
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