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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PERFECT 10, INC., a California corporation,

Plaintiff,

vs.

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

Defendants.

AND COUNTERCLAIM

PERFECT 10, INC., a California corporation,

Plaintiff,

vs.

AMAZON.COM, INC., a corporation; A9.COM, INC., a corporation; and DOES 1 through 100, inclusive,

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 SUPPORT OF PERFECT 10'S SECOND MOTION FOR A PRELIMINARY INJUNCTION AGAINST GOOGLE

Hon. A. Howard Matz

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

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

Google hereby submits the following objections to the Declaration of C.J. Newton ("Newton Declaration"), Submitted in Support of Perfect 10's Second Motion for a Preliminary Injunction Against Google ("Second PI Motion").[1] The Newton Declaration is objectionable for several reasons, and should be disregarded or accorded little or no weight in the determination of Perfect 10's Second PI Motion.

I. THE NEWTON DECLARATION SHOULD BE STRICKEN BECAUSE NEWTON WAS NOT DISCLOSED.

P10 failed to disclose Newton as a person having knowledge of the facts relevant to the case. Instead, P10 has sprung Newton's declaration upon Google, without first allowing Google a fair opportunity to depose Newton.[2] The Newton Declaration should be stricken on this basis.

II. THE NEWTON DECLARATION IS A SIDESHOW AND SHOULD BE DISREGARDED AS SUCH.

P10's attempt to create a "case within a case" should be rejected. This suit is not about whether Google processed the DMCA notices of Newton–it is about P10's claims of infringement of its images and its DMCA notices to Google. The Newton Declaration, along with the declarations of Dean Hoffman, Margaret Jane Eden, and Les Schwartz, are a sideshow and should be disregarded as such. Unit Drilling Co.

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[1] The Newton Declaration is the same declaration, with the same signature date, that P10 submitted from CJ Newton in support of its opposition to Google's DMCA Motions (Dkt No. 477), with an updated caption reflecting the title of the present motion. Google filed objections to this declaration in connection with its DMCA Motions on September 8, 2009. See Dkt No. 513.

[2] Because P10 has refused to agree to Google's request that, given the numerous 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 Newton since the first Newton Declaration was filed in August 2009. On July 27, 2009,

(footnote continued)

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

II. PORTIONS OF THE NEWTON DECLARATION ARE INADMISSIBLE AND SHOULD BE DISREGARDED.

The Newton Declaration should be disregarded for purposes of P10's Second PI Motion for the additional reason that it is inadmissible under the Federal Rules of Evidence.

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

Google filed a motion seeking leave to take additional depositions (Dkt No. 471). (footnote continued)

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

	Proffered Evidence	**Google's Objection**
1.	**Newton Decl., at ¶¶ 2, 3**	Fed. R. Evid. 401, 402, 403, 602, 701, 702, Fed. R. Civ. P. 26 The statements are irrelevant, argumentative, constitute improper legal opinion, speculative, lack foundation, and constitute improper opinion testimony.
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 noted search term is the	Fed. R. Evid. 401, 402, 403, 602, 701, 702 The statements are irrelevant, argumentative, speculative, lack foundation, and constitute improper opinion testimony.

The Court has not yet ruled on Google's motion.

	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.")	Fed. R. Evid. 401, 402, 403, 602, 701, 702 The statements are irrelevant, argumentative, speculative, lack foundation, and constitute improper opinion testimony.
4.	**Newton Decl. Exh. 1**	Fed. R. Evid. 401, 402, 403 The evidence is irrelevant.
5.	**Newton Decl. Exh. 2-3**	Fed. R. Evid. 401-403, 602, 901 The evidence is irrelevant and is not properly authenticated.

DATED: March 15, 2010

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