

**HIGHLY CONFIDENTIAL
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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

VIACOM INTERNATIONAL INC., ET)	
AL.,)	
)	ECF Case
Plaintiffs,)	
v.)	Civil No. 07-CV-2103 (LLS)
)	
YOUTUBE, INC., ET AL.,)	
)	
Defendants.)	
<hr/>		
THE FOOTBALL ASSOCIATION)	
PREMIER LEAGUE LIMITED, ET AL.,)	
on behalf of themselves and all others)	ECF Case
similarly situated,)	
)	Civil No. 07-CV-3582 (LLS)
Plaintiffs,)	
v.)	
)	
YOUTUBE, INC., ET AL.,)	
)	
Defendants.)	
<hr/>		

**DEFENDANTS’ MEMORANDUM OF LAW IN SUPPORT OF
OBJECTIONS TO EVIDENCE AND MOTION TO STRIKE
MATERIAL FROM VIACOM’S SUMMARY JUDGMENT SUBMISSIONS AND
PUTATIVE CLASS PLAINTIFFS’ RULE 56.1 STATEMENT**

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TABLE OF CONTENTS

	Page
I. DEFENDANTS' OBJECTIONS TO PLAINTIFFS' EVIDENCE.....	1
II. YOUTUBE'S EVIDENTIARY OBJECTIONS SHOULD BE SUSTAINED	17
A. Rules 401-403: Relevance.....	17
B. Rule 901: Authentication	18
C. Rules 801-803: Hearsay	18
D. Rule 106: Remainder of Related Writings or Recordings	19
E. Rule 602: Foundation (Lack of Personal Knowledge)	19
F. Rule 407: Subsequent Remedial Measures	19
G. Rule 408: Compromise and Offers to Compromise	19
H. Rule 411: Insurance	20
I. Rule 701: Improper Lay Opinion	20
J. Rule 1002: Best Evidence Rule	20
K. Rule 1006: Summaries	20
III. THE COURT SHOULD EXCLUDE IMPROPER EVIDENCE SUBMITTED BY PLAINTIFFS	20
A. Hohengarten Ex. 2 (Declaration of Warren Solow)	20
1. Many Statements Made In The Solow Declaration Lack Foundation And Are Demonstrably Erroneous.....	21
2. The Exhibits To The Solow Declaration Are Inadmissible.....	25
B. Viacom Improperly Offers Evidence of Insurance as Proof of Misconduct.....	27
C. Third Parties' Foundationless Reports And Estimates About The Kinds Of Videos on YouTube Are Inadmissible.....	28
D. YouTube's Removal Of Advertisements From Certain "Watch Pages" Is Inadmissible to Prove Defendants' Liability.....	31
E. Putative Class Plaintiffs Have Improperly Submitted Altered Documents	31
F. Evidence Purporting To Show How Much YouTube Employees Made From the Google Acquisition Is Inadmissible.....	32
G. Licenses and Negotiations Are Inadmissible To Prove Liability	32
H. Dean Garfield's Deposition Testimony (Hohengarten Ex. 333) is Inadmissible	34
IV. THE COURT SHOULD STRIKE HOHENGARTEN EXHIBITS 312 AND 315 AND THE PORTION OF VIACOM'S BRIEF THAT REFERENCES THOSE EXHIBITS.....	37
V. THE COURT SHOULD STRIKE THE PUTATIVE CLASS PLAINTIFFS' RULE 56.1 STATEMENT IN ITS ENTIRETY	42

TABLE OF CONTENTS

(continued)

	Page
A. The Class SUF is Improperly Argumentative.....	43
B. Many Of The Class Plaintiffs’ Proposed Statements of Fact Are Impermissibly Compound	45
C. The Class SUF Is Vague and Unintelligible	46
D. The Citations In The Class SUF Mischaracterize the Evidence And Do Not Support The Propositions Asserted.....	47
VI. CONCLUSION.....	50

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Alpex Computer Corp. v. Nintendo Co., Ltd.</i> , 1994 WL 681752 (S.D.N.Y. Dec. 5, 1994)	33
<i>Amalgamated Lithographers of Am. v. Unz & Co. Inc.</i> , 670 F. Supp. 2d 214 (S.D.N.Y. 2009).....	43
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	32, 38
<i>Bey v. City of New York</i> , No. 99 Civ. 3873 (LMM), 2009 WL 2060076 (S.D.N.Y. July 15, 2009)	44, 48
<i>Crane v. Poetic Products Ltd.</i> , 593 F. Supp. 2d 585 (S.D.N.Y. 2009).....	27
<i>Curtis Mfg. Co., Inc. v. Plasti-Clip Corp.</i> , 933 F. Supp. 94 (D.N.H. 1995).....	27
<i>Davis & Cox v. Summa Corp.</i> , 751 F. 2d 1507 (9th Cir. 1985)	25
<i>Domnister v. Exclusive Ambulette, Inc.</i> , No. 03-CV-1666 (NGG), 2007 WL 4244151 (E.D.N.Y. Nov. 29, 2007)	47
<i>Evans v. Port Auth. of N.Y. & N.J.</i> , 192 F. Supp. 2d 247 (S.D.N.Y. 2002).....	35
<i>Flaherty v. Filardi</i> , No. 03 Civ. 2167 (LTS)(HBP), 2009 U.S. Dist. LEXIS 22641 (S.D.N.Y. Mar. 20, 2009)	38
<i>Garnac Grain Co. v. Blackley</i> , 932 F.2d 1563 (8th Cir. 1991)	27
<i>Geoghan v. Long Island R.R.</i> , No. 06 CV 1435(CLP), 2009 WL 982451 (E.D.N.Y. Apr. 9, 2009).....	35
<i>Giannullo v. City of New York</i> , 322 F.3d 139 (2d Cir. 2003).....	42
<i>Goldstick v. Hartford, Inc.</i> , No. 00 Civ. 8577 LAK, 2002 WL 1906029 (S.D.N.Y. Aug. 19, 2002).....	42

TABLE OF AUTHORITIES

(continued)

	Page
<i>Griffin v. Hilke</i> , 804 F.2d 1052 (8th Cir. 1986)	27
<i>Humphrey v. Demitro</i> , No. 94 C 6234, 1996 WL 580861 (N.D. Ill. Oct. 4, 1996)	28
<i>In re: Joint E. Dist. and So. Dist. Asbestos Litig.</i> , 995 F.2d 343 (2d Cir. 1993).....	19
<i>Jeffreys v. City of New York</i> , 426 F.3d 549 (2d Cir. 2005).....	38
<i>Lapine v. Seinfeld</i> , 92 U.S.P.Q.2d 1428, 2009 WL 2902584 (S.D.N.Y. Sep. 10, 2009).....	43
<i>Littel v. Twentieth Century Fox Film Corp.</i> , 1995 WL 404939 (S.D.N.Y. Jul. 7, 1995)	27
<i>Matosantos Commercial Corp. v. SCA Tissue N. Am.</i> , L.L.C., 369 F. Supp. 2d 191 (D. P.R. 2005)	27
<i>Orr v. Bank of Am.</i> , 285 F.3d 764 (9th Cir. 2002)	32
<i>Pacenza v. IBM Corp.</i> , 04-CIV-5831 (SCR) (S.D.N.Y. Jul. 26, 2007).....	25, 45
<i>Phipps v. Comprehensive Cmty. Dev. Corp.</i> , No. 00 Civ. 6063RJHKNF, 2005 WL 287413 (S.D.N.Y. Feb. 4, 2005)	34
<i>PLC Med. Sys., Inc. v. Eclipse Surgical Techs., Inc.</i> , 976 F. Supp. 89 (D. Mass. 1997)	34
<i>Reilly v. Natwest Mkts. Group Inc.</i> , 181 F. 3d 253 (2d Cir. 1999).....	36
<i>Rodriguez v. Schneider</i> , No. 95 Civ. 4083, 1999 WL 459813 (S.D.N.Y. Jun. 29, 1999).....	43
<i>Rowe Enter., Inc. v. William Morris Agency, Inc.</i> , No. 98 CIV. 8272 (RPP), 2005 WL 22833 (S.D.N.Y. Jan. 5, 2005).....	45
<i>Samsung Elecs. Co., Ltd. v. Quanta Computer, Inc.</i> , No. C-00-4524 VRW, 2006 WL 2850028 (N.D. Cal. Oct. 4, 2006)	33

TABLE OF AUTHORITIES

(continued)

	Page
<i>Santrayall v. Burrell</i> , 993 F. Supp. 173 (S.D.N.Y. 1998)	17
<i>SEC v. Geon Indus., Inc.</i> , 531 F.2d 39 (2d Cir. 1976).....	19
<i>Seiler v. Lucasfilm, Ltd.</i> , 808 F.2d 1316 (9th Cir. 1986)	20, 27
<i>Trilink Saw Chain, LLC v. Blount, Inc.</i> , 583 F. Supp. 2d 1293 (N.D. Ga. 2008).....	33
<i>U.S. Info. Sys., Inc. v. Int’l Bhd. of Elec. Workers Local Union No. 3</i> , No. 00 CIV. 4763 RMB JCF, 2006 WL 2136249 (S.D.N.Y. Aug. 1, 2006).....	42
<i>United States v. Kaplan</i> , 490 F.3d 110 (2d Cir. 2007).....	17
<i>Vardon Golf Co., Inc. v. BBMG Golf Ltd.</i> , 156 F.R.D. 641 (N.D. Ill. 1994).....	34
<i>Walker v. Time Life Films, Inc.</i> , 784 F.2d 44 (2d Cir. 1986).....	26, 27
 OTHER AUTHORITIES	
Fed. R. Civ. P. 30(b)(6).....	36
Fed. R. Civ. P. 56(e)	42
Fed. R. Evid. 106	19
Fed. R. Evid. 401	17
Fed. R. Evid. 402	17, 28, 30, 32
Fed. R. Evid. 403	18
Fed. R. Evid. 407	19, 31, 33, 34
Fed. R. Evid. 408	19, 33
Fed. R. Evid. 411	20, 27, 28
Fed. R. Evid. 602	19, 21, 29

TABLE OF AUTHORITIES

(continued)

	Page
Fed. R. Evid. 701	20
Fed. R. Evid. 702	20
Fed. R. Evid. 801	29, 30, 34
Fed. R. Evid. 802	18, 29, 30
Fed. R. Evid. 803	18, 34
Fed. R. Evid. 805	18
Fed. R. Evid. 901	18
Fed. R. Evid. 902	32
Fed. R. Evid. 1001	32
Fed. R. Evid. 1002	20, 27
Fed. R. Evid. 1003	32
Fed. R. Evid. 1006	20, 25, 26
Local Rule 5.1	37
Local Rule 56.1	passim

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I. DEFENDANTS' OBJECTIONS TO PLAINTIFFS' EVIDENCE

Defendants assert objections to plaintiffs' evidence¹ in support of their motions for summary judgment as follows:

Exhibit	Objections
Hohengarten Declaration ¶ 4	Foundation
Hohengarten Declaration ¶¶ 263-265	Foundation; Hearsay; Relevance
Hohengarten Declaration ¶ 268	Foundation
Hohengarten Declaration ¶ 274	Foundation
Hohengarten Declaration ¶ 408	Improper Lay Opinion; Foundation
Hohengarten Decl. Ex. 2: Solow Declaration ¶ 1	Foundation
Hohengarten Decl. Ex. 2: Solow Declaration ¶ 2	Foundation
Hohengarten Decl. Ex. 2: Solow Declaration ¶ 4	Foundation
Hohengarten Decl. Ex. 2: Solow Declaration ¶ 5	Foundation
Hohengarten Decl. Ex. 2: Solow Declaration ¶ 6	Foundation
Hohengarten Decl. Ex. 2: Solow Declaration ¶ 7	Foundation; Hearsay; Improper Summary Rule 1006; Best Evidence
Hohengarten Decl. Ex. 2: Solow Declaration ¶ 8	Foundation; Hearsay; Improper Summary Rule 1006; Best Evidence
Hohengarten Decl. Ex. 2: Solow Declaration ¶ 9	Foundation; Hearsay; Improper Summary Rule 1006
Hohengarten Decl. Ex. 2: Solow Declaration ¶¶ 10-14	Foundation; Hearsay; Improper Summary Rule 1006; Best Evidence
Hohengarten Decl. Ex. 2: Solow Declaration ¶ 15	Foundation; Hearsay; Best Evidence

¹ The chart includes objections to evidence other than authentication objections. Authentication objections are set forth below in Section II.B.

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Exhibit	Objections
Hohengarten Decl. Ex. 2: Solow Declaration ¶ 16	Foundation; Hearsay; Improper Lay Opinion Rule 701; Improper Summary Rule 1006; Best Evidence
Hohengarten Decl. Ex. 2: Solow Declaration ¶¶ 17-23	Foundation; Hearsay; Improper Lay Opinion Rule 701; Improper Summary Rule 1006; Best Evidence
Hohengarten Decl. Ex. 2: Solow Declaration ¶ 24	Foundation; Hearsay; Improper Lay Opinion Rule 701; Improper Summary Rule 1006; Best Evidence
Hohengarten Decl. Ex. 2: Solow Declaration ¶ 25	Foundation; Hearsay; Improper Lay Opinion Rule 701; Improper Summary Rule 1006; Best Evidence
Hohengarten Decl. Ex. 2: Solow Declaration ¶ 26	Foundation; Hearsay; Improper Lay Opinion Rule 701; Improper Summary Rule 1006; Best Evidence
Hohengarten Decl. Ex. 2: Solow Declaration ¶ 26	Foundation; Hearsay; Improper Lay Opinion Rule 701; Improper Summary Rule 1006; Best Evidence
Hohengarten Decl. Ex. 2: Solow Declaration ¶ 27	Foundation; Hearsay; Improper Lay Opinion Rule 701; Improper Summary Rule 1006; Best Evidence
Hohengarten Decl. Ex. 2: Solow Declaration ¶ 28	Foundation; Hearsay; Improper Lay Opinion Rule 701; Best Evidence
Hohengarten Decl. Ex. 2: Solow Declaration ¶ 29	Foundation; Hearsay; Improper Lay Opinion Rule 701; Best Evidence
Hohengarten Decl. Ex. 2: Solow Declaration ¶ 30	Foundation
Hohengarten Decl. Ex. 2: Solow Declaration ¶ 31	Foundation; Hearsay
Hohengarten Decl. Ex. 2: Solow Declaration ¶ 32	Foundation; Hearsay
Hohengarten Decl. Ex. 2: Solow Declaration Exs. A-F	Foundation; Hearsay; Best Evidence; Improper Summary Rule 1006
Hohengarten Decl. Ex. 3	Foundation; Hearsay
Hohengarten Decl. Ex. 12	Relevance; Foundation
Hohengarten Decl. Ex. 17	Hearsay; Foundation; Relevance

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Exhibit	Objections
Hohengarten Decl. Ex. 21	Rule 408; Rule 407
Hohengarten Decl. Ex. 23	Hearsay; Foundation; Relevance
Hohengarten Decl. Ex. 25	Relevance; Rule 403
Hohengarten Decl. Ex. 27	Hearsay; Foundation; Relevance
Hohengarten Decl. Ex. 28	Hearsay; Foundation; Relevance
Hohengarten Decl. Ex. 29	Hearsay; Foundation; Relevance
Hohengarten Decl. Ex. 30	Hearsay; Foundation; Relevance
Hohengarten Decl. Ex. 32	Best evidence; Relevance; Foundation
Hohengarten Decl. Ex. 33	Foundation
Hohengarten Decl. Ex. 34	Hearsay
Hohengarten Decl. Ex. 35	Hearsay
Hohengarten Decl. Ex. 37	Rule 408; Rule 407
Hohengarten Decl. Ex. 38	Relevance
Hohengarten Decl. Ex. 39; Figueira Decl. Ex. 93	Hearsay; Relevance; Foundation
Hohengarten Decl. Ex. 41	Hearsay; Relevance; Foundation
Hohengarten Decl. Ex. 42	Hearsay; Relevance; Foundation
Hohengarten Decl. Ex. 43; Figueira Decl. Ex. 94	Hearsay; Relevance; Foundation
Hohengarten Decl. Ex. 44	Hearsay; Relevance; Foundation
Hohengarten Decl. Ex. 45	Hearsay; Relevance; Foundation
Hohengarten Decl. Ex. 46	Hearsay; Relevance; Foundation
Hohengarten Decl. Ex. 47	Hearsay; Relevance; Foundation
Hohengarten Decl. Ex. 48	Hearsay; Relevance; Foundation
Hohengarten Decl. Ex. 49	Hearsay; Foundation; Best Evidence; Relevance
Hohengarten Decl. Ex. 50	Hearsay; Relevance; Foundation
Hohengarten Decl. Ex. 51; Figueira Decl. Ex. 78	Hearsay; Relevance; Foundation
Hohengarten Decl. Ex. 52; Figueira Decl. Ex. 109	Hearsay; Foundation; Relevance

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Exhibit	Objections
Hohengarten Decl. Ex. 53	Hearsay; Foundation; Relevance
Hohengarten Decl. Ex. 55	Foundation; Relevance
Hohengarten Decl. Ex. 56	Foundation; Relevance
Hohengarten Decl. Ex. 57	Hearsay; Foundation; Relevance
Hohengarten Decl. Ex. 58	Hearsay; Foundation; Relevance
Hohengarten Decl. Ex. 59	Hearsay; Foundation; Relevance
Hohengarten Decl. Ex. 60	Hearsay; Foundation; Relevance
Hohengarten Decl. Ex. 61	Hearsay; Foundation; Relevance
Hohengarten Decl. Ex. 62; Figueira Decl. Ex. 23	Hearsay; Foundation; Relevance
Hohengarten Decl. Ex. 63	Hearsay; Foundation; Relevance
Hohengarten Decl. Ex. 64	Hearsay; Foundation; Relevance
Hohengarten Decl. Ex. 65	Hearsay; Foundation; Relevance
Hohengarten Decl. Ex. 66	Best Evidence; Hearsay; Foundation; Relevance
Hohengarten Decl. Ex. 67	Hearsay
Hohengarten Decl. Ex. 68	Relevance
Hohengarten Decl. Ex. 69	Hearsay; Relevance
Hohengarten Decl. Ex. 70	Hearsay; Relevance
Hohengarten Decl. Ex. 72	Best Evidence; Hearsay; Relevance; Foundation
Hohengarten Decl. Ex. 73	Best Evidence; Hearsay; Relevance; Foundation
Hohengarten Decl. Ex. 74	Foundation
Hohengarten Decl. Ex. 75	Best Evidence; Hearsay; Relevance; Foundation
Hohengarten Decl. Ex. 77	Best Evidence; Relevance
Hohengarten Decl. Ex. 78	Foundation; Relevance
Hohengarten Decl. Ex. 79	Relevance
Hohengarten Decl. Ex. 80	Relevance
Hohengarten Decl. Ex. 81	Foundation; Relevance

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Exhibit	Objections
Hohengarten Decl. Ex. 82	Foundation; Relevance
Hohengarten Decl. Ex. 83	Relevance
Hohengarten Decl. Ex. 84	Rule 106 Completeness; Foundation; Hearsay; Relevance
Hohengarten Decl. Ex. 85	Foundation
Hohengarten Decl. Ex. 86	Rule 408; Rule 407
Hohengarten Decl. Ex. 87	Hearsay; Foundation; Relevance
Hohengarten Decl. Ex. 88	Rule 408; Rule 407
Hohengarten Decl. Ex. 89	Rule 408; Rule 407
Hohengarten Decl. Ex. 90	Rule 408; Rule 407
Hohengarten Decl. Ex. 91	Rule 408; Rule 407
Hohengarten Decl. Ex. 104	Foundation; Relevance; Hearsay; Improper Lay Opinion
Hohengarten Decl. Ex. 105	Foundation
Hohengarten Decl. Ex. 106	Hearsay; Foundation; Relevance
Hohengarten Decl. Ex. 107	Foundation; Relevance
Hohengarten Decl. Ex. 108	Foundation; Relevance
Hohengarten Decl. Ex. 110	Hearsay; Foundation; Relevance
Hohengarten Decl. Ex. 111; Figueira Decl. Ex. 12	Rule 407; Foundation
Hohengarten Decl. Ex. 112	Relevance
Hohengarten Decl. Ex. 113	Relevance
Hohengarten Decl. Ex. 114	Relevance
Hohengarten Decl. Ex. 115; Figueira Decl. Ex. 80	Relevance
Hohengarten Decl. Ex. 116; Figueira Decl. Ex. 79	Foundation; Relevance
Hohengarten Decl. Ex. 117	Foundation; Relevance
Hohengarten Decl. Ex. 127	Foundation
Hohengarten Decl. Ex. 129	Hearsay; Foundation
Hohengarten Decl. Ex. 136	Foundation

HIGHLY CONFIDENTIAL
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Exhibit	Objections
Hohengarten Decl. Ex. 137	Foundation; Relevance
Hohengarten Decl. Ex. 140	Hearsay; Foundation.
Hohengarten Decl. Ex. 142	Foundation
Hohengarten Decl. Ex. 144; Figueira Decl. Ex. 13	Hearsay; Foundation; Rule 403.
Hohengarten Decl. Ex. 145	Foundation
Hohengarten Decl. Ex. 146	Foundation
Hohengarten Decl. Ex. 148	Rule 408; Rule 407; Best Evidence.
Hohengarten Decl. Ex. 149	Rule 408; Rule 407; Foundation; Best Evidence.
Hohengarten Decl. Ex. 152	Rule 408; Rule 407; Foundation; Best Evidence.
Hohengarten Decl. Ex. 153	Rule 408; Rule 407
Hohengarten Decl. Ex. 154	Rule 408; Rule 407; Best Evidence.
Hohengarten Decl. Ex. 159	Foundation.
Hohengarten Decl. Ex. 160	Rule 408; Rule 407
Hohengarten Decl. Ex. 161	Rule 408; Rule 407; Foundation; Best Evidence.
Hohengarten Decl. Ex. 162	Rule 408; Rule 407; Foundation; Hearsay.
Hohengarten Decl. Ex. 163	Rule 408; Rule 407
Hohengarten Decl. Ex. 165	Rule 408; Rule 407
Hohengarten Decl. Ex. 166	Rule 408; Rule 407
Hohengarten Decl. Ex. 167	Rule 408; Rule 407
Hohengarten Decl. Ex. 168	Rule 408; Rule 407; Foundation.
Hohengarten Decl. Ex. 169	Rule 408; Rule 407; Foundation.
Hohengarten Decl. Ex. 172	Relevance
Hohengarten Decl. Ex. 173	Foundation; Relevance.
Hohengarten Decl. Ex. 174	Foundation
Hohengarten Decl. Ex. 177	Rule 408; Rule 407; Foundation.
Hohengarten Decl. Ex. 178	Rule 408; Rule 407; Foundation.
Hohengarten Decl. Ex. 182	Foundation

HIGHLY CONFIDENTIAL
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Exhibit	Objections
Hohengarten Decl. Ex. 184	Foundation
Hohengarten Decl. Ex. 185	Foundation; Rule 403
Hohengarten Decl. Ex. 186; Figueira Decl. Ex. 172	Rule 408; Rule 407
Hohengarten Decl. Ex. 187	Rule 408; Rule 407
Hohengarten Decl. Ex. 188	Rule 408; Rule 407
Hohengarten Decl. Ex. 190	Relevance; Rule 403
Hohengarten Decl. Ex. 191	Relevance; Hearsay
Hohengarten Decl. Ex. 192; Figueira Decl. Ex. 14	Relevance; Rule 403.
Hohengarten Decl. Ex. 193; Figueira Decl. Ex. 15	Relevance; Foundation; Rule 403.
Hohengarten Decl. Ex. 194	Relevance; Rule 403.
Hohengarten Decl. Ex. 195	Relevance; Rule 403.
Hohengarten Decl. Ex. 196	Relevance; Rule 403.
Hohengarten Decl. Ex. 197	Relevance; Rule 403.
Hohengarten Decl. Ex. 198	Relevance; Rule 403.
Hohengarten Decl. Ex. 199	Relevance; Rule 403; Foundation; Hearsay
Hohengarten Decl. Ex. 200	Relevance; Rule 403.
Hohengarten Decl. Ex. 201	Relevance; Rule 403.
Hohengarten Decl. Ex. 202; Figueira Decl. Ex. 16	Relevance; Rule 403.
Hohengarten Decl. Ex. 203	Relevance; Rule 403; Hearsay; Foundation
Hohengarten Decl. Ex. 204	Foundation.
Hohengarten Decl. Ex. 205	Relevance; Hearsay.
Hohengarten Decl. Ex. 207	Relevance; Foundation; Rule 403.
Hohengarten Decl. Ex. 208	Rule 403; Foundation.
Hohengarten Decl. Ex. 213	Relevance; Foundation; Rule 403.
Hohengarten Decl. Ex. 214	Relevance
Hohengarten Decl. Ex. 215; Figueira Decl. Ex. 47	Foundation; Relevance; Rule 403.

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Exhibit	Objections
Hohengarten Decl. Ex. 216	Relevance
Hohengarten Decl. Ex. 217; Figueira Decl. Ex. 64	Foundation; Relevance; Rule 403
Hohengarten Decl. Ex. 218	Relevance; Rule 403.
Hohengarten Decl. Ex. 219	Foundation; Relevance
Hohengarten Decl. Ex. 221	Hearsay
Hohengarten Decl. Ex. 223	Foundation; Relevance; Rule 403.
Hohengarten Decl. Ex. 224	Relevance
Hohengarten Decl. Ex. 225	Hearsay; Relevance
Hohengarten Decl. Ex. 226	Hearsay; Relevance
Hohengarten Decl. Ex. 227	Hearsay; Relevance
Hohengarten Decl. Ex. 228	Relevance
Hohengarten Decl. Ex. 229	Hearsay; Relevance
Hohengarten Decl. Ex. 230; Figueira Decl. Ex. 63	Relevance
Hohengarten Decl. Ex. 232; Figueira Decl. Ex. 43	Relevance
Hohengarten Decl. Ex. 233	Hearsay; Relevance
Hohengarten Decl. Ex. 234	Hearsay; Relevance
Hohengarten Decl. Ex. 235	Hearsay; Relevance
Hohengarten Decl. Ex. 236	Relevance
Hohengarten Decl. Ex. 237	Foundation; Hearsay; Relevance; Best Evidence
Hohengarten Decl. Ex. 238	Relevance
Hohengarten Decl. Ex. 240; Figueira Decl. Ex. 44	Relevance; Rule 403
Hohengarten Decl. Ex. 241	Relevance; Rule 403; Foundation; Best Evidence; Improper Summary Rule 1006
Hohengarten Decl. Ex. 242	Relevance; Hearsay; Foundation
Hohengarten Decl. Ex. 244	Relevance; Hearsay; Rule 403; Rule 408
Hohengarten Decl. Ex. 245	Rule 408; Rule 407

HIGHLY CONFIDENTIAL
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Exhibit	Objections
Hohengarten Decl. Ex. 248	Relevance; Best Evidence; Foundation; Hearsay
Hohengarten Decl. Ex. 249	Relevance; Best Evidence; Foundation; Hearsay
Hohengarten Decl. Ex. 250	Relevance; Best Evidence; Foundation; Hearsay
Hohengarten Decl. Ex. 251	Relevance; Best Evidence; Foundation; Hearsay
Hohengarten Decl. Ex. 252	Relevance; Best Evidence; Foundation; Hearsay
Hohengarten Decl. Ex. 253	Relevance; Best Evidence; Foundation; Hearsay
Hohengarten Decl. Ex. 254	Relevance; Best Evidence; Foundation; Hearsay
Hohengarten Decl. Ex. 255	Relevance; Best Evidence; Foundation; Hearsay
Hohengarten Decl. Ex. 256	Relevance; Best Evidence; Foundation; Hearsay
Hohengarten Decl. Ex. 257	Relevance; Best Evidence; Foundation; Hearsay
Hohengarten Decl. Ex. 258	Relevance; Best Evidence; Foundation; Hearsay
Hohengarten Decl. Ex. 259	Relevance; Best Evidence; Foundation; Hearsay
Hohengarten Decl. Ex. 260	Relevance; Best Evidence; Foundation; Hearsay
Hohengarten Decl. Ex. 261	Relevance; Best Evidence; Foundation; Hearsay
Hohengarten Decl. Ex. 262	Relevance; Best Evidence; Foundation
Hohengarten Decl. Ex. 263	Relevance; Best Evidence; Foundation; Hearsay
Hohengarten Decl. Ex. 264	Relevance; Best Evidence; Foundation; Hearsay
Hohengarten Decl. Ex. 265	Relevance; Best Evidence; Foundation; Hearsay

HIGHLY CONFIDENTIAL
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Exhibit	Objections
Hohengarten Decl. Ex. 266	Relevance; Best Evidence; Foundation; Hearsay
Hohengarten Decl. Ex. 267	Relevance; Best Evidence; Foundation; Hearsay
Hohengarten Decl. Ex. 268	Relevance; Best Evidence; Foundation; Hearsay
Hohengarten Decl. Ex. 269	Relevance; Best Evidence; Foundation; Hearsay
Hohengarten Decl. Ex. 278	Relevance; Rule 403
Hohengarten Decl. Ex. 283	Relevance
Hohengarten Decl. Ex. 284	Relevance; Best Evidence; Foundation; Hearsay
Hohengarten Decl. Ex. 285	Relevance; Best Evidence; Foundation; Hearsay
Hohengarten Decl. Ex. 286; Figueira Decl. Ex. 99	Foundation
Hohengarten Decl. Ex. 288	Relevance
Hohengarten Decl. Ex. 289	Hearsay; Foundation; Relevance
Hohengarten Decl. Ex. 290	Hearsay; Relevance
Hohengarten Decl. Ex. 291; Figueira Decl. Ex. 176	Hearsay; Foundation; Relevance; Improper Summary Rule 1006; Rule 403.
Hohengarten Decl. Ex. 292	Hearsay; Foundation; Relevance; Improper Summary Rule 1006; Rule 403.
Hohengarten Decl. Ex. 293; Figueira Decl. Ex. 108	Hearsay; Foundation; Relevance; Rule 411; Rule 403
Hohengarten Decl. Ex. 294	Hearsay; Foundation; Relevance
Hohengarten Decl. Ex. 295	Rule 411; Hearsay; Foundation; Relevance
Hohengarten Decl. Ex. 296	Relevance
Hohengarten Decl. Ex. 297	Relevance
Hohengarten Decl. Ex. 299	Rule 411; Relevance
Hohengarten Decl. Ex. 300	Relevance; Hearsay
Hohengarten Decl. Ex. 301	Rule 411; Relevance
Hohengarten Decl. Ex. 303	Rule 411; Relevance

HIGHLY CONFIDENTIAL
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Exhibit	Objections
Hohengarten Decl. Ex. 307	Hearsay; Relevance
Hohengarten Decl. Ex. 308	Hearsay; Relevance
Hohengarten Decl. Ex. 309	Hearsay; Relevance; Foundation
Hohengarten Decl. Ex. 312; Figueira Decl. Ex. 48, 49	Relevance; Rule 403; Foundation
Hohengarten Decl. Ex. 313; Figueira Decl. Ex. 65	Relevance; Rule 403; Foundation; Hearsay
Hohengarten Decl. Ex. 314; Figueira Decl. Ex. 110, 111	Rule 411; Rule 408; Rule 407; Relevance; Foundation
Hohengarten Decl. Ex. 315	Relevance; Foundation
Hohengarten Decl. Ex. 316	Relevance; Rule 403
Hohengarten Decl. Ex. 317	Relevance; Hearsay
Hohengarten Decl. Ex. 318	Relevance
Hohengarten Decl. Ex. 319	Relevance; Hearsay
Hohengarten Decl. Ex. 320	Relevance
Hohengarten Decl. Ex. 323	Relevance
Hohengarten Decl. Ex. 324	Relevance
Hohengarten Decl. Ex. 325	Relevance
Hohengarten Decl. Ex. 327	Rule 411
Hohengarten Decl. Ex. 328; Figueira Decl. Ex. 177, 178	Relevance; Hearsay; Foundation
Hohengarten Decl. Ex. 329; Figueira Decl. Ex. 17, 18, 19	Relevance; Foundation
Hohengarten Decl. Ex. 330	Relevance
Hohengarten Decl. Ex. 332; Figueira Decl. Ex. 26	Relevance
Hohengarten Decl. Ex. 333	Hearsay
Hohengarten Decl. Ex. 334; Figueira Decl. Ex. 32	Foundation; Rule 403
Hohengarten Decl. Ex. 335	Hearsay
Hohengarten Decl. Ex. 336; Figueira Decl. Ex. 52, 53	Foundation; Relevance; Hearsay

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Exhibit	Objections
Hohengarten Decl. Ex. 338; Figueira Decl. Ex. 54	Relevance; Foundation
Hohengarten Decl. Ex. 339	Foundation
Hohengarten Decl. Ex. 340	Foundation
Hohengarten Decl. Ex. 341; Figueira Decl. Ex. 81	Foundation; Hearsay; Relevance
Hohengarten Decl. Ex. 342	Foundation; Relevance.
Hohengarten Decl. Ex. 343	Relevance
Hohengarten Decl. Ex. 344	Foundation; Relevance.
Hohengarten Decl. Ex. 345	Foundation; Relevance.
Hohengarten Decl. Ex. 346	Foundation; Relevance
Hohengarten Decl. Ex. 347	Foundation; Relevance
Hohengarten Decl. Ex. 348	Foundation; Relevance
Hohengarten Decl. Ex. 349	Foundation; Hearsay; Relevance
Hohengarten Decl. Ex. 350	Foundation; Relevance
Hohengarten Decl. Ex. 351	Foundation; Relevance
Hohengarten Decl. Ex. 352	Foundation; Hearsay
Hohengarten Decl. Ex. 353	Foundation; Relevance; Hearsay
Hohengarten Decl. Ex. 354	Rule 411
Hohengarten Decl. Ex. 358	Relevance; Hearsay
Hohengarten Decl. Ex. 359	Relevance; Hearsay; Foundation
Hohengarten Decl. Ex. 363	Relevance; Rule 403
Hohengarten Decl. Ex. 369	Relevance; Hearsay; Foundation
Hohengarten Decl. Ex. 371; Figuera Decl. Ex. 6	Rule 408; Rule 407; Relevance; Rule 106
Hohengarten Decl. Ex. 373	Rule 408; Rule 407
Hohengarten Decl. Ex. 374	Relevance
Hohengarten Decl. Ex. 375	Relevance
Hohengarten Decl. Ex. 376	Relevance; Rule 403; Hearsay
Hohengarten Decl. Ex. 377	Foundation; Relevance; Hearsay

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Exhibit	Objections
Hohengarten Decl. Ex. 378	Foundation; Relevance; Rule 403
Hohengarten Decl. Ex. 382	Rule 408; Rule 407
Hohengarten Decl. Ex. 383	Hearsay
Hohengarten Decl. Ex. 384	Relevance; Hearsay
Hohengarten Decl. Ex. 385	Foundation
Hohengarten Decl. Ex. 387	Relevance
Figueira Decl. Ex. 1	Relevance
Figueira Decl. Ex. 2	Relevance; Foundation
Figueira Decl. Ex. 3	Relevance; Foundation
Figueira Decl. Ex. 4	Relevance; Foundation
Figueira Decl. Ex. 5	Relevance; Foundation
Figueira Decl. Ex. 7	Hearsay; Relevance
Figueira Decl. Ex. 8	Hearsay; Foundation; Relevance
Figueira Decl. Ex. 9	Relevance; Foundation
Figueira Decl. Ex. 10	Relevance
Figueira Decl. Ex. 20	Relevance; Foundation
Figueira Decl. Ex. 21	Relevance
Figueira Decl. Ex. 22	Relevance
Figueira Decl. Ex. 24	Relevance
Figueira Decl. Ex. 25	Relevance
Figueira Decl. Ex. 27	Foundation
Figueira Decl. Ex. 30	Hearsay; Relevance
Figueira Decl. Ex. 34	Hearsay; Relevance; Foundation
Figueira Decl. Ex. 35	Relevance; Best Evidence; Foundation; Hearsay
Figueira Decl. Ex. 36	Hearsay; Relevance
Figueira Decl. Ex. 37	Hearsay; Relevance
Figueira Decl. Ex. 38	Hearsay; Relevance
Figueira Decl. Ex. 39	Hearsay; Relevance; Foundation
Figueira Decl. Ex. 41	Relevance

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Exhibit	Objections
Figueira Decl. Ex. 42	Relevance
Figueira Decl. Ex. 46	Relevance
Figueira Decl. Ex. 50	Hearsay; Relevance
Figueira Decl. Ex. 51	Hearsay; Relevance
Figueira Decl. Ex. 55	Relevance
Figueira Decl. Ex. 56	Relevance
Figueira Decl. Ex. 57	Relevance
Figueira Decl. Ex. 58	Relevance
Figueira Decl. Ex. 60	Relevance
Figueira Decl. Ex. 61	Relevance
Figueira Decl. Ex. 62	Foundation; Relevance; Rule 403.
Figueira Decl. Ex. 66	Relevance
Figueira Decl. Ex. 67	Relevance; Rule 408
Figueira Decl. Ex. 68	Relevance; Rule 408
Figueira Decl. Ex. 69	Relevance
Figueira Decl. Ex. 70	Relevance; Rule 408
Figueira Decl. Ex. 71	Relevance; Rule 408
Figueira Decl. Ex. 72	Relevance.
Figueira Decl. Ex. 73	Relevance.
Figueira Decl. Ex. 76	Relevance; Best Evidence; Foundation.
Figueira Decl. Ex. 83	Rule 408; Relevance
Figueira Decl. Ex. 85	Best Evidence; Relevance; Hearsay.
Figueira Decl. Ex. 86	Hearsay; Best Evidence; Relevance; Rule 408; Rule 407
Figueira Decl. Ex. 88	Foundation; Hearsay.
Figueira Decl. Ex. 92	Relevance; Rule 408
Figueira Decl. Ex. 97	Relevance
Figueira Decl. Ex. 98	Rule 408
Figueira Decl. Ex. 100	Relevance
Figueira Decl. Ex. 101	Foundation; Best Evidence; Relevance

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Exhibit	Objections
Figueira Decl. Ex. 102	Foundation; Best Evidence; Relevance
Figueira Decl. Ex. 103	Foundation; Best Evidence; Relevance.
Figueira Decl. Ex. 104	Relevance
Figueira Decl. Ex. 105	Relevance; Rule 408
Figueira Decl. Ex. 106	Relevance
Figueira Decl. Ex. 113	Foundation; Hearsay; Best Evidence; Relevance
Figueira Decl. Ex. 114	Foundation; Hearsay; Best Evidence; Relevance
Figueira Decl. Ex. 115	Foundation; Hearsay; Best Evidence; Relevance
Figueira Decl. Ex. 117	Relevance; Hearsay; Foundation
Figueira Decl. Ex. 118	Foundation; Hearsay; Relevance
Figueira Decl. Ex. 119	Rule 408
Figueira Decl. Ex. 120	Foundation; Hearsay; Relevance.
Figueira Decl. Ex. 122	Rule 407
Figueira Decl. Ex. 123	Rule 408.
Figueira Decl. Ex. 124	Hearsay; Foundation
Figueira Decl. Ex. 125	Rule 411; Rule 403; Rule 408
Figueira Decl. Ex. 126	Rule 408.
Figueira Decl. Ex. 127	Rule 408; Foundation; Relevance
Figueira Decl. Ex. 128	Rule 408; Hearsay; Relevance
Figueira Decl. Ex. 129	Rule 408; Hearsay; Relevance
Figueira Decl. Ex. 130	Relevance; Rule 408; Foundation; Relevance; Best Evidence.
Figueira Decl. Ex. 131	Rule 408; Relevance
Figueira Decl. Ex. 132	Relevance
Figueira Decl. Ex. 133	Hearsay; Rule 403; Relevance.
Figueira Decl. Ex. 135	Relevance
Figueira Decl. Ex. 136	Relevance

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Exhibit	Objections
Figueira Decl. Ex. 137	Hearsay; Foundation; Relevance.
Figueira Decl. Ex. 138	Hearsay; Foundation; Relevance.
Figueira Decl. Ex. 144	Rule 408; Hearsay; Relevance
Figueira Decl. Ex. 145	Rule 408; Hearsay; Relevance
Figueira Decl. Ex. 146	Rule 408; Hearsay; Relevance
Figueira Decl. Ex. 147	Rule 408; Hearsay; Relevance
Figueira Decl. Ex. 148	Foundation.
Figueira Decl. Ex. 150	Relevance
Figueira Decl. Ex. 151	Relevance
Figueira Decl. Ex. 152	Relevance
Figueira Decl. Ex. 153	Relevance
Figueira Decl. Ex. 154	Hearsay; Relevance; Rule 408
Figueira Decl. Ex. 155	Relevance; Rule 408
Figueira Decl. Ex. 156	Relevance; Rule 408
Figueira Decl. Ex. 157	Relevance; Rule 408
Figueira Decl. Ex. 158	Relevance; Rule 408
Figueira Decl. Ex. 159	Relevance
Figueira Decl. Ex. 160	Relevance; Rule 408
Figueira Decl. Ex. 161	Rule 408; Relevance
Figueira Decl. Ex. 162	Rule 408; Relevance
Figueira Decl. Ex. 163	Rule 408; Relevance
Figueira Decl. Ex. 165	Rule 408; Relevance
Figueira Decl. Ex. 166	Rule 408; Relevance
Figueira Decl. Ex. 167	Rule 408; Relevance
Figueira Decl. Ex. 168	Relevance
Figueira Decl. Ex. 169	Relevance
Figueira Decl. Ex. 170	Rule 408; Relevance
Figueira Decl. Ex. 171	Rule 408; Relevance
Figueira Decl. Ex. 173	Foundation; Relevance

Exhibit	Objections
Figueira Decl. Ex. 174	Relevance
Figueira Decl. Ex. 175	Relevance; Rule 408
Figueira Decl. Ex. 176	Hearsay; Foundation
Figueira Decl. Ex. 179	Rule 407; Relevance
Figueira Decl. Ex. 180	Foundation; Relevance; Rule 407.
Figueira Decl. Ex. 181	Relevance
Figueira Decl. Ex. 183	Foundation; Relevance; Best Evidence; Hearsay
Figueira Decl. Ex. 184	Foundation; Relevance; Best Evidence; Hearsay
Figueira Decl. Ex. 185	Foundation; Relevance; Best Evidence; Hearsay
Figueira Decl. Ex. 186	Foundation; Relevance; Best Evidence; Hearsay
Figueira Decl. Ex. 187	Foundation; Relevance; Best Evidence; Hearsay
Addendum to Figueira Declaration	Best Evidence; Relevance

II. YOUTUBE’S EVIDENTIARY OBJECTIONS SHOULD BE SUSTAINED

A. Rules 401-403: Relevance

Only relevant evidence is admissible. Fed. R. Evid. 401-402. Although relevance is a liberal standard, the proponent of evidence must still prove the following: “(1) [t]he evidence must be probative of the proposition it is being offered to prove, and (2) the proposition to be proved must be one that is of consequence to the determination of the action.” *United States v. Kaplan*, 490 F.3d 110, 121 (2d Cir. 2007) (quoting *United States v. Diaz*, 878 F.2d 608, 614 (2d Cir. 1989)). If the proponent cannot demonstrate that the evidence is relevant, it is inadmissible. *See Santrayall v. Burrell*, 993 F. Supp. 173, 177 (S.D.N.Y. 1998). Here, plaintiffs

frequently offer evidence in support of unrelated propositions, and the evidence is inadmissible for the purpose for which plaintiffs seek to admit it.

Evidence may be excluded, though relevant, if it would cause unfair prejudice, confusion, or waste of time. Fed. R. Evid. 403.

B. Rule 901: Authentication

Authentication is a condition precedent to admissibility. Fed. R. Evid. 901. The following exhibits lack full authentication: Hohengarten Exs. 3-242, 244-288, 293, 289-98, 302, 309, 376-377, 379-383, 387-88; Figueira Exs. 1-10, 12-16, 20-25, 27-30, 33-35, 39-47, 50-51, 59-64, 66-74, 78-80, 82-86, 89, 92-94, 97-103, 105-9,112, 117-19, 125-36, 141-76, 179-97, Figueira Decl. Addendum screenshots. In particular, screenshots are not “true and correct copies” of the website they purport to represent when there is information missing that was present on the original website but not included in the screenshot. *See, e.g.*, Hohengarten Ex. 248; Figueira Addendum screenshots. Similarly, all altered versions of exhibits with superimposed boxes and arrows are also not “true and correct copies” of the originals. *See infra* Section III.E.

C. Rules 801-803: Hearsay

Hearsay is not admissible pursuant to Federal Rule of Evidence 802. Fed. R. Evid. 802. The evidence objected to as hearsay is offered to prove the truth of the matter asserted, yet no hearsay exception applies. Fed. R. Evid. 803. In addition, hearsay within hearsay is inadmissible. Fed. R. Evid. 805.

D. Rule 106: Remainder of Related Writings or Recordings

Federal Rule of Evidence 106 provides that “[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.” Fed. R. Evid. 106.

E. Rule 602: Foundation (Lack of Personal Knowledge)

Testimony is admissible only to the extent based on personal knowledge. Fed. R. Evid. 602. Plaintiffs’ declarants lack personal knowledge on issues about which they purport to testify, and plaintiffs rely on evidence where no proper foundation for knowledge has been laid.

F. Rule 407: Subsequent Remedial Measures

Under Rule 407, evidence of subsequent remedial measures is inadmissible to prove culpable conduct. Fed. R. Evid. 407; *SEC v. Geon Indus., Inc.*, 531 F.2d 39, 52 (2d Cir. 1976) (upholding decision by trial court to exclude evidence that brokerage firm had introduced a new regulation aimed at preventing future securities violations); *In re: Joint E. Dist. and So. Dist. Asbestos Litig.*, 995 F.2d 343, 345-46 (2d Cir. 1993) (remanding for new trial after district court erred in failing to exclude evidence of subsequent remedial measures pursuant to Rule 407).

G. Rule 408: Compromise and Offers to Compromise

Under Rule 408, settlement offers and conduct or statements in compromise negotiations regarding plaintiffs’ claim cannot be admitted to show liability for or the amount of a claim. Fed. R. Evid. 408. *See infra* Section III.G.

H. Rule 411: Insurance

Under Rule 411, evidence of insurance agreements is inadmissible to prove wrongful conduct. Fed. R. Evid. 411. This applies equally to indemnification agreements. *See infra* Section III.B.

I. Rule 701: Improper Lay Opinion

Under Rule 701, lay witnesses may offer testimony in the form of opinions or inferences when they are “not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.”

J. Rule 1002: Best Evidence Rule

Under Rule 1002, to prove the content of a writing or recording, the original writing or recording must be proffered. Fed. R. Evid. 1002. *Seiler v. Lucasfilm, Ltd.*, 808 F.2d 1316, 1319 (9th Cir. 1986).

K. Rule 1006: Summaries

Under Rule 1006, the contents of voluminous writings or recordings which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. Fed. R. Evid. 1006. The court may order that they be produced in court. *Id.* Plaintiffs proffer improper summary evidence under this rule. *See infra* Section III.A.

**III. THE COURT SHOULD EXCLUDE IMPROPER EVIDENCE
SUBMITTED BY PLAINTIFFS**

A. Hohengarten Ex. 2 (Declaration of Warren Solow)

The Declaration of Warren Solow (Hohengarten Decl. Ex. 2) and the exhibits to that declaration are improper and should be excluded.

1. Many Statements Made In The Solow Declaration Lack Foundation And Are Demonstrably Erroneous.

Solow does not have personal knowledge of the matters about which he purports to testify. Fed. R. Evid. 602. Solow describes his title as “Vice President of Information and Knowledge Management,” without further explanation of his job duties (Solow Decl. ¶ 1), leaving the declaration without foundation as to his basis for personal knowledge of the wide-ranging subjects in the declaration, many of which have nothing to do with information services or knowledge management.²

For example, in Paragraphs 30-32, Solow declares about Viacom’s use of YouTube for “promotional marketing purposes.” There is no foundation for the statements in these paragraphs. The declaration does not explain how Solow is “familiar” with Viacom’s “use of YouTube” to “display promotional marketing clips.” Solow Decl. ¶ 30. Not only that, when he was deposed in this case, Solow acknowledged that he lacks knowledge about the full scope of Viacom’s extensive practice of uploading video clips of its content to YouTube. *See* Schapiro Opp. Ex. 1 (423:12:425:12) (Solow professing ignorance about whether data provided to him “from Viacom subsidiaries and Viacom agents regarding their upload activity with respect to Viacom content on the internet and on YouTube” was comprehensive: “When one doesn't know the extent of the universe of a data set it’s hard to make a

² As might be expected in a situation where the witness lacks personal knowledge, many of Solow’s averments are wrong. For example, Solow states that “Viacom’s . . . copyrighted works” include “*Iron Man*.” Solow Decl. ¶ 5. Viacom does not own a copyright in the film *Iron Man*; its Paramount Pictures subsidiary is merely a distributor of this film—and Paramount has no exclusive distribution rights that are relevant to the alleged infringement in this case. *See* Counterstatement to Viacom’s Statement of Undisputed Facts ¶ 4.

determination that something is missing.”). In light of that admission, it is impermissible for Solow now to declare that Viacom’s uploading of clips to YouTube occurred only in “limited circumstances.”

There is also no foundation for Solow’s statement that “[t]o the best of my knowledge, the authorized activities of Wiredset and Fanscape were also known to YouTube.” Solow Decl. ¶ 32. Solow does not explain how he could possibly know what activities of Wiredset and Fanscape were “known to YouTube.” Nor does he explain how he could know whether the accounts that Viacom used to upload material to YouTube “were known to YouTube to be authorized Viacom accounts.” *Id.* ¶ 31.

The lack of foundation for the averments in Paragraphs 30-32 is confirmed by the fact that Solow’s statements—in particular, his claims that Viacom’s authorized uploading of material to YouTube was “limited,” that the accounts Viacom used to carry out those activities “were known to YouTube to be authorized Viacom accounts,” and that the authorized activities of Viacom’s stealth-marketing firms “were known to YouTube”—are squarely contradicted by the evidence. *See* Rubin Declaration in Support of YouTube’s Motion for Summary Judgment; *see also* Chan. Opening Decl. ¶¶ 4, 10; Ostrow Opening Decl. ¶ 5; Maxcy Opening Decl. ¶¶ 3-7; Schaffer Opening Decl. ¶ 6. The evidence that contradicts Solow’s statements includes numerous documents that Solow himself received. For example, Viacom has produced documents showing Solow’s awareness of dozens of obscure YouTube accounts authorized by Viacom to upload content to YouTube. *See* Schapiro Opp.

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Ex. 2; Schapiro Opening Ex. 140. Among the accounts that Solow was told that Viacom used to upload videos to YouTube are: “bestweekevertv,” “BroadwayJoe,” “BroadwayJoe415,” “Damonjohnson,” “FiveChemical,” “jerseymouth1,” “isitfridayyet,” “ParkMyVibe,” “Reaction2006,” “snackboard,” “thatsfunny,” “thatisalsofunny,” and “thatsnotfunny.” *Id.* The registration data that was provided to YouTube when these accounts were set up further obscures their connection to Viacom. *See* Schapiro Opp. Ex. 4.

There is similarly no foundation for the statement in Paragraph 26 that “Viacom has not authorized Defendants to copy, distribute, reproduce, display, or perform the copyrighted audiovisual content contained in the clips listed in Exhibit F.” Solow Decl., ¶ 26. Even putting aside the improper legal argument and conclusions embedded in this statement, as discussed above, Solow lacks personal knowledge of the scope of Viacom’s authorized uploading activity. The declaration does not explain how Solow would or could know whether every one of the clips listed in Exhibit F was not authorized by Viacom to appear on YouTube.

The lack of foundation for Paragraph 26 is confirmed by the fact that the statement is demonstrably incorrect. Among the clips listed in Exhibit F are clips that Viacom and its agents uploaded to YouTube or specifically authorized to remain on YouTube when uploaded by others. *See, e.g.,* Rubin Decl. ¶ 14 & Exs. 87, 117-28; Schapiro Opp. Ex. 397A/B; Schapiro Opp. Ex. 331 (describing Viacom’s acquiescence to uploads of clips to YouTube of the television program *Human Giant*); Schaffer Opp. Decl. ¶ 2. Exhibit F also includes a number of clips that

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Viacom's marketing agent, ICED Media, found on YouTube and obtained Viacom's permission to use on YouTube in its marketing campaigns. *See* Schapiro Opp. Exs. 370 (117:10-23; 61:4-63:4; 119:4-32), 373; Solow Decl. Ex. F (listing at least four clips as "unauthorized" that ICED Media obtained authorization to use: video id PvKdAy1Dha4; video id O_zHn77_XaU; video id 77NggE2uLdw; and video id cm9LBDINj2o).

Solow also lacks personal knowledge with respect to the averments made in Paragraphs 24-25. Solow states that an unnamed "team" working under his supervision compared each of the the allegedly infringing video clips on Exhibit F with an undefined "Work in Suit." Solow has no apparent knowledge of the activities of his "team," and any reliance on communications from the "team" is hearsay-within-hearsay. Solow also does not explain what constitutes the purported "Works in Suit" that his team reviewed. He does not even claim that they are copies of the works as submitted to the Copyright Office with Viacom's copyright registrations.

Solow's declaration also lacks foundation for the statements made in Paragraphs 28 and 29, which discuss Viacom's use of YouTube's Content ID technology. The declaration does not explain what personal knowledge Solow has for declaring about how or when YouTube "implemented digital fingerprinting." Solow Decl. ¶ 29. Beyond the foundation problem, Paragraph 29's statement that YouTube "implemented digital fingerprinting to prevent the infringement of Viacom's copyrighted works on the YouTube website in May 2008" is vague and

misleading. YouTube implemented its Content ID technology before May 2008, and that technology was available for Viacom to use as of October 2007. *See King Opp. Decl.* ¶¶ 7-10.

Finally, the Solow Declaration is objectionable due to the repeated legal arguments and conclusions found in a purportedly factual declaration. Solow characterizes YouTube videos as “infringing”; refers to Viacom’s works as having been “infringed”; and refers to Viacom’s ownership or control of various “exclusive rights” under the Copyright Act. Solow Decl. ¶¶ 2, 7, 9, 16-27, 28-29. These kinds of legal arguments and conclusions in a non-lawyer’s fact declaration are improper. *Pacenza v. IBM Corp.*, 04-CIV-5831 (SCR), slip op. at 8-9 (S.D.N.Y. July 26, 2007).

2. The Exhibits To The Solow Declaration Are Inadmissible

The exhibits to the Solow declaration are also objectionable. Federal Rule of Evidence 1006 allows summaries of “the contents of voluminous writings, recordings, or photographs” to be admitted in some circumstances. Fed. R. Evid. 1006. Such a summary must “fairly represent” the underlying material. *Davis & Cox v. Summa Corp.*, 751 F. 2d 1507, 1516 (9th Cir. 1985). The Solow Declaration exhibits do not meet the standards for admissibility. In particular, Exhibit F to the Solow Declaration does not constitute a proper summary for purposes of Rule 1006. Exhibit F does not summarize the contents of the audiovisual material at issue here— it describes neither the contents of Viacom’s purported copyrighted works nor the contents of the allegedly infringing YouTube videos. Nothing about the “contents” of that audiovisual material is included; rather, only titles of works, copyright registration numbers, and file names are listed. Not only does the chart

omit “contents” of the recordings, it does not even include citations to where they may purportedly be found; there are no Bates numbers referencing allegedly produced items.³ Viacom does not even attempt to summarize the contents of the YouTube videos that it claims infringe its copyrighted works, much less submit the actual videos.

In any event, however, even if Viacom had provided a chart summarizing the “contents” of the audiovisual recordings, such a chart would not constitute sufficient proof of the material facts on which it bears the burden of production for its claims of copyright infringement. “[C]omparison of secondary or descriptive materials cannot prove substantial similarity under the copyright laws, because the works themselves, not descriptions or impressions of them, are the real test for claims of infringement.” *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 51 (2d Cir. 1986) (emphasis added). In *Walker*, the Second Circuit held that summaries proffered by plaintiff under Rule 1006 were not admissible on the question of infringement:

The Rule [FRE 1006] is designed to deal with the problem of writings, recordings or photographs ‘which cannot conveniently be examined in court’ by allowing them to be presented in ‘chart [or] summary form,’ and does not apply to the movie, which could be viewed in its undistorted entirety by the use of standard projection equipment[I]n copyright infringement cases the works themselves supersede and control contrary descriptions of them.

³ While Viacom at least provided Bates numbers and extremely cursory descriptions of documents in Solow Exs. A-D, those exhibits likewise cannot be said to “fairly represent” the underlying material. For example, Viacom describes two documents as “assignments” in connection with the film *Iron Man*, see Solow Ex. D at 13, but review of those documents demonstrates that they are actually distribution agreements, not assignments at all. Schapiro Opp. Exs. 371, 372.

Id. at 52; *see also Crane v. Poetic Products Ltd.*, 593 F. Supp. 2d 585, 597 (S.D.N.Y. 2009); *Littel v. Twentieth Century Fox Film Corp.*, 1995 WL 404939, at *17 (S.D.N.Y. Jul. 7, 1995) (though “plaintiffs presented the court with multiple volumes of textual analysis of the various works,” these “descriptive materials cannot prove substantial similarity under the copyright laws”).

Exhibit F also violates the best evidence rule. Under Rule 1002, proof of the contents of a writing or recording requires submission of the actual recording – not a description or other substitute evidence. Fed. R. Evid. 1002. In particular, in copyright cases, a plaintiff cannot prove the contents of a copyrighted work or allegedly infringing work without submitting the actual writing or recording. *Seiler v. Lucasfilm, Ltd.*, 808 F.2d 1316, 1319 (9th Cir. 1986).

B. Viacom Improperly Offers Evidence of Insurance as Proof of Misconduct.

In its Statement of Undisputed Facts Nos. 183-186, Viacom cites the indemnification/escrow provisions of the agreement by which Google acquired YouTube as supposed proof that YouTube was committing copyright infringement and both parties knew it. That tactic is improper for two reasons. First, it is foreclosed by Fed. R. Evid. 411. *Matosantos Commercial Corp. v. SCA Tissue N. Am., L.L.C.*, 369 F. Supp. 2d 191, 194-95 (D. P.R. 2005) (finding indemnification agreements subject to Rule 411); *Curtis Mfg. Co., Inc. v. Plasti-Clip Corp.*, 933 F. Supp. 94, 100-01 (D.N.H. 1995); *see also Garnac Grain Co. v. Blackley*, 932 F.2d 1563, 1570 (8th Cir. 1991); *Griffin v. Hilke*, 804 F.2d 1052, 1057 (8th Cir. 1986);

Humphrey v. Demitro, No. 94 C 6234, 1996 WL 580861, at * 1 (N.D. Ill. Oct. 4, 1996).

Second, the presence of an indemnification provision in the agreement is entirely unremarkable and thus inadmissible under Fed. R. Evid. 402. A similar escrow provision can be found in the agreement by which Viacom acquired Atom Entertainment and Addicting Clips in August 2006. Schapiro Opp. Ex. 343. At his deposition, Mika Salmi—President of Global Digital Media at Viacom and previously the CEO of Atom Entertainment which Viacom acquired—explained that provision as standard in large corporate transactions: “I’d be surprised if there was any deal of this size that doesn’t have an escrow provision. I think it’s just a legal protection. Like a standard check box.” Salmi added that it would not be reasonable to assume, by virtue of the presence of the escrow provision in the Viacom/Atom acquisition agreement that either the buyer or seller expected lawsuits or was engaged in misconduct. Schapiro Opp. Ex. 104 (99:1-101:5, 102:20-105:10). The Federal Rules bar the indemnification/escrow evidence Viacom proffers for precisely the reasons Salmi articulated. Fed. R. Evid. 411, 402.

C. Third Parties’ Foundationless Reports And Estimates About The Kinds Of Videos on YouTube Are Inadmissible.

In an attempt to equate YouTube with illegitimate services dedicated to pirated content, Viacom introduces what it says is a valid estimate of such content on YouTube. Viacom Br. 8; Hohengarten Ex. 49. Hohengarten Ex. 49 is an April 2006 email from a Google employee to others at Google reporting on statements from an online blog post, which itself was reporting on statements supposedly made

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at a conference by Fox Entertainment/News Corporation executive Peter Chernin. According to the Google employee's account of the blog post's recounting of it, Chernin supposedly said that "we did a survey and more than 80 percent of video on this site is copyrighted content." In submitting this document, Viacom ignores at least four levels of hearsay,⁴ and offers the foundationless number 80% as some estimate of infringement on YouTube, rather than the estimate of copyrighted content it purports to be. The exhibit is inadmissible under Fed R. Evid. 802, 402, 602, and 1002.

Hohengarten Ex. 61 is objectionable for similar reasons. In it, the same Google employee who received the email with Chernin's reported comment and replied "Holy Cow" tells another that 80% of YouTube is illegal content. But this Google employee's guesswork has even less probative value than the fourth-hand report of a survey Fox supposedly conducted. There is not even that deficient foundation for this estimate, and Viacom offers none. Indeed, Viacom does not offer any explanation as to how the author of Hohengarten Ex. 61 could have been in a position to know what was and was not authorized to be on YouTube. The exhibit is inadmissible for this reason alone. Fed. R. Evid. 602.

In addition, to the extent Viacom offers the exhibit for its truth, it is inadmissible hearsay. Fed. R. Evid. 801, 802. A statement by someone at Google

⁴ Assuming some survey of online video users was actually done, the results were somehow communicated to Chernin who repeated them at a conference. Someone attempted to capture Chernin's remarks, then reported them in a news story, which a Google employee read and purported to summarize, long before there was any relationship between Google and YouTube.

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about YouTube in May 2006, five months before the company acquired YouTube (and while its video service was competing against YouTube) is not a YouTube admission. Fed. R. Evid. 801(d)(2)(D) (statement by agent of party non-hearsay if made while the relationship is in existence). Viacom cannot be offering the document to prove Google's state of mind; there is no showing that this thinking informed the decision about acquiring YouTube, and even if it did, that would not be relevant to the inducement test that *Grokster* sets forth. See YouTube Opp. Section V.B.2; Fed. R. Evid. 402.

Viacom also submits Hohengarten Exhibit 62, which includes the statement: "One senior media executive told me they are monitoring YouTube very closely and referred to them as a 'Video Grokster.'" On its face, this statement is hearsay, attributed to an unidentified "senior media executive." Fed. R. Evid. 801, 802. To the extent Viacom seeks to offer this statement for its truth, it is inadmissible and should be excluded. Given the origin of statement, all references to "Video Grokster" and other media company statements in the evidence submitted by Viacom should be excluded. See, e.g., Hohengarten Ex. 52 (using term "rogue enabler" in quotation marks, indicating it was taken from another source); Hohengarten Ex. 60 (Under heading "Premium Content Owners -- Lessons Learned" is bullet point "They acknowledge You Tube can provide some level of promotion, but (mainly) perceive You Tube as trafficking mostly illegal content – 'it's a video Grokster'"). Moreover, even if such statements could be attributable to Google, rather than repetitions of media company disparagements, they would still

be hearsay if offered against YouTube: these are pre-acquisition documents, from a time when Google and YouTube had no affiliation. They are not party admissions of YouTube.

D. YouTube’s Removal Of Advertisements From Certain “Watch Pages” Is Inadmissible to Prove Defendants’ Liability.

Relying on Hohengarten Ex. 111, Viacom argues that YouTube undermined its DMCA protection by displaying advertising on so called “watch pages” of its site because, according to the document, it ultimately ceased doing so for “legal reasons.” As we show in our Motion for Summary Judgment, YouTube is protected by the DMCA safe harbor regardless of whether it shows ads on watch pages.

YouTube Br. 76-77. But even under Viacom’s theory that YouTube was at one point outside the safe harbor and infringing copyrights, evidence that YouTube took steps to remedy that conduct cannot be used as evidence of previous impropriety. Fed. R. Evid. 407. Because that is the purpose for which Viacom introduces Hohengarten Ex. 111, the exhibit is inadmissible.

E. Putative Class Plaintiffs Have Improperly Submitted Altered Documents.

Most of the exhibits attached to the Declaration of Elizabeth Figueira are not true and correct copies of the original documents as Ms. Figueira claims. Although there is no explanation of it in her declaration, someone (presumably plaintiffs’ counsel) has altered the documents by adding extraneous notations, mainly boxes and arrows, that do not appear in the original documents. These alterations place undue emphasis on portions of documents and detract from the emphasis the authors actually supplied. *See, e.g.*, Figueira Decl. Ex. 63. Moreover, as to some of

the boxes and arrows, such as those on PowerPoint presentations, it is difficult to discern which graphics are in the original document and which are plaintiffs' additions. *See, e.g.*, Figueira Decl. Ex. 97. All such altered materials are not admissible. *See* Fed. R. Evid. 1001(4) (defining "duplicate" as an accurate reproduction of the original); Fed. R. Evid. 1003. Furthermore, given the alterations, Ms. Figueira has not properly authenticated these exhibits. Fed. R. Evid. 902; *see also Orr v. Bank of Am.*, 285 F.3d 764, 777-78 (9th Cir. 2002).

F. Evidence Purporting To Show How Much YouTube Employees Made From the Google Acquisition Is Inadmissible

In its separate statement, Viacom includes seven supposedly material propositions (Viacom SUF Nos. 21-27) reflecting returns that YouTube stockholders received on their investment following the sale of the company to Google. Viacom offers no legitimate reason for injecting such information into the summary judgment process, and there is none. The evidence is irrelevant, prejudicial, and inadmissible. Fed. R. Evid. 402; 403. Whatever inference Viacom imagines someone might someday draw in Viacom's favor from these personal details, that inference cannot be drawn in this proceeding. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (on summary judgment, inferences drawn in favor of nonmoving party).

G. Licenses and Negotiations Are Inadmissible To Prove Liability

Viacom rests multiple propositions in its separate statement on negotiations that it had with Google after Google acquired YouTube in October 2006. *See* Viacom SUF 203-08. Each proposition is a variation on the same theme: Google

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was negotiating a deal with Viacom because it knew that YouTube was infringing Viacom's copyrights. But offered for that purpose, any evidence of the negotiations is inadmissible for two reasons.

First, if Viacom's theory is to be credited and Google was seeking to resolve possible claims by Viacom against YouTube, Viacom plainly cannot cite the settlement negotiations as an indication of supposed wrongdoing or the amount of supposed liability. Fed. R. Evid. 408; *Alpex Computer Corp. v. Nintendo Co., Ltd.*, 1994 WL 681752, at *45 (S.D.N.Y. Dec. 5, 1994), *rev'd in part on other grounds*, 102 F.3d 1214 (Fed. Cir. 1996); *Samsung Elecs. Co., Ltd. v. Quanta Computer, Inc.*, No. C-00-4524 VRW, 2006 WL 2850028, at *5 (N.D. Cal. Oct. 4, 2006) (in pre-suit discussions: "[plaintiff's] license offers and [defendant's] counter-offer are precisely the sort of settlement offers-- made in an effort to avoid litigation--that FRE 408 bars"). Similarly, to the extent plaintiffs seek to admit evidence of license agreements YouTube has entered into with other parties (including releases of liability in those agreements) as evidence that YouTube must have "known" it had liability, that evidence is likewise barred for that purpose. Fed. R. Evid. 408; *Samsung*, 2006 WL 2850028, at *2.

Second, if the negotiations and license agreements are offered to show the existence or awareness of infringement, the evidence is barred as a remedial measure under Rule 407. Fed. R. Evid. 407; *Trilink Saw Chain, LLC v. Blount, Inc.*, 583 F. Supp. 2d 1293, 1317 n.12 (N.D. Ga. 2008) (excluding evidence under FRE 407 that alleged infringer voluntarily discontinued allegedly infringing

activities shortly after being notified of alleged violation); *PLC Med. Sys., Inc. v. Eclipse Surgical Techs., Inc.*, 976 F. Supp. 89, 90 (D. Mass. 1997) (where copyright defendant revised its allegedly infringing materials, such act was a remedial measure under FRE 407 that would not be considered by the court in deciding whether to issue preliminary injunction); *Vardon Golf Co., Inc. v. BBMG Golf Ltd.*, 156 F.R.D. 641, 652 (N.D. Ill. 1994) (FRE 407 precluded plaintiff from seeking discovery regarding change defendant made to its product after learning of plaintiff's patent).

H. Dean Garfield's Deposition Testimony (Hohengarten Ex. 333) is Inadmissible

Hohengarten Ex. 333 (testimony of Dean Garfield) is inadmissible. First, it is hearsay: Garfield's statement that YouTube refused to participate in a filtering test because "the copyrighted content on YouTube was a major lure for their users" is offered for its truth. Fed. R. Evid. 801-803. Garfield purported to attribute the statement to some unidentified person from YouTube, although he could not remember that person's name (or even the person's gender). Schapiro Opp. Ex. 162 (122:25-126:20; 128:3-19). Viacom has laid no adequate foundation to prove that the statement falls within the nonhearsay provision of Rule 801(d)(2)(D) relating to admissions by a party-opponent.

In order to qualify as a party agent for purposes of Rule 801(d)(2)(D), the declarant must be "an advisor or other significant participant in the decision-making process that is the subject matter of the statement." *Phipps v. Comprehensive Cmty. Dev. Corp.*, No. 00 Civ. 6063RJHKNF, 2005 WL 287413, at

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*13 (S.D.N.Y. Feb. 4, 2005) (internal quotations and citation omitted) (finding statement to be hearsay when made by an administrative assistant employed by party). Here, Garfield was unable to identify the declarant as an “advisor or other significant participant in the decision-making process.” In fact, Garfield could not identify (1) the person who made the statement; (2) whether the speaker was a man or a woman; (3) when the statement was made; (4) whether the statement was made before or after YouTube’s acquisition by Google; (5) where he was when the statement was made; or (6) how he reacted to the statement. Schapiro Opp. Ex. 162 (122:25-126:20; 128:3-19). In such circumstances, where Viacom has offered no evidence of the foundation for the party-opponent rule, the testimony is hearsay. *Geoghan v. Long Island R.R.*, No. 06 CV 1435(CLP), 2009 WL 982451, at *23-24 (E.D.N.Y. Apr. 9, 2009) (finding of hearsay when declarants were “unidentified supervisors” of party); *Evans v. Port Auth. of N.Y. & N.J.*, 192 F. Supp. 2d 247, 264 (S.D.N.Y. 2002) (excluding hearsay testimony there was no evidence declarant “played a role in any relevant decision-making process”).

Further underscoring the unreliability of Garfield’s testimony, all of the contemporaneous documentary evidence belies the purported statement. This includes Garfield’s own email explaining that YouTube did, in fact, agree to a filtering test with the MPAA. Schapiro Opp. Ex. 163. Garfield’s hearsay testimony should be excluded.

Plaintiffs should also be precluded from offering evidence regarding the MPAA’s discussions with YouTube about online copyright protection because the

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MPAA—Viacom’s agent—blocked discovery on that precise topic. *See* Viacom Br. at 19 (MPAA acted “on behalf of all the movie studios, including Viacom’s Paramount.”) YouTube served a Rule 30(b)(6) deposition subpoena on the MPAA asking for corporate testimony about its “conversations with YouTube regarding online copyright protection.” Schapiro Opp. Exs. 374, 375. The MPAA unequivocally refused to seat a witness on that topic. *See id.* Ex. 376. The law is clear that plaintiffs may not then offer alternative testimony purporting to reflect the MPAA’s “conversations with YouTube regarding online copyright protection.” *See Reilly v. Natwest Mkts. Group Inc.*, 181 F. 3d 253, 268-69 (2d Cir. 1999) (affirming order precluding witnesses from testifying on the “very issue” on which a party refused to seat Rule 30(b)(6) witnesses).

Rule 30(b)(6) requires an organization to designate a witness “to give complete, knowledgeable and binding answers on its behalf.” *Reilly*, 181 F. 3d at 268 (citation and internal quotations omitted); Fed. R. Civ. P. 30(b)(6). None of those conditions attached to the Garfield deposition. Plaintiffs noticed and took Garfield’s deposition in his personal capacity when he was no longer employed by the MPAA. His testimony was not binding on the MPAA, and he was not obligated to prepare to give testimony known or reasonably available to the MPAA. Plaintiffs’ decision to proffer the unreliable Garfield testimony purporting to describe communications between YouTube and the MPAA and to obstruct a properly noticed Rule 30(b)(6) deposition on the same topic is improper and should not be condoned.

IV. THE COURT SHOULD STRIKE HOHENGARTEN EXHIBITS 312 AND 315 AND THE PORTION OF VIACOM'S BRIEF THAT REFERENCES THOSE EXHIBITS

In support of a facially improper argument in its motion for summary judgment and in violation of Local Rule 5.1, Viacom submitted the entire deposition transcripts of Larry Page (Google's co-founder), Eric Schmidt (Google's CEO), Chad Hurley (YouTube's CEO and co-founder) and Jawed Karim (co-founder of YouTube). Viacom has since withdrawn the full transcripts of the Schmidt, Hurley, and Karim depositions, substituting excerpts, but Hohengarten Exhibit 315 remains the full deposition transcript of Google co-founder Larry Page. And the Hurley "excerpt" that Viacom submitted as substituted Hohengarten Exhibit 312 is *166 pages long*—even though Viacom's Statement of Undisputed Facts cites to only *26 pages* of his testimony. *See* Viacom SUF. This, too, violates Local Rule 5.1, which provides that a party shall "quote or attach *only those portions* of the depositions" that are cited in their papers. L.R. 5.1 (emphasis added). Viacom submitted both the original and substituted versions of these transcripts for an improper purpose: to ask the Court to make credibility determinations on summary judgment. The Court should strike Hohengarten Exhibit 315 and substituted Exhibit 312 as well as the portion of Viacom's Memorandum that references them (Section I.A.3 beginning on page 21).

In its objectionable argument Section I.A.3, Viacom specifically references only one topic from the Page transcript, concerning the acquisition of YouTube by Google. Viacom Br. 23. Viacom nevertheless submitted the entire transcript, purportedly because review of the entire transcript would allow the Court to assess the witness's "level of candor". *Id.* Viacom also submitted 140 pages of the Hurley

transcript for the same purpose. *Id.* at 22 (“we include pages 177-317 of Mr. Hurley’s testimony and invite the Court to review it.”). However, the Court cannot make credibility determinations in connection with Viacom’s summary judgment motion. *See Anderson*, 477 U.S. at 255 (“Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge”); *Jeffreys v. City of New York*, 426 F.3d 549, 553 (2d Cir. 2005) (“Assessments of credibility and choices between conflicting versions of the events are matters for the jury, not for the court on summary judgment.”). Because the stated purpose for which Viacom submitted the transcripts is an improper one, Exhibit 315 and substituted Exhibit 312 should be stricken.⁵

The Court should also strike the section of Viacom’s brief discussing the Schmidt, Karim, Page, and Hurley transcripts (Section I.A.3 beginning on page 21). Viacom uses the transcripts in support of an argument that documents relevant to this case were “lost” and that the witnesses did not have sufficient recall during their depositions. There is no conceivable relevance of this innuendo to Viacom’s summary judgment motion, on which all inferences must be drawn in YouTube’s favor. *Anderson*, 477 U.S. at 255. Viacom has never made a motion seeking a

⁵ To the extent Viacom submitted these transcripts with an ulterior purpose of gratuitously maligning Google’s and YouTube’s executives, the submission is likewise improper and should be stricken. *Flaherty v. Filardi*, No. 03 Civ. 2167 (LTS)(HBP), 2009 U.S. Dist. LEXIS 22641, at *60-62 (S.D.N.Y. Mar. 20, 2009) (invoking court’s “inherent authority” to strike irrelevant materials that were “a clear, and repeated, attempt to cast Defendants in a negative light”).

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finding of spoliation—nor could it, given that none occurred.⁶ Viacom’s argument in this section is included solely to attack the credibility of Google and YouTube personnel, and/or to generally cast them in a negative light. Such arguments are not proper on summary judgment.⁷

Viacom’s charges are particularly surprising when placed in the context of the manner in which Viacom interpreted its document preservation obligations and proper deposition conduct. For the time period from February 2006 to June 2007—during which Viacom sought to acquire YouTube, the Google-YouTube acquisition occurred, the Viacom-YouTube and then Viacom-Google negotiations took place, and Viacom filed this lawsuit—Viacom produced a total of six custodial documents from its Chairman, Sumner Redstone. *See* Schapiro Opp. Ex. 377. Indeed, for the months of January, February, March, April, May, June, July, August, November, and December of 2006, and January, February, March, April, May, June, and July of 2007, Viacom produced *zero* custodial documents from Mr. Redstone. *Id.*

⁶ Dr. Eric Schmidt was clear that his practice of not keeping email changed after the litigation was filed and he was notified. Schapiro Opp. Ex. 134 (19:22-25). He also testified that Google used an automated process to preserve email. *Id.* 21:12-16. As the CEO of Google, Dr. Schmidt does not run the YouTube subsidiary on a day to day basis; he is not even likely to have numerous relevant, nonprivileged documents. And Mr. Hurley explained that his computer crashed prior to this lawsuit, causing emails to be lost – which is why Viacom does not even contend that there was intentional document destruction here. Schapiro Opp. Ex. 83 (317:3-15). Even aside from that, there is nothing sinister about the absence of documents from 2005 in a lawsuit filed in 2007; any claim that parties should necessarily have documents dating from *years* prior to a lawsuit’s filing is specious.

⁷ Viacom recognized as much during the deposition, framing its questions in terms of what a *jury* could conclude. Schapiro Opp. Ex. 134 (12:3-6) (asking Dr. Schmidt what it would be “fair for the jury in this case to conclude” about the production of his documents).

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Viacom also made no effort to preserve many of the central documents in this case: documents showing extensive uploading of videos to YouTube as part of its stealth marketing campaigns. For example, disturbingly, Kristina Tipton, a Paramount marketer who was heavily involved in YouTube uploading⁸ and who left Viacom in September 2007 (six months after this lawsuit was filed), was never told to preserve documents. Schapiro Opp. Ex. 378 (184:20-24). She testified that she sent over 20,000 emails while employed at Paramount — yet Viacom produced a total of 6 custodial documents from Ms. Tipton. *Id.* (181:22-18210), Ex. 379. Todd Apmann, an MTVN marketing employee, likewise *never was told to preserve documents*, and he *deliberately deleted* all of his emails when he left the company in February 2007 – a time when Viacom anticipated filing this lawsuit, which occurred only a month later. Schapiro Opp. Ex. 305 (176:17-20) (Viacom was preparing to file this lawsuit as of November 2006); Schapiro Opp. Ex. 257 (134:3-136:13). Viacom also failed to preserve the documents of Michael Wolf, MTVN’s President and Chief Operating Officer, when he left the company in February 2007. *Id.* Ex. 305 (25:11-14; 207:17-210:12) (testifying that he deleted his emails upon leaving and was not asked to preserve them)

⁸ See, e.g., Schapiro Opp. Exs. 378 (33:25-34:11) (Tipton recommended that Paramount use YouTube for viral marketing) (17:8-13) (her department posted videos on YouTube) (39:24-40:9) (Tipton’s boss directed uploading of clips to YouTube) (43:4-45:2) (describing opening account on YouTube and uploading videos to it) (108:5-110:16) (describing Paramount’s Be Heard campaign on YouTube for *Freedom Writers* movie), 380, 381.

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Moreover, Viacom witnesses frequently suffered from memory lapses during their depositions.⁹ For example, one witness, MTVN's Vice President for Consumer Marketing who participated in online and viral marketing,¹⁰ claimed an inability to remember hundreds of times.¹¹

Viacom's arguments concerning the purported credibility and candor of YouTube witnesses should be rejected, and the Court should strike Hohengarten Exhibit 315, substituted Hohengarten Exhibit 312, and Section I.A.3. of Viacom's Memorandum.

⁹ *See, e.g.*, Schapiro Opp. Exs. 257 (28:11-30:20); (34:23-35:2); (98:3-100:15), 8; *see also* Schapiro Opp. Exs. 102 (85:8-24, 94:4-12, 116:7-13), 264 (52:15-53:4, 85:20-25), 384 (164:21-165:3), 257 (26:3-27:9; 111:25-118:12), 385.

¹⁰ *See* Schapiro Opp. Ex. 259 (6:11-15) (job title); Schapiro Opp. Exs. 63 (email by Burrell with viral marketing plan), 386 (email asking to discuss with Burrell uploading of Viacom show to YouTube).

¹¹ Schapiro Opp. Ex 259 (8:3,13-14, 20-21; 11:14; 12:9-10; 14:3,8; 15:6-7,12-13,20,24-25; 16:5-6,20; 17:8,14,19; 18:5,9-10,17,22-23; 19:3-4,10-11,16-17,24-25; 20:17-18, 20-21; 21:5,10,15-16 ; 22:13-14; 24:24; 25:5,9; 26:7,10,16-17,25; 27:6; 28:2; 29:11,16; 30:2,9,17,23; 31:4,13, 20-21, 25; 32:3,5,7-8,10,19; 35:8,23; 36:20,25; 38:3-4,8,11,15-16; 39:9,12; 41:17-18; 43:15,20; 44:8-9; 45:3-4,10-11, 14-16, 20; 46:2-3,9-11,24; 47:17-18,20,23; 48:12,17,25; 49:8-9,24-25; 51:16,20,12; 52:23-24; 53:17,20,24; 54:4,9-10,18-19; 55:5; 57:20,23; 58:11,15-16,22; 59:3,10,14,18,22; 60:2-3,10-11,23; 61:3; 62:21,25; 66:16-17, 21-23; 67:4-5,13; 68: 13-14,21-22; 69:6-8,14-15; 70:3-5; 72:10-11,17; 73:7,12; 74:8,11-13; 75:12-14; 77:11,21; 78:2; 79:20,23; 84:18-19; 87:12,15; 88:4,10,12,16,20,22,24; 89:8,12-13,25; 90:5,7,13,15,17; 91:5,13,17,21; 92:9,13,15,17,20,23; 93:3,7; 96:19-17; 97:21-22; 98:19-21; 99:3-6; 101:8; 104:7,15,19; 106:2,9-10; 107:12-16,22-23; 108:17-20; 109:18; 110:9-10, 21-23; 111:3-4,10-12,21; 114:11-14,21-25; 115:11-12; 116:2,5-6,17,24-25; 117:9-12, 19-21; 118:6-7, 12-13; 119:4,7,13,22; 120:11-12,17-18,21-22; 121:3,14,18-19,23-24; 122:5, 18,21; 123:16-17; 124:13,17,21; 125:4-8,22-23).

V. THE COURT SHOULD STRIKE THE PUTATIVE CLASS PLAINTIFFS' RULE 56.1 STATEMENT IN ITS ENTIRETY

Class Plaintiffs' Statement of Uncontroverted Material Facts in Support of Their Motion for Partial Summary Judgment ("Class SUF") should be stricken in its entirety because it violates Local Rule 56.1. Rather than offering short, concise statements of fact, the Class SUF instead consists of statements that are argumentative, conclusory, vague, overbroad, unsupported, compound, and contain legal conclusions. The Class SUF subjects YouTube to unfair prejudice in seeking to respond to these statements in the manner contemplated by Local Rule 56.1.

Local Rule 56.1 requires a party moving for summary judgment to submit a statement of the allegedly undisputed facts on which the moving party relies, together with citation to the admissible evidence of record supporting each such fact. *Giannullo v. City of New York*, 322 F.3d 139, 140 (2d Cir. 2003). A moving party's Rule 56.1 statement must be "short and concise," and list "in numbered paragraphs" each of the "material facts as to which the moving party contends there is no genuine issue to be tried." Local Rule 56.1(a). "Each statement" of material fact "must be followed by citation to evidence which would be admissible, set forth as required by Federal Rule of Civil Procedure 56(e)." Local Rule 56.1(d).

Importantly, "Rule 56.1 statements are not argument. They should contain factual assertions with citation to the record. They should not contain conclusions." *U.S. Info. Sys., Inc. v. Int'l Bhd. of Elec. Workers Local Union No. 3*, No. 00 CIV. 4763 RMB JCF, 2006 WL 2136249, at *3 (S.D.N.Y. Aug. 1, 2006); *see also Goldstick v. Hartford, Inc.*, No. 00 Civ. 8577 LAK, 2002 WL 1906029, at *1 (S.D.N.Y. Aug. 19,

2002); *Rodriguez v. Schneider*, No. 95 Civ. 4083, 1999 WL 459813, at n.3 (S.D.N.Y. Jun. 29, 1999).

Rule 56.1 statements that contain argument and conclusions are improper and should be stricken and disregarded. *Amalgamated Lithographers of Am. v. Unz & Co. Inc.*, 670 F. Supp. 2d 214, 217 (S.D.N.Y. 2009) (striking *sua sponte* Rule 56.1 statement where “[v]ery little of it is statements of fact; for the most part, it is legal argument.”); *Lapine v. Seinfeld*, 92 U.S.P.Q.2d 1428, 2009 WL 2902584 at *4 (S.D.N.Y. Sep. 10, 2009) (granting motion to strike “elements of Plaintiffs’ Rule 56.1 statement that constitute legal argument rather than facts”). The Class SUF violates the local rule in multiple ways.

A. The Class SUF is Improperly Argumentative.

The Class SUF is riddled with improper legal arguments and conclusions. The numbered paragraphs required by the Local Rule are interspersed with a series of unnumbered headings that are legal conclusions. For example:

- “Defendants Have Clear Knowledge of Extensive Infringing Content on YouTube.” Class SUF at 12.
- “Defendants Restricted Use of Technical Measures To Avoid Knowledge of Infringing Content.” Class SUF at 27.
- “Defendants Capitalized on Infringing Content Rather Than Remove It.” Class SUF at 36.

Argumentative headings like these, which essentially duplicate the legal arguments made in the Class Plaintiffs’ memorandum of law, have no place in a Statement of Undisputed Facts.

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The problem is not limited to the headings. Many of Class Plaintiffs' proposed material facts likewise consist of argumentative statements incorporating legal conclusions. That is inappropriate in a Local Rule 56.1 statement. For example, one court struck proposed material facts stating that the plaintiffs "manipulated [their] tax forms to get more money." *Bey v. City of New York*, No. 99 Civ. 3873 (LMM), 2009 WL 2060076, *2 (S.D.N.Y. July 15, 2009). The court agreed that the use of the word "manipulated" . . . tends more toward argument than a factual allegation" and that the evidence supported only the fact that the plaintiffs filled out their tax forms so as to get more money. *Id.* The court therefore granted the motion to strike the argumentative statements. *Id.* Here, Class Plaintiffs put forth statements that go far beyond the use of shaded words and consist of blatantly argumentative rhetoric. For example:

- "YouTube has been and is capable of identifying and removing copyright infringing and other 'inappropriate' content from the website through, among other things, proactive searches by YouTube personnel and 'community flagging' by users; it deploys such practices when removal corresponds to its financial interests." Class SUF ¶ 6.
- For a brief period in September 2005, YouTube's 'community flagging' feature permitted users to flag unauthorized copyrighted content, but YouTube discontinued it in order to claim ignorance of the copyright infringing content on the site." Class SUF ¶ 7.
- "By exploiting unlicensed copyrighted material, YouTube's founders/management effectively implemented a plan to derive financial benefits from both the operation of the site and the eventual sale of the site." Class SUF ¶ 9.
- "Movies and TV shows are other examples of premium content that Defendants exploit without authorization on YouTube." Class SUF ¶ 27.

- “Rather than avail itself of existing third party technology, Google’s strategy was to develop its own proprietary fingerprinting technology to create a product it could license to third parties, even though that both limited and delayed copyright protection tools for content owners.” Class SUF ¶ 30.

These thinly disguised statements of “undisputed” fact are legal arguments that should not appear in a Rule 56.1 statement. YouTube responds to these legal arguments in its memorandum of law opposing Class Plaintiffs’ motion for summary judgment. YouTube should not be forced to repeat that exercise in responding to the Class SUF. Class Plaintiffs’ argumentative and conclusory statements violate the Local Rule and should be stricken. *See, e.g., Rowe Enter., Inc. v. William Morris Agency, Inc.*, No. 98 CIV. 8272 (RPP), 2005 WL 22833, at *1 n.1 (S.D.N.Y. Jan. 5, 2005) (striking Rule 56.1 statements that are “argumentative and conclusory”); *Pacenza v. IBM Corp.*, 04-CIV-5831 (SCR), slip op. at 8-9 (S.D.N.Y. Jul. 26, 2007) (striking 56.1 statement that “confuses *facts* with argument and analysis”).

B. Many Of The Class Plaintiffs’ Proposed Statements of Fact Are Impermissibly Compound.

A number of the proposed statements of fact in the Class SUF contain lengthy statements that include multiple distinct facts, often mixed in with arguments and legal conclusions. For example:

- “YouTube identifies ‘premium’ content on its site and understands that this content is copyrighted, routinely uploaded without authorization, and a major attraction that generates traffic.” Class SUF ¶ 15.
- “YouTube designed systems and databases, including Claim Your Content (“CYC”), to monitor, manage, and monetize infringing

content, but only made these tools available to favored, select counterparties.” Class SUF ¶ 28.

- “Defendants sell advertising in connection with videos, including contents that infringe the rights of Class Plaintiffs. Those ads are displayed both on the pages where the videos are viewed (‘watch pages’) and on the search pages that list the videos generated by a user search (‘search result pages.’) The advertising is contextually targeted to these videos by subject, title and other metadata associated with the videos.” Class SUF ¶ 36.

Class SUF ¶ 36. On their face, these rambling and compound statements violate the express requirement of the Local Rule that each proposed fact be “short and concise.” Local Rule 56.1. It is all but impossible for YouTube (or the Court) to parse the multiple factual predicates buried in statements such as these and determine what is disputed or undisputed.

C. The Class SUF Is Vague and Unintelligible.

Many of Class Plaintiffs’ proposed material facts include language that is overbroad, vague, and unintelligible. For example, proposed fact 8 states: “YouTube no longer undertakes proactive searches generally for copyright infringing content (but only for select partners).” Class SUF ¶ 8. It is not clear whether plaintiffs mean to say that YouTube no longer undertakes searches on a universal basis but now does so for “select partners,” or whether they mean to claim that YouTube no longer undertakes searches at all but when YouTube did so, it was only for “select partners.” It is also unclear what plaintiffs mean by “proactive searches.” And the qualifier “generally” further serves to make the entire statement ambiguous. Equally ambiguous is the Class Plaintiffs’ repeated use of the word “exploit,” which they do not define. *See, e.g.*, Class SUF ¶¶ 9,

YouTube cannot reasonably be expected to respond to such vague and confusing statements. *See, e.g., Domnister v. Exclusive Ambulette, Inc.*, No. 03-CV-1666 (NGG), 2007 WL 4244151, at *4 n.6 (E.D.N.Y. Nov. 29, 2007) (assertions in Rule 56.1 statements that are “vague” and “incomprehensible” may be disregarded).

D. The Citations In The Class SUF Mischaracterize the Evidence And Do Not Support The Propositions Asserted.

Finally, many of the proposed facts set out in the Class SUF are not supported by simple citations to evidence as required by Local Rule 56.1, but instead include lengthy argumentative “spin” giving Class Plaintiffs’ misleading interpretation of the documents. Other proposed facts are not supported by any evidence at all.

Class Plaintiffs repeatedly use misquotations and skewed characterizations of the evidence they cite to support their “factual” propositions. For example:

- In purported support of proposed fact 5, Class Plaintiffs cite Figueira Decl. Ex. 42, which they describe with a parenthetical stating “Premium content causes user traffic to ‘surge.’” But the actual document does not say that. The document never uses the word “premium” or anything like it.
- In connection with proposed fact 29, Class Plaintiffs cite Figueira Decl. Ex. 71, which they describe with a parenthetical that omits the material portion of the quoted sentence. *Compare* Class SUF ¶ 29 *with* Figueira Decl. Ex. 71 (omitting the italicized language: “We want to minimize the number of requests, *one reason being PSO has to support this and as you know we are quite strained for resources.*”).
- In connection with proposed fact No. 3, Class Plaintiffs cite Figueira Decl. Ex. 148 and include a parenthetical that misquotes the document as stating “July 2009: 98.1 million unique visitors, and 17.5 billion page views per month... 8.9 video views in July 2009,” when nowhere does such a quote appear in the document.

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Class Plaintiffs also creatively use ellipses to create a misleading impression of the evidence. For example, in Class SUF ¶ 5, which cites Figueira Decl. Ex. 63, the parenthetical uses misleading brackets and ellipses to change the meaning of the email message. *Compare* Class SUF ¶ 5 *with* Figueira Decl. Ex. 63 (adding the words “But the” and omitting the phrase “if you search the right tags on Flickr”).

The Class SUF also includes a number of citations to evidence that do not at all support the proposition asserted. This is improper, and the SUF should be stricken on that basis. *Bey*, 2009 WL 2060076 at *2-6 (striking statements of fact unsupported by the cited evidence).

For example, none of the documents cited in supposed support of Class SUF ¶ 9 supports the Class Plaintiffs’ assertion that YouTube’s founders “exploit[ed] unlicensed copyrighted material.” The first document is a press release issued by Google to announce its acquisition of YouTube. Figueira Decl. Ex. 134. The second is a chat in which Steve Chen mused about a plan to builds YouTube’s numbers by “scraping MySpace” (a never-implemented idea that has nothing whatsoever to do with copyright, *see* Chen Opp. Decl. at 4). Figueira Decl. Ex. 14. The third is a draft email from one of YouTube’s founders describing their plans for the site, which says nothing about “exploiting” unauthorized material. To the contrary, the email says that YouTube’s goal was “to secure our position as the #1 place for *personal videos* on the internet.” Figueira Decl. Ex. 60 (emphasis added). The fourth is an email from August 2005 in which Chad Hurley wrote that “we need to start being diligent about rejecting copyrighted/inappropriate content. We are getting serious

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traffic and attention now, I don't want this to be killed by a potentially bad experience of a network exec or someone visiting us." Figueira Decl. Ex. 46. And the final piece of evidence is a video in which Karim mentions to his co-founders that his "secret" goal was to "sell out quickly"—there is no mention of copyright issues or exploiting unauthorized material. Figueira Decl. Exs. 44 & 49. That is improper.

Similarly, proposed fact No. 11 states that Google acquired YouTube "because YouTube had attracted substantially more users than Google's competing website, known as Google Video." Yet four of the five evidentiary citations for this proposition have nothing to do with the reasons for the Google-YouTube acquisition, and the fifth does not support the proposed fact. YouTube Response to SUF ¶ 11. Other similar examples could be given. *See generally* YouTube's Response to Class SUF. Class Plaintiffs' repeated citation of evidence that does not support the proposed facts is simply not proper.

In short, the Class Plaintiffs' approach to Local Rule 56.1 violates its letter and its spirit. Their entire statement should be stricken.

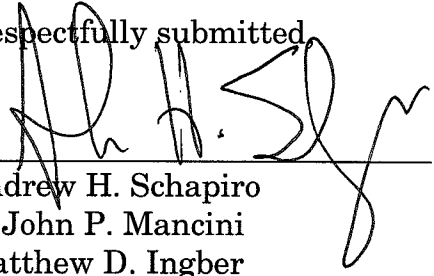
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VI. CONCLUSION

For the foregoing reasons, YouTube requests that the Court exclude the objectionable evidence relied upon by plaintiffs, and grant YouTube's Motion to Strike material as set forth above.

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Respectfully submitted



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