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Plaintiff Rosetta Stone Ltd. ("Rosetta Stone") respectfully submits this opposition to Google Inc.'s ("Google") Motion to Exclude Expert Report and Opinion of Dr. Kent Van Liere. For the reasons that follow, Google's motion should be denied.

INTRODUCTION

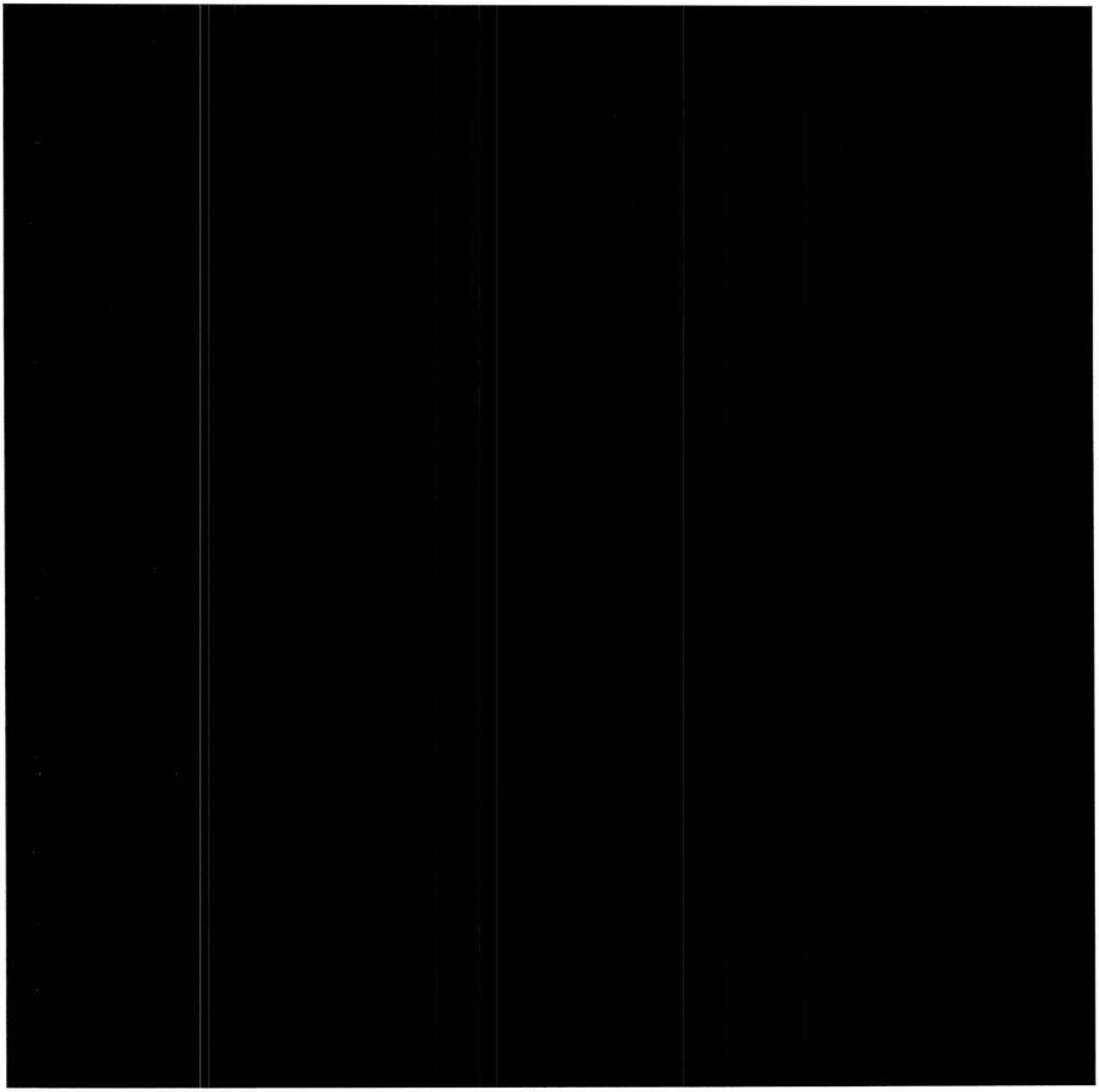
On July 10, 2009, Rosetta Stone filed a complaint against Google to stop Google's unauthorized use and sale of Rosetta Stone's trademarks as keywords that trigger third-party, paid advertisements on Google search-results webpages. Prior to filing the instant suit, Rosetta Stone commissioned a study by Dr. Kent Van Liere to determine whether Google's practices cause a likelihood of consumer confusion. Conducted in April and May 2009, Dr. Van Liere's survey reveals that Google's practices of allowing advertisers to bid on Rosetta Stone's trademarks and use the marks within the ad text of advertisements displayed on Google's search-results pages results in a net consumer confusion rate of 17%. Google now moves to strike Dr. Van Liere's expert report and testimony on the grounds that the survey results are irrelevant and the survey methodology is flawed. For the reasons set forth below, Dr. Van Liere's survey is relevant, sound, reliable, and consistent with accepted principles of survey design. As such, the Court should deny Google's motion to exclude.

BACKGROUND

A. Confusion Associated With Google's AdWords Program

Through its AdWords program, Google permits companies to buy advertising on Google's search-results pages that is triggered when web users enter certain keywords into Google's search engine. Advertisers bid money to purchase the keywords that trigger the ads, which are labeled as "Sponsored Links," and the bidders most attractive to Google receive the most desirable and visible positions along the top and right-hand side of the search-results page. The advertisers then pay Google each time a web user clicks on one of its Sponsored Links.

Google initially prohibited advertisers from using the trademarks of other companies as keyword triggers. In 2004, however, Google changed its policy and started selling trademarks of others as keywords in the United States and Canada. In considering its 2004 policy change,



[1] Unless otherwise noted, exhibit references herein are to the exhibits attached to the Declaration of Jennifer L. Spaziano in Opposition to Google's Motion for Summary Judgment and Its Motion to Exclude Expert Report and Opinion of Dr. Kent Van Liere.

[redacted]

Following the 2004 policy change, Google defended its new policy by emphasizing that it did not allow advertisers to use trademarks in ad text:

- In 2004, Ms. Hagan stated: "The standard in the U.S. for trademark infringement is likelihood of confusion, and we just don't believe users are likely to be confused unless there is something in the ad text that is causing that confusion." (Ex. 48.)

- In 2008, Richard Holden, director of product management for AdWords told *The Wall Street Journal*: "We have a long-running policy where we don't allow advertisers to use trademarked terms in ad text to avoid creating any user confusion." (Ex. 61.)

[redacted]

Effective June 15, 2009, Google again amended its policy on the use of trademarks in AdWords advertisements in the United States. [redacted] Google decided to allow advertisers to use other companies' trademarks in the text of their advertisements – even over the objection of the trademark owner.

B. Dr. Van Liere's Credentials

Shortly after Google's 2009 trademark policy change, Rosetta Stone filed the instant action. Before doing so, however, Rosetta Stone retained Dr. Kent Van Liere, a Vice President at NERA Economic Consulting, to conduct a consumer survey designed to assess whether Google's trademark practices resulted in consumer confusion. Dr. Van Liere is an expert in market analysis, sampling analysis, and survey research relating to, among other topics, consumer decision making, consumer choice, and consumer behavior. (Ex. 38, Expert Report of Kent D. Van Liere ("Van Liere Report") at 1.) Dr. Van Liere earned a Ph.D. in Sociology (with specialization in research methods and statistics) from Washington State University and was a tenured Associate Professor at the University of Tennessee, where he taught graduate and undergraduate courses in statistics, survey research methods, and social psychology. (*Id.* at Ex. A.) In addition to teaching as a Visiting Associate Professor at the University of Wisconsin, Dr. Van Liere served as a Principal, President, or Director of market analysis and survey research for HBRS and Hagler Bailly for more than 15 years. Dr. Van Liere also served as President and CEO of the market intelligence firm Primen. (*Id.*)

Over his 30-year career, Dr. Van Liere has conducted hundreds of studies and published numerous articles in technical reports and peer-reviewed journals concerning consumer attitudes,

choices, and behavior. (*Id.* at 1.) He has substantial experience conducting and using focus groups and surveys to measure consumer opinions and behaviors regarding products and services including purchase processes, branding and positioning, market segmentation, product attributes, new product research, and communications strategies. (*Id.*) During his career, he has facilitated hundreds of focus groups and has designed and analyzed hundreds of surveys focusing on marketing-related issues. (*Id.*)

Dr. Van Liere has testified at trial and in deposition on the application of statistical methods, sampling, questionnaire design, and the use of surveys. (*Id.* at Ex. A.) In the area of trademark infringement, his expertise extends to conducting surveys measuring likelihood of consumer confusion, secondary meaning, and dilution. (*Id.*)

C. Dr. Van Liere's Confusion Study

In this case, Dr. Van Liere designed a survey to determine whether consumers are confused as to the origin, sponsorship, or approval of the Sponsored Links that appear on the Google search-results page after a consumer has conducted a search using a Rosetta Stone mark as a keyword and/or are confused as to the affiliation, endorsement, or association of the websites linked to those Sponsored Links with Rosetta Stone. (*Id.* at 2.) Dr. Van Liere designed his research in conformance with generally accepted principles for the design of trademark confusion studies as described in several key treatises on the subject. (*Id.* at 4.) His Expert Report details his methodology with respect to key areas of confusion studies, including the definition of the relevant population, the procedures for sampling from the relevant population, the survey questions and interviewing procedures, the nature of the specific test and control stimuli shown to sampled consumers, and the protocol for estimating confusion. (*See id.* at 4-11.)

In designing the study, Dr. Van Liere defined the relevant population as "United States consumers who would potentially use Google's search services to gather information about the purchase of products and services from Rosetta Stone or to purchase products and services from Rosetta Stone." (*Id.* at 4.) Dr. Van Liere then used qualified interviewers to conduct face-to-face, double-blind surveys in shopping malls in eight separate cities representing the major census geographic regions of the United States.[2] (*Id.* at 5.) Individual consumers at these malls were sampled in accordance with demographic quotas to assure a reasonable representation of the diversity of consumers in the relevant population. (*Id.* at 5-6.) Respondents then were asked screening questions to ensure that they were part of the relevant population. Based on these screening questions, a respondent was considered qualified for the interview if he or she:

1. was interested in learning a foreign language;
2. would use the internet in the next 12 months to look for information about learning a foreign language;
3. had heard of Rosetta Stone as a company that offers foreign-language products; and
4. had used Google as an internet search engine in the past 12 months and would use Google as an internet search engine in the next twelve months.

(*Id.* at 6.)

A total of 379 respondents met the screening criteria, and these respondents were randomly assigned to one of two conditions: 188 were shown and asked about the "test stimulus," and 191 were shown and asked about the "control stimulus." (*Id.* at 7.) The test stimulus was an actual screenshot of a Google search-results page triggered by the keyword

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[2] Chicago, IL; Dallas, TX; Denver, CO; Gaithersburg, MD; Miami, FL; San Jose, CA; Seattle, WA; and Yorktown Heights, NY.

"Rosetta Stone."[3] (*Id.* at Ex. D at 1.) The test stimulus included not only organic search results down the left-hand side of the page, but also Sponsored Links along the top and right-hand side of the page. (*Id.*) Each Sponsored Link contained some variant of the Rosetta Stone mark. (*Id.*) The control stimulus was identical to the test stimulus except the control did not include the allegedly infringing Sponsored Links – the subject of the consumer confusion study. (*Id.* at Ex. D at 2.) In other words, the organic search results were identical on the test and control stimuli.

After the screening process, respondents were administered the main survey in front of a laptop computer screen. (*Id.* at 7.) Respondents were asked to click the Internet Explorer icon, which opened to the Google home search page. (*Id.* at 7-8.) Respondents were instructed to enter "Rosetta Stone" into the Google search box and hit the enter button. (*Id.* at 8.) Either the test or control stimulus then was displayed on the respondent's computer. (*Id.* at 7-8.) While the respondents reviewed the search results, the interviewers asked a series of questions:

- "Which link or links if any do you think sells Rosetta Stone language software products?"
- "Of the links you mentioned, which link or links, if any, are a Rosetta Stone company website?"
- "Of the links you mentioned, which link or links, if any, are endorsed by the Rosetta Stone company?"

(*Id.* at 8.) During the questioning, no distinction was made, and no guidance was given, with respect to organic links and Sponsored Links. (*Id.*) Following these questions, respondents were asked to explain why they believed each of the links they identified was either a Rosetta Stone company website or a link endorsed by Rosetta Stone. (*Id.* at 9.)

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[3] As explained in Section II.D.1 *infra*, the only change to the screenshot was the removal of the Rosetta Stone Sponsored Link to obtain an accurate measure of the confusion caused by Google's conduct.

Under Dr. Van Liere's protocol for estimating the levels of confusion in the test condition, respondents were counted as confused if they identified any Sponsored Link as being a Rosetta Stone company website or endorsed by Rosetta Stone. (*Id.* at 11.) Under the protocol for estimating confusion in the control condition, respondents were counted as confused if they (i) identified any organic link other than the official Rosetta Stone website as being a Rosetta Stone company website, or (ii) identified any organic link other than the official Rosetta Stone website or the Wikipedia website[4] as being endorsed by Rosetta Stone. (*Id.*)

Based on the survey results, Dr. Van Liere concluded that "a significant portion of consumers in the relevant population are likely to be confused as to the origin, sponsorship, or approval of the 'sponsored links' that appear on the search results page after a consumer has conducted a Google search using a Rosetta Stone trademark as a keyword and/or are likely to be confused as to the affiliation, endorsement, or association of the websites linked to those 'sponsored links' with Rosetta Stone." (*Id.* at 2-3.) More specifically, Dr. Van Liere's study concluded that 47% of the 188 test-condition respondents were confused and 30% of the 191 control-condition respondents were confused, yielding a net confusion rate of 17%. (*Id.* at 12.)

ARGUMENT

The admissibility of expert testimony is governed by Federal Rule of Evidence 702, which provides, in relevant part:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto . . . if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

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[4] As explained *infra*, Rosetta Stone endorses the Wikipedia website relating to Rosetta Stone software, inasmuch as Rosetta Stone monitors and contributes to the website.

When a party seeks to admit any expert testimony, the district court's obligation is to serve a "gatekeeping" function. *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 261 (4th Cir. 2005) (citing *Kumbo Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999)). In carrying out its "gatekeeping" role, a court not only should view such evidence with an understanding of the difficulty in devising and executing a survey, but also should consider any technical defects in the survey design as a factor in giving evidentiary weight to the expert testimony rather than rejecting the results out of hand. 6 J. Thomas McCarthy, *Trademarks and Unfair Competition* § 32:178 (4th ed. 2009) (citing *SquirtCo. v. Seven-Up Co.*, 628 F.2d 1086 (8th Cir. 1980)).

In general, "courts are loathe to exclude consumer surveys from evidence." *McNeil-PPC, Inc. v. Merisant Co.*, No. 04-1090 (JAG), 2004 WL 3316380, at *12 (D. Puerto Rico July 29, 2004). Indeed, it is rare that a survey, no matter what flaws are alleged, is "completely unhelpful to the trier of fact." *See AHP Subsidiary Holding Co. v. Stuart Hale Co.*, 1 F.3d 611, 618 (7th Cir. 1993) (labeling the district court's rejection of survey evidence as "premature," and noting that "any shortcomings in the survey results go to the proper weight of the survey and should be evaluated by the trier of fact"); *see also Children's Med. Ctr. of Dallas v. Columbia Hosp. at Med. City Dallas Subsidiary L.P.*, No. 3-04-CV-2436-BD, 2006 WL 616000, at *7 (N.D. Tex. Mar. 10, 2006) (admitting survey even with alleged bias in its initial screening question, a universe defined too narrowly, and a "too limited" geographic area). So long as the survey is conducted according to accepted principles, "survey evidence should ordinarily be found sufficiently reliable under *Daubert*." *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1143 (9th Cir. 1997); *see also* Federal Judicial Center, Manual for Complex Litigation § 11.493, at 103 (4th ed. 2004) ("Even if the court finds deficiencies in the proponent's showing, the court may receive the evidence subject to argument going to its weight and probative value.").

I. CONFUSION AS TO AFFILIATION, ENDORSEMENT, OR ASSOCIATION IS ACTIONABLE UNDER 15 U.S.C. § 1114(1).

Google preliminarily argues that Dr. Van Liere's survey and expert opinion are irrelevant because they "'shed[] no light on the question that is key to' Rosetta Stone's trademark infringement claim—confusion as to source or origin of goods." (Google Mem. in Supp. of Mot. to Exclude ("Google Mem.") at 6.) Google contends that because the Court dismissed Rosetta Stone's claim for false representation under 15 U.S.C. § 1125(a), "the question that remains in this case—and the question that would be relevant to a survey or opinion testimony—is whether users are confused as to source or origin of the goods advertised." (*Id.* at 7.) According to Google, because the survey shows confusion only as to whether Rosetta Stone has "endorsed" the advertisers whose Sponsored Links appear on the test stimulus, and "Rosetta Stone's operative pleading no longer contains a claim based on 'endorsement,' Dr. Van Liere's survey and any opinion testimony about it lack any probative value and should be excluded." (*Id.*)

Google's misguided argument is premised entirely on the faulty contention that confusion as to affiliation, endorsement, or association is actionable only under 15 U.S.C. § 1125(a). To the contrary, however, such confusion is also actionable under 15 U.S.C. § 1114(1), which is the statutory basis for Rosetta Stone's claims under Counts I, II, and III of its Amended Complaint.

As an initial matter, a comparison of the plain text of the two provisions reveals that the confusion actionable under § 1114(1) is as broad, if not broader, than the confusion actionable under § 1125(a). Section 1114(1) prohibits, *inter alia*, the use in commerce of a registered trademark if such use is "likely to cause confusion, or to cause mistake, or to deceive." In contrast, § 1125(a) prohibits, *inter alia*, the use of a "any word, term, name, symbol, or devise" in connection with the sale of goods or services in a manner that would "cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with

another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person." Thus, whereas the types of confusion actionable under § 1125(a) are specifically limited to "affiliation, connection, or association" and "origin, sponsorship, or approval," the types of confusion actionable under § 1114(1) are not so limited.

The history of the Lanham Act further supports a broad interpretation of the confusion actionable under § 1114(1). The original language of § 1114(1), as adopted in 1946, limited confusion for trademark infringement purposes to "purchasers as to the source of origin of [the] goods or services." In 1962, however, Congress amended the Lanham Act by striking the words "purchasers as to the source of origin of such goods or services." *See* Pub. L. No. 87-772 § 17, 76 Stat. 769, 773 (Oct. 9, 1962). Following this amendment, courts broadly interpreted the confusion element as protecting against all kinds of confusion, not just confusion as to source or origin of the goods. *See, e.g., Syntex Labs., Inc. v. Norwich Pharmacal Co.*, 437 F.2d 566, 568-569 (2d Cir. 1971) (concluding that the 1962 amendment prohibits "the use of trademarks which are likely to cause confusion, mistake, or deception of any kind, not merely of purchasers nor simply as to source of origin"). Indeed, the Fourth Circuit also concluded that the 1962 amendment broadened the protection that § 1114 affords so that the "public is protected from being confused as to the *sponsorship* of goods or services purchased." *AMP Inc. v. Foy*, 540 F.2d 1181, 1184, 1184 n.5 (4th Cir. 1976) (emphasis added) ("The deletion of the language, so far as this case is concerned, may only broaden the protection afforded.").

Congress codified the courts' broad interpretation of the confusion standard when it again amended the Lanham Act in 1989. This time, Congress amended § 1125(a), which originally did not refer at all to confusion, to expressly protect against confusion "as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or

approval of his or her goods, services, or commercial activities by another person." Although Congress did not amend § 1114(1) in a similar fashion, courts and leading authorities have continued to recognize that the confusion necessary for trademark infringement of federally registered marks under § 1114(1) extends to any kind of confusion, not just that related to the source or origin of the goods. *See, e.g.*, McCarthy, *Trademarks and Unfair Competition* § 23:76 (2009) (noting § 1114's broader scope following the 1962 Lanham Act amendment).

Notably, even after the 1989 amendment to the Lanham Act, courts in the Fourth Circuit continued to recognize that confusion as to affiliation, endorsement, approval, and source or origin of goods is actionable under § 1114(1). *See Anheuser-Busch, Inc. v. L & L Wings, Inc.*, 962 F.2d 316, 318 (4th Cir. 1992) ("In other words, an unauthorized use of a trademark infringes the trademark holder's rights if it is likely to confuse an 'ordinary consumer' as to the *source or sponsorship of the goods*.") (emphasis added) (citation omitted)); *Maurag, Inc. v. Bertuglia*, 494 F. Supp. 2d 395, 397 (E.D. Va. 2007) (explaining that to show likelihood of confusion under § 1114, a plaintiff could show ads are likely to cause customers to patronize one restaurant thinking it was affiliated with another).

At bottom, Google is plainly wrong that "endorsement confusion . . . is not at issue in this case." (Google Mem. at 8.) To the contrary, whether consumers believe that Rosetta Stone has endorsed, is affiliated with, or has approved third-party Sponsored Links triggered by, and containing, Rosetta Stone's marks is central to Rosetta Stone's trademark infringement claims. Pertinent authorities make clear that endorsement, affiliation, or sponsorship confusion is actionable under § 1114(1). Thus, notwithstanding the Court's dismissal of Rosetta Stone's false representation claim under § 1125(a), the confusion measured in Dr. Van Liere's survey as to

both origin and endorsement is actionable under Rosetta Stone's remaining federal trademark infringement counts and therefore "legally relevant."

II. DR. VAN LIERE'S SURVEY IS RELIABLE AND SHOULD BE ADMITTED.

A. Dr. Van Liere's Survey Is Consistent With The Ample Evidence Of Actual Confusion Already Part Of The Record In This Case

As detailed above, [redacted] In addition, in a similar trademark infringement case that GEICO brought against Google in this Court, Judge Brinkema found that the GEICO expert's survey results "were sufficient to establish a likelihood of confusion regarding those Sponsored Links in which the trademark GEICO appears either in the heading or text of the ad." *GEICO v. Google, Inc.*, No. 1:04CV507, 2005 WL 1903128, at *7 (E.D. Va. Aug. 8, 2005). Moreover, Rosetta Stone deposed five college-educated consumers who testified that they were confused by Google's Sponsored Links when they attempted to purchase Rosetta Stone software over the internet. (Ex. 52, Doyle Dep. at 11:15-14:6; Ex. 53, DuBow Dep. at 15:2-19:20; Ex. 62, Jeffries Dep. at 13:5-14:17; Ex. 67, Porter Dep. at 12:22-23:9; Ex. 69, Thomas Dep. at 12:16-18:3.) Aside from being relevant and reliable, Dr. Van Liere's study is entirely consistent with the powerful evidence of actual confusion already marshaled in this case. This fact alone undermines Google's arguments that Dr. Van Liere's report and testimony should be excluded.

B. Google's Expert Has Provided No Independent Survey Or Data To Support His Opinions, But Instead Merely Criticizes Dr. Van Liere's Survey

Google's confusion expert Dr. Edward A. Blair has submitted a report and declaration criticizing Dr. Van Liere's study, but Dr. Blair did not conduct his own study to test the actual

confusion that arises as a result of Google's practices. Moreover, he offers no independent empirical data to support his criticisms of Dr. Van Liere's study. This Court has been skeptical of experts who merely criticize the opposing expert's study without conducting a survey of their own. *See, e.g., Teaching Co. Ltd. P'ship v. UnaPix Entm't, Inc.*, 87 F. Supp. 2d 567, 584 (E.D. Va. 2000) (Lee, J.) ("When questioned about Unapix's failure to conduct its own survey, Mr. Ossip suggested that time and financial limitations did not permit it. However, Unapix had ample opportunity to conduct a 'proper' survey on likelihood of confusion, since it completed a survey purportedly addressing secondary meaning by the end of July.")

Other courts similarly have been critical of experts who pass judgment without conducting their own surveys. For example, in a trademark infringement case before the U.S. District Court for the Eastern District of California, the court concluded that the expert's criticisms of plaintiff's confusion expert amounted to nothing more than "differences of opinion between survey experts about the optimum survey design." *E. & J. Gallo Winery v. Gallo Cattle Co.*, No. CV-F-86-183 REC, 1989 U.S. Dist. Lexis 7950, at *27 (E.D. Cal. June 19, 1989). The court explained:

> While Defendants' expert, Dr. Robert Sorensen ("Sorenson"), criticized Field's survey design, his criticisms are based on untested hypotheses about how consumers might have reacted to Field's questions or to alternate questions suggested by Sorensen. Sorensen did not conduct a survey of his own design to demonstrate different levels of confusion or the invalidity of Field's design. Absent such evidence, Sorensen's criticisms show nothing more than differences of opinion between survey experts about the optimum survey design. Field's questions were carefully framed to address the relevant issues of consumer confusion and were tested for effectiveness. In light of Mervin Field's 41 years' experience and preeminent reputation, Field's survey design is eminently trustworthy.

Id.; *see also BellSouth Corp. v. Internet Classified of Ohio*, No. 1:96-CV-0769-CC, 1997 WL 33107251, at *20 (N.D. Ga. Nov. 12, 1997) ("Defendants did not conduct a survey of their own. The failure to conduct a survey has sometimes been criticized. Regardless, Defendants[']

'Monday-morning quarterbacking' of BellSouth's survey is without merit. BellSouth's survey is probative of a finding of likelihood of confusion."); *CytoSport, Inc. v. Vital Pharm., Inc.*, 617 F. Supp. 2d 1051, 1076 n.10 (E.D. Cal. 2009) ("Notably, while defendant submits a declaration by an expert who criticizes plaintiff's survey, defendant did not conduct its own survey, despite adequate time to do so. At oral argument, remarkably, defendant's counsel admitted that he and his client made a conscious choice to not perform a competing survey as *they* believed the motion was baseless and a survey was thus, unnecessary."). This Court likewise should be skeptical of Dr. Blair's "Monday-morning quarterbacking" and untested hypotheses in this case.

Google's and Dr. Blair's criticisms are further undermined [redacted] Given the dearth of empirical support for Dr. Blair's criticisms and untested hypotheses, along with the strong evidence of actual confusion in this case, the Court should give little weight to the criticisms set forth in Google's Motion to Exclude.

C. Alleged Flaws In The Survey Go To The Weight, Not The Admissibility, Of The Expert Opinion

Google identifies what it believes to be flaws in Dr. Van Liere's survey design and methodology. These alleged technical deficiencies, however, bear only on the evidentiary weight that a fact finder should give to the survey, not on the admissibility of Dr. Van Liere's expert testimony. Courts generally hold that such alleged technical flaws can reduce a survey's weight, but they will not prevent the survey from being admitted into evidence. *See Selchow & Richter Co. v. Decipher, Inc.*, 598 F. Supp. 1489, 1503 (E.D. Va. 1984); *see also Schering Corp.*

v. Pfizer, Inc., 189 F.3d 218, 228 (2d Cir. 1999) (stating that "errors in methodology [] properly go only to the weight of the evidence - subject, of course, to Rule 403's more general prohibition against evidence that is less probative than prejudicial or confusing"); *Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 814 (9th Cir. 1997) ("Challenges to survey methodology go to the weight given the survey, not its admissibility."); *AHP Subsidiary Holding Co.*, 1 F.3d at 618 (noting that "any shortcomings in the survey results go to the proper weight of the survey and should be evaluated by the trier of fact"); *Brunswick Corp. v. Spinit Reel Co.*, 832 F.2d 513, 523 (10th Cir. 1987) (stating that a "survey is trustworthy if it is shown to have been conducted according to generally accepted survey principles" and that allegations of technical and methodological deficiencies "relate not to the survey's admissibility but to the weight to be given such evidence"); *Whirlpool Props., Inc. v. LG Elecs. U.S.A., Inc.*, No. 1:03 CV 414, 2006 WL 62846, at *2 (W.D. Mich. Jan. 10, 2006) ("A survey need not be perfectly conducted for testimony concerning its results to be admissible. So long as the expert's testimony and the underlying survey have probative value after all the survey's deficiencies are taken into account, testimony concerning the results of the survey that meets the basic requirements of usefulness and reliability is admissible into evidence, and the trier of fact may accord it the weight it deems proper.") (citing 4 Weinstein § 702.06[3] at 702-140); 5 McCarthy, *Trademarks and Unfair Competition* § 32:170.

Indeed, in *Selchow & Richter Co.*, this Court stated that "[i]t must be recognized that no survey is perfect." 598 F. Supp. at 1502 (assessing plaintiff's survey under a Lanham Act claim). There, the defendant attacked plaintiffs' survey on grounds that (1) the sample size was too small, (2) the respondents were not properly selected, (3) the geographic area surveyed was too narrow, (4) it failed to accurately recreate the purchasing environment, (5) the results were not properly validated, and (6) the questions asked were leading and, therefore, biased. *Id.* The Court stated

that "the flaws exposed by the defendant should be taken into consideration in determining the weight that the Court attributes to the survey." *Id.* The Court added that "[s]urveys, where results were far more inconclusive than plaintiffs' survey, have been relied upon as strong evidence of likelihood of confusion." *Id.* The Court took into consideration the flaws of the survey in giving it evidentiary weight, but still relied upon it as evidence of the likelihood of confusion between the contested products. *Id.* at 1503.

Consistent with this practice, in January of this year, this Court held that the issues of reliability, survey controls, fitness, and materiality in the consumer survey before it went towards the weight a jury may give it, not the survey's admissibility. *PBM Prods. LLC v. Mead Johnston Nutrition Co.*, No. 3:09-CV-269, Slip Copy, 2010 WL 56072, at *3-5 (E.D. Va. Jan. 4, 2010); *see also Tunnell v. Ford Motor Co.*, 330 F. Supp. 2d 731, 742 (W.D. Va. 2004) (concluding that any criticism of witness's scientific method was a question of weight for the jury). So too, here, Google's challenges to Dr. Van Liere's survey go to the weight a jury may give it, not its admissibility.

D. Dr. Van Liere's Methodology Is Sound, Reliable, And Consistent With Accepted Principles Of Survey Design

Google has identified four categories of alleged methodological flaws in Dr. Van Liere's study. Not only are Google's criticisms unfounded, but even if true, none renders Dr. Van Liere's conclusions unreliable or inadmissible.

1. Dr. Van Liere's Survey Replicates Actual Market Conditions

Google asserts that Dr. Van Liere's study did not replicate actual market conditions because it "failed to adequately approximate normal online shopping behavior." (Google Mem. at 10.) Specifically, Google criticizes the study because respondents were not able to click Sponsored Links "to determine if an ad is relevant to their search and to find more information

about the advertised product of service." (*Id.*) According to Google, "[d]epriving the consumer of this important information 'distorts the experience' in a way that undermines the reliability of the survey." (*Id.* (citing *Simon Property Group L.P. v. mySimon, Inc.*, 104 F. Supp. 2d 1033, 1044 (S.D. Ind. 2008)).)

As an initial matter, although courts generally require that consumer surveys accurately reflect marketplace conditions, they do not require surveys to precisely replicate the process by which consumers actually purchase products or come in contact with a mark. *See Visa Int'l Serv. Ass'n v. JSL Corp.*, 590 F. Supp. 2d 1306, 1319 (D. Nev. 2008) ("Moreover, Defendant has provided no authority for the proposition that a scientifically valid survey must replicate the process by which a person will come into contact with the relevant mark. In contrast, Plaintiff presented evidence that accepted scientific methods require only that consumers are shown the mark.").[5]

Having said that, Dr. Van Liere's survey did accurately replicate the relevant search behavior of an online consumer searching for Rosetta Stone on the internet using Google's search engine. As detailed in Dr. Van Liere's Expert Report, the interviewers asked the respondents to enter the relevant search term into the search box and hit enter. (Ex. 38, Van Liere Report at 7-8.) The computer then displayed the relevant search results. (*Id.* at 8.) Nothing in the survey suggested that the search-results page was not live. In fact, considerable

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[5] Google's reliance on *Simon Property*; *Smith v. Wal-Mart Stores, Inc.*, 537 F. Supp. 2d 1302 (N.D. Ga. 2008); and *THOIP v. Walt Disney Co.*, ___ F. Supp. 2d ___, 2010 WL 447049 (S.D.N.Y. Feb. 9, 2010) is misguided, for the cases are inapposite. Unlike the studies in those cases, Dr. Van Liere's survey included the necessary "contextual cues" typically present on a Google search-results page, including the organic search results, the ads, the associated text, images, and the rank order in which the listings appear. In addition, unlike in *THOIP*, this survey replicated an authentic Google search-experience common to Google users.

effort was undertaken by Dr. Van Liere and his staff to replicate an actual Google search, as opposed to simply presenting the respondents with a printout of a Google search-results page.

As to the substance of Google's criticism that the search-results pages did not have "clickable links," Dr. Van Liere's survey was properly designed to test "initial interest" confusion caused by Google's Sponsored Links. Courts have widely accepted initial interest confusion as a type of actionable confusion under the Lanham Act. *See, e.g., Brookfield Commc'ns, Inc. v. West Coast Entm't Corp.*, 174 F.3d 1036, 1064 (9th Cir. 1999). As Judge Brinkema explained in *GEICO v. Google, Inc.*, initial interest confusion

> describes the distraction or diversion of a potential customer from the Web site he was initially seeking to another site, based on the user's belief that the second site is associated with the one he originally sought. Inherent in this concept is the risk that the user will be satisfied with the second site or sufficiently distracted that he will not arrive at or return to the site for which he was originally searching.

No. 1:04CV507, 2005 WL 1903128, at *4 (E.D. Va. Aug. 8, 2005) (internal citations omitted). Even if a web user cures her confusion by clicking on a Sponsored Link and realizing she has not arrived at the Rosetta Stone site as intended, the damage already has been done. Thus, any "contextual clues" provided to respondents by clicking the Sponsored Links would be irrelevant to Dr. Van Liere's measure of initial interest confusion. The lack of "clickable links" on the test and control stimuli, therefore, is entirely immaterial to Dr. Van Liere's survey and opinions.

Google also criticizes Dr. Van Liere for removing the official Rosetta Stone Sponsored Link from the test stimulus. Google asserts that the removal of the Rosetta Stone Sponsored Link "likely influenced the survey results." Google's criticism is unavailing for two reasons.

First, Dr. Van Liere's removal of the Rosetta Stone Sponsored Link was warranted because Rosetta Stone is forced to bid on its own trademark in an effort to secure the top listing in Google's Sponsored Links and thereby minimize the number of web users diverted to competitors, counterfeiters, and resellers as a result of Google's alleged infringing conduct. (Ex.

63, Leigh Dep. at 43:4-43:11 ("Unfortunately, because Google has been accepting money from companies to bid on our trademarks and use our trademark within ad text, I am forced to bid to position one [i.e., the top position] within Google search so that customers that are looking for us have a better chance of finding the authentic Rosetta Stone site instead of a pirate site where they're going to end up getting duped.").) Consequently, the test search-results page appears exactly how it would if Rosetta Stone were not forced to bid on its own mark.[6]

Although Google cited the deposition testimony of Rosetta Stone General Manager and Vice President Eric Duehring in support of its contention that the official Rosetta Stone Sponsored Link should not have been removed from the test stimulus, Mr. Duehring's testimony actually supports Dr. Van Liere's decision to do so. When asked why Rosetta Stone wanted to appear at the top of the Sponsored Links, Mr. Duehring explained:

> So because Google strives so hard to present organic links in a way that the most relevant results appear at the top of the list, many consumers are confused about whether or not a sponsored link is organic or not. And so appearing in line with those organic results is valuable because people make the mistake of clicking on a sponsored link when they think they might be getting an actual official website or an objective listing.
>
> And so, unfortunately, the confusion created requires us to be in a position to make sure that when folks might be confused we're in a position that they click on us properly.
>
> For instance, if you [search] on Rosetta Stone, the first organic result might be rosettastone.com, and if there are three links above it for a pirate site and I don't bid to be in that position, and I run the risk of somebody mistaking that one of those sites is the official site, well, that's deceptive to the consumer and destructive to all the work I've done to get somebody to do a search on my brand.

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[6] It would turn trademark law on its head to test likelihood of confusion without controlling for efforts by the trademark owners to mitigate the harm caused by the alleged infringer.

(Ex. 54, Duehring Dep. at 111:25-112:22.)[7]

Second, Google's and Dr. Blair's assertion that removal of the official Rosetta Stone Sponsored Link "likely influenced the survey results" is entirely speculative. His report includes no survey data or empirical evidence to support his belief. [redacted] In the absence of any credible or empirical support for Dr. Blair's belief, the Court should not credit Dr. Blair's speculation.

2. Dr. Van Liere's Control Stimulus Was Appropriate

Google argues that Dr. Van Liere's survey failed "to use an adequate control stimulus to filter out the background noise in the survey." (Google Mem. at 12.) Specifically, Google complains that "far fewer organic links refer to the plaintiff Rosetta Stone in the control condition than in the test condition—two versus seven." (*Id.* at 13.)

In support of its argument, Google notes that a proper control in a confusion study should "share as many characteristics with the experimental stimulus as possible, with the key exception of the characteristic whose influence is being assessed." (*Id.* at 12.) Google's reliance on this quotation is remarkable because Dr. Van Liere designed his control in strict accordance with this instruction. The control stimulus is identical to the test stimulus except that the control does not include the Sponsored Links "whose influence is being assessed."

Google takes issue with the control stimulus not because it fails to share as many characteristics with the test stimulus as possible (except for, of course, the characteristics whose influence is being evaluated), but because it does not fail to do so. Specifically, Google does not

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[7] Google also attempts to use the deposition testimony of Nino Ninov to support its argument. Google admits, however, that Mr. Ninov never had an opportunity to review Dr. Van Liere's methodology. Therefore, he has no basis for critiquing a survey he has not reviewed.

like the fact that the assortment of organic links on the control stimulus – which, again, is identical to the assortment of organic links on the test stimulus – does not include sufficient Rosetta Stone commercial-related links to increase the confusion rate on the control condition, which thereby would reduce the overall net confusion rate.

Accordingly, Google's real complaint is not with the manner in which Dr. Van Liere created the control stimulus, but with the selection of the screenshot on which both the test and control stimuli are based. This is reflected in Google's criticism that Dr. Van Liere could have selected a screenshot with "more balanced content" that Google assumes would have resulted in a lower net confusion rate. (*Id.* at 14.) Google, once again, makes an assertion without providing any survey data or empirical evidence to support its position. Without testing these screenshots, Google's argument is pure conjecture. Google had sufficient time and resources to conduct its own confusion study to test its hypotheses, but it chose not to do so. In light of this, the Court should provide little weight to Google's speculation.

That aside, Google fails to appreciate that the identical sets of organic links in both the test and control stimuli are actual Google organic search results generated by Google's algorithm. According to Google, its algorithm identifies organic links to web pages that are most relevant to the web user's search query.[8] (Google Answer ¶ 4 [Dkt. 22].) The composition of organic links in the test and control stimuli, therefore, was determined by Google's algorithm, not by Dr. Van Liere. Thus, even if it were true that "the design of the control stimulus practically dictated a

[8] Interestingly, none of the third-party advertisers with Sponsored Links on the Google search-results page used in Dr. Van Liere's study had organic links appearing on the first page of search results. Given that Google's algorithm lists the organic links in order of relevance to the search query, it is reasonable to conclude that Google's algorithm did not view these advertisers as particularly relevant to the "Rosetta Stone" search. Thus, the only way for these advertisers to elevate their ads to the highly sought-after first page of Google search results was to bid on Rosetta Stone's mark and purchase a position in Google's paid search.

high level of 'net confusion' based on the content of the links," (Google Mem. at 14), as Google claims, it was Google's algorithm and Google's practice of selling Rosetta Stone's trademark to third party advertisers that dictated the high level of net confusion, not Dr. Van Liere.

Furthermore, the suggestion that Dr. Van Liere could have selected other Google search-results pages with a list of organic search results that might have resulted in a higher confusion measure for the control stimulus is irrelevant. The reality is that the test stimulus is an actual screenshot of a Google search-results page generated by the keyword "Rosetta Stone,"[9] the control stimulus was an appropriate control inasmuch as it properly excluded the elements being assessed for consumer confusion, and Dr. Van Liere's survey is a reliable measure of the consumer confusion caused by the Sponsored Links on this actual Google search-results page.

Next, Google argues that respondents who correctly answered the initial survey question ("Which link or links if any . . . sells Rosetta Stone language software products?") should not be counted in the confusion calculation. (*Id.* at 15.) Google explains that these respondents should be excluded because they were not asked the subsequent survey questions regarding whether the links were either Rosetta Stone company links or links endorsed by Rosetta Stone. (*Id.*)

Google's recalculation of the confusion rates by excluding those who correctly answered the initial survey question – and therefore demonstrated that they were not confused – is flawed. Google maintains that these individuals should not have been counted "towards the not-confused population" because "they were never given the opportunity to say they were confused." (*Id.*) To the contrary, their correct answers to the initial survey question clearly demonstrated that they were not confused; if the respondents correctly believed that the other links did not sell Rosetta

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[9] For the reasons stated in Section II.D.1, the Rosetta Stone Sponsored Link was removed from the test and control stimuli. Otherwise, the test stimulus was identical to the screenshot.

Stone software, it is reasonable to conclude that they would not have believed those same links were owned or endorsed by Rosetta Stone. Further, Google provides no plausible reason why a control-condition respondent who correctly answered that no organic links other than the Rosetta Stone link sells Rosetta Stone software would incorrectly indicate, if asked the two subsequent survey questions, that one or more of the other organic links were either Rosetta Stone company links or endorsed by Rosetta Stone. Absent such an explanation, Google seeks to exclude a large segment of the unconfused respondents based on pure supposition that they might have given inconsistent answers on the subsequent "ownership" and "endorsement" questions.

Google points out that under its suggested protocol of excluding respondents who correctly answered the initial survey question, there would be a 75% confusion rate in the test condition and a 73% confusion rate in the control condition. (*Id.*) These excessively high confusion rates on both the test and control conditions are further evidence that Google's proposed protocol is flawed. It is premised on the conclusion that approximately three-fourths of web users are confused by Google's search-results pages, condemning Google's "complex algorithm" that is touted as automatically providing relevant results.

Finally, another reason the Court should give little weight to Google's argument relating to the control is that some of Google's statements in support of its argument are simply incorrect. For instance, Google asserts: "Given the screenshot Dr. Van Liere selected and his methodology, far fewer organic links refer to the plaintiff Rosetta Stone in the control condition than in the test condition—two versus seven." (*Id.* at 13.) Again, the set of organic links on the control stimulus is identical to the set of organic links on the test stimulus. (*See* Ex. 38, Ex D.) Thus, there cannot be – and, indeed, there is not – any discrepancy in the number of organic links referring to Rosetta Stone Ltd. in the test versus the control conditions.

In addition, Google alleges that the control stimulus "failed to include a representative depiction of links actually referring to Rosetta Stone (the plaintiff) and links not referring to Rosetta Stone (the plaintiff), such as third parties that use 'Rosetta' in their own marks or on websites referring to the Rosetta Stone artifact." (Google Mem. at 13.) However, the control stimulus actually includes "representative depiction[s]" of each of these categories of links:

1. links actually referring to Rosetta Stone (the plaintiff) – Rosetta Stone: Learn English, Learn Spanish, Learn French, Learn . . . (www.rosettasone.com)

2. links not referring to Rosetta Stone (the plaintiff) – Ancient Egyptian Culture (www.mnsu.edu/emusuem/prehistory/egypt/hieroglyphics/rosettastone.html)

3. third parties that use "Rosetta" in their own marks – Rosetta Stone for Unix (bhami.com/rosetta.html)

4. third parties that use "Rosetta" on websites referring to the Rosetta Stone artifact – The Rosetta Stone (www.rosetta.com/RosettaStone.html)

(Ex. 38, Van Liere Report, Ex. D.)

3. Dr. Van Liere's Survey Targeted And Surveyed The Appropriate Universe Of Consumers

Google next complains that the survey has not captured the appropriate universe of consumers because the respondents did not independently recall Rosetta Stone's brand during the screening. (Google Mem. at 16.) Google claims that "respondents who could independently recall the Rosetta Stone brand would generally be more familiar with the brand, which, in turn could have had a material effect on the level of confusion measured by the survey." (*Id.*)

Dr. Van Liere appropriately identified the relevant population for the survey as "United States consumers who would potentially use Google's search services to gather information about the purchase of products and services from Rosetta Stone or to purchase products and services from Rosetta Stone." (Ex. 38, Van Liere Report at 4.) To ensure that the survey sample

reflected this relevant population, survey interviewers asked a series of screening questions. Most relevant to Google's criticism is Question S5:

> I am going to read a list of companies that have foreign language products. Please tell me, which, if any of these companies you have heard of?
>
> 1 Berlitz
> 2 Pimsleur
> 3 Rosetta Stone
> 4 Fluenz
> 5 None of these

(Ex. 38, Van Liere Report, Ex. C.) Only those respondents identifying Rosetta Stone in response to this screening question qualified to participate in the survey.

Despite Google's speculative criticism, screening question S5 adequately ensured that the respondents were sufficiently familiar with Rosetta Stone. Though Google may wish to limit the confusion survey to only those consumers most knowledgeable about Rosetta Stone in an effort to skew the results in Google's favor, restricting the survey to only these consumers would be inappropriate for a confusion study regarding the alleged infringement of Rosetta Stone's marks.

Aside from the soundness of the screening procedures, Google's assertion that the manner in which Dr. Van Liere screened respondents on their familiarity with the Rosetta Stone brand materially affected the survey results is pure conjecture. Neither Google nor its confusion expert offers any empirical support for this hypothesis. Nor do they provide any authorities to bolster their claim that the screening procedures on the respondents' familiarity with Rosetta Stone were inadequate. On these bases alone, the Court should not credit Google's criticism.

Google's baseless nitpicking continues with its criticism that the surveys were conducted only in shopping malls that did not have a Rosetta Stone kiosk. (Google Mem. at 16.) Google speculates that selecting malls with Rosetta Stone kiosks would have provided "a sample more closely akin to the actual population interested in Rosetta Stone." (*Id.* at 17.)

Dr. Van Liere's decision to exclude malls with Rosetta Stone kiosks was entirely appropriate and consistent with fundamental survey design principles, as it was intended to reduce potential bias. First, the survey was conducted as a double-blind survey, meaning that neither the interviewers nor the respondents knew who commissioned the study. If a respondent had walked by a Rosetta Stone kiosk shortly before participating in the survey, he or she might have assumed that the survey was sponsored by Rosetta Stone and thus undermined the intent behind double-blind surveys. Second, respondents who had just seen a Rosetta Stone kiosk might have been more likely to select more links as being endorsed or owned by Rosetta Stone because Rosetta Stone was fresh in their minds. To protect against either type of bias, Dr. Van Liere sensibly excluded such malls from the survey.

Furthermore, Dr. Van Liere's common-sense decision to exclude malls with Rosetta Stone kiosks did not mean that the surveys were not otherwise conducted in high-end malls that cater to Rosetta Stone's target customer base. In fact, the malls were specifically selected to ensure the population was representative of consumers who might be seeking information about Rosetta Stone's products. It also should be noted that simply being a shopper at one of the eight malls was not sufficient, in and of itself, to qualify a consumer as a participant in the survey. Rather, the respondent had to answer the screening questions to qualify. The selection of the malls merely affected the incidence rate – i.e., the number of people who had to be contacted to find respondents qualified for the survey – not the qualifications of the survey population.

4. Dr. Van Liere Properly Calculated Endorsement Confusion

Google's final criticism of Dr. Van Liere's study is that he applied inconsistent definitions to the term "endorsement" when calculating confusion with respect to the test and control stimuli. (Google Mem. at 17-18.) Specifically, Google argues that if Dr. Van Liere

concludes that Rosetta Stone "endorses" the Wikipedia site in the organic search results because Rosetta Stone reviews and contributes content to the Wikipedia site about Rosetta Stone, then Dr. Van Liere likewise should conclude that Rosetta Stone "endorses" Amazon.com and Cactus Coupon because of their "official relationships" with Rosetta Stone.[10] (*Id.*)

Dr. Van Liere's protocol for counting confusion with respect to the Wikipedia, Amazon.com, and Coupon Cactus links was proper and consistent. Respondents who stated that Rosetta Stone "endorses" the Wikipedia link were not counted as confused because Rosetta Stone does, in fact, endorse the link. As Dr. Van Liere testified, Rosetta Stone monitors the Wikipedia site and contributes content – including its trademarked terms – to the sites. (Ex. 70, Van Liere Dep. at 84:18-85:15.) Indeed, Rosetta Stone supports the Wikipedia site and welcomes its position on the first page of the Google search results.

In contrast, Rosetta Stone does not "endorse" the Sponsored Links of Amazon.com or Coupon Cactus. Although Amazon.com is an authorized reseller of Rosetta Stone software and has the right to use Rosetta Stone's marks on Amazon.com's webpages, Rosetta Stone has not provided Amazon.com authority to bid on Rosetta Stone's mark through the Google AdWords program or use Rosetta Stone's marks in the ad text of its Sponsored Links. (*Id.*, Ramsey Dep. at 148:20-148:23; 164:9-164:13.) Similarly, Rosetta Stone has not authorized Coupon Cactus to bid on or use Rosetta Stone's mark in its Sponsored Links since September 2008. (*Id.*, Leigh Dep. at 166:19-166:24; 171:5-171:9; 176:12-176:14.) Thus, when the survey was conducted in April and May 2009, Rosetta Stone did not "endorse" the Coupon Cactus Sponsored Link. In

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[10] Similarly, Google criticizes Dr. Van Liere because he "failed to provide his respondents with a definition of 'endorsement' when he asked them whether certain links were endorsed by Rosetta Stone." (*Id.* at 17.) Google's position is disingenuous as its own counsel used the term "endorsed," without definition, when deposing individuals who testified that they had been confused by Google's Sponsored Links. (*See, e.g.*, DuBow Dep. at 128:3-128:22.)

light of this, Dr. Van Liere properly counted as confused any respondent who thought Rosetta Stone "endorsed" the Amazon.com or Coupon Cactus Sponsored Link.

Even if Dr. Van Liere were to adopt Dr. Blair's inconsistent and factually erroneous approach to counting as confused those control-condition respondents who stated that Rosetta Stone "endorses" the Wikipedia link, Dr. Blair's report indicates that the net confusion rate would drop from 17% to 11%. Given that courts have concluded that consumer surveys finding a net confusion rate of 10% or more constitute viable evidence of a likelihood of confusion in trademark infringement cases, *see, e.g.*, *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 467 n.15 (4th Cir. 1996); *Mutual of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 400 (8th Cir. 1987), Dr. Van Liere's report and opinion are probative and therefore should not be excluded.

On a related note, Google cites *Mary Kay v. Weber* in support of its position that the Court should strike Dr. Van Liere's report and opinion. 601 F. Supp. 2d 839 (N.D. Tex. 2009). The *Mary Kay* case, however, provides little useful guidance with respect to Google's motion because Dr. Van Liere's survey was not excluded in *Mary Kay*, as Google is seeking to do here. Rather, the court required adjustments to the data based on verbatim responses of certain interviewees, but otherwise was prepared to allow the jury to rely on the survey. *Id.* at 849.

Second, the Court should not give weight to Google's argument that based on the *Mary Kay* decision, certain respondents who indicated that the Amazon.com and/or Coupon Cactus Sponsored Links were "endorsed" by Rosetta Stone should not be counted as confused because of their open-ended responses. Google contends that some of these individuals seemed to suggest in their open-ended responses that they came to this belief because Amazon.com and Coupon Cactus appeared to be reselling Rosetta Stone goods. It is important to note, however, that the ruling in *May Kay* was quite narrow, stating that "interviewees who believed affiliation

existed *solely* because the website sells Mary Kay products are inadmissible." *Id.* (emphasis added). The court's use of the term "solely" was not by mistake, as it used the word or words similar thereto repeatedly in the context of the open-ended responses. *Id.* at 848-49.

Dr. Blair's declaration fails to confirm which, if any, respondents believed that Rosetta Stone endorsed Amazon.com or Cactus Coupon solely because the companies were resellers of Rosetta Stone's goods. This is so because, [redacted] Indeed, it stands to reason that a confused respondent is unable to articulate all reasons for, or factors contributing to, his confusion. Nevertheless, Dr. Blair's and Dr. Van Liere's competing interpretations of the data should be submitted to the jury for its consideration, as "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" will be sufficient to assist the jury in weighing the evidence. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993). Thus, wholesale exclusion of Dr. Van Liere's report and opinion is not warranted based simply on Dr. Blair's competing interpretation of the survey data.

CONCLUSION

For the foregoing reasons, Rosetta Stone respectfully requests that this Court deny Google's Motion to Exclude Expert Report and Opinion of Dr. Kent Van Liere.

Respectfully submitted,

April 9, 2010

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2010, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system which will then send a notification of such filing (NEF) to the following:

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