

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

ROSETTA STONE LTD.

Plaintiff,

v.

GOOGLE INC.

Defendant.

CIVIL ACTION NO. 1:09cv736 (GBL /
TCB)

**GOOGLE INC.'S OBJECTIONS TO EVIDENCE AND
MEMORANDUM IN SUPPORT OF MOTION TO STRIKE**

Google Inc. (“Google”), hereby objects to certain documents and testimony attached to the declarations submitted by Rosetta Stone in support of its March 26, 2010 Motion for Partial Summary Judgment as to Liability (Dkt. No. 103). For the reasons set forth below, Google requests that the Court strike this purported evidence from the record and preclude it from the Court’s consideration of the parties’ motions.

	Proffered Evidence	Google’s Objection(s)
1.	Declaration of Jason Calhoun in Support of Rosetta Stone Ltd.’s Motion for Partial Summary Judgment as to Liability (“Calhoun Decl.”), ¶¶ 2, 3 (sentences 5, 6), 4 (sentences 1, 2), 5 (sentences 1, 2), 6 (last sentence), 7 (sentence 5), 8-11.	Google objects that Mr. Calhoun’s declaration lacks foundation, constitutes hearsay, is irrelevant, and is argumentative. <i>See</i> Fed. R. Civ. P. 56(e); Fed. R. Evid. 401, 402, 403, 602; <i>See Coleman v. Loudoun County School Bd.</i> , 294 Fed. Appx. 778, 782 (4th Cir. 2008) (statements that are “self-serving, unsubstantiated opinions” cannot defeat a motion for summary judgment); <i>see also U.S. v. Roane</i> , 378 F. 3d 382, 400-401 (4th Cir. 2004) (Such “airy generalities, conclusory assertions and hearsay statements [do] not suffice to stave off summary judgment”) (internal quotation and citation omitted); <i>Maryland Highways Contractors Ass’n, Inc. v. State of Maryland</i> ,

		933 F.2d 1246, 1251 (4th Cir. 1991) (noting that “hearsay evidence, which is inadmissible at trial, cannot be considered on a motion for summary judgment”).
2.	Calhoun Decl., Ex. B.	Google objects that Mr. Calhoun lacks personal knowledge to authenticate the documents. <i>See</i> Fed. R. Evid. 901.
3.	Calhoun Decl., Ex. C.	Google objects that the cited evidence constitutes inadmissible hearsay. <i>See</i> Fed. R. Evid. 801. <i>See also</i> <i>Roane</i> , 378 F. 3d at 400-401; <i>Maryland Highways Contractors Ass’n</i> , 933 F.2d at 1251. Google further objects that this evidence is not properly authenticated by the Calhoun Declaration and lacks foundation. <i>See</i> Fed. R. Civ. P. 56(e); Fed R. Evid. 901(b); <i>Coleman</i> , 294 Fed. Appx. at 782; <i>see also</i> , <i>Williams v. Cerberonics, Inc.</i> , 871 F. 2d 452, 456 (4th Cir. 1989) (holding that plaintiff’s own assertions, when contradicted by substantial evidence to the contrary, are insufficient to support a claim for employment

		discrimination and upholding trial court ruling).
4.	Declaration of Van Leigh in Support of Rosetta Stone Ltd.'s Motion for Partial Summary Judgment as to Liability ("Leigh Decl."), ¶ 3.	Google objects that Mr. Leigh's declaration lacks foundation. [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] See Fed. R. Civ. P. 56(e); Fed. R. Evid. 602; <i>Coleman</i> , 294 Fed. Appx. at 782. See also, <i>Williams</i> , 871 F. 2d at 456.
5.	Declaration of Jennifer Spaziano in Support of Rosetta Stone Ltd.'s Motion for Partial Summary Judgment as to Liability ("Spaziano Decl."), Tab A, 3/3/10 deposition of Edward Allen Blair	Google objects to the cited deposition testimony as incomplete because the cited excerpts of testimony do not include relevant portions of Dr. Blair's testimony necessary for a fair understanding of his testimony and do not include Dr. Blair's errata sheet. Fed. R. Evid. 106. Additional portions of Dr. Blair's deposition are attached to the Declaration of H. Lien ¹ as Exhibit 26.

¹ The Lien Declaration was submitted with Google's Opposition to Rosetta Stone's Motion for Partial Summary Judgment as to Liability.

6.	Spaziano Decl., Tab A, 2/23/10 deposition of Terri Chen.	Google objects to the cited deposition testimony as incomplete. Fed. R. Evid. 106. Fairness requires that additional testimony be considered contemporaneously with the evidence offered by Rosetta Stone. Additional portions of Ms. Chen's deposition are attached to the Declaration of H. Lien as Exhibit 25.
7.	Spaziano Decl., Tab A, 2/26/10 deposition of Daniel Dulitz.	Google objects to the cited deposition testimony as incomplete. Fed. R. Evid. 106. Fairness requires that additional testimony be considered contemporaneously with the evidence offered by Rosetta Stone. Additional portions of Mr. Dulitz's deposition are attached to the Declaration of H. Lien as Exhibit 26.
8.	Spaziano Decl., Tab A, 3/4/10 deposition of Baris Gultekin.	Google objects to the cited deposition testimony as incomplete. Fed. R. Evid. 106. Fairness requires that additional testimony be considered contemporaneously with the evidence offered by Rosetta Stone. Additional portions of Mr. Gultekin's

		deposition are attached to the Declaration of H. Lien as Exhibit 29.
9.	Spaziano Decl., Tab A, 3/5/10 deposition of Richard Holden.	Google objects to the cited deposition testimony as incomplete. Fed. R. Evid. 106. Fairness requires that additional testimony be considered contemporaneously with the evidence offered by Rosetta Stone. Additional portions of Mr. Holden's deposition are attached to the Declaration of H. Lien as Exhibit 31.
10.	Spaziano Decl., Tab A, 2/25/10 deposition of Cory Louie.	Google objects to the cited deposition testimony as incomplete. Fed. R. Evid. 106. Fairness requires that additional testimony be considered contemporaneously with the evidence offered by Rosetta Stone. Additional portions of Mr. Louie's deposition are attached to the Declaration of H. Lien as Exhibit 33.
11.	Spaziano Decl., Tab A, 3/5/10 deposition of Rose Hagan.	Google objects to the cited deposition testimony as incomplete. Fed. R. Evid. 106. Fairness requires that additional testimony be considered contemporaneously with the

		evidence offered by Rosetta Stone. Additional portions of Ms. Hagan's deposition are attached to the Declaration of H. Lien as Exhibit 30.
12.	Spaziano Decl., Tab A, 3/10/10 deposition of Bill Lloyd.	Google objects to the cited deposition testimony as incomplete. Fed. R. Evid. 106. Fairness requires that additional testimony be considered contemporaneously with the evidence offered by Rosetta Stone. Additional portions of Mr. Lloyd's deposition are attached to the Declaration of H. Lien as Exhibit 32.
13.	Spaziano Decl., Exs. 24-27.	Google objects that the cited evidence is irrelevant because it relates to third party trademarks not at issue in this case, and because such complaints by trademark owners are not probative of actual confusion or willfulness in the present case. <i>See, e.g., Renaissance Greeting Cards, Inc. v. Dollar Tree Stores, Inc.</i> , 405 F. Supp. 2d 680, 697 (E.D. Va. 2005) (holding that defendant's continued marketing of allegedly infringing

		<p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED] [REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED] Trademark infringement actions depend on the likelihood of confusion between a senior user's mark and a junior user's use, and "determining the likelihood of confusion is an 'inherently factual' issue that depends on the facts and circumstances in each case." <i>Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.</i>, 43 F.3d 922, 933 (4th Cir. 1995). As such, cases in which the "facts and circumstances" were different than the current case—different trademarks were at issue, different advertisements, different products, different</p>
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		<p>types and identities of advertisers, different consumer expectations—have no bearing on this litigation. [REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED] See Fed. R. Evid. 401, 402, 403; see also <i>Vista Food Exchange, Inc. v. Vistar Corp.</i>, 2005 WL 2371958, at *7 (E.D.N.Y. Sept. 27, 2005) (excluding survey as unfairly prejudicial based on, among other reasons, failure to replicate market conditions); <i>Simon Prop. Group LP. v. mySimon, Inc.</i>, 104 F. Supp. 2d 1033, 1052 (S.D. Ind. 2000) (same).</p>
15.	Spaziano Decl., Exs. 12-15.	<p>Google objects that the cited evidence is irrelevant because [REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED] Additionally, this evidence is unreliable and unduly prejudicial. Moreover, as noted above, “determining the likelihood of confusion is</p>

		<p>an ‘inherently factual’ issue that depends on the facts and circumstances in each case.”</p> <p><i>Lone Star Steakhouse</i>, 43 F.3d at 933.</p> <p>██</p> <p>██</p> <p>██</p> <p>██</p> <p>██ See</p> <p>Fed. R. Evid. 401, 402, 403; <i>see also</i> Objections to No. 15.</p>
16.	Spaziano Decl., Tab A, 3/8/10 deposition of Steve Dubow.	<p>Google objects that the cited evidence is irrelevant because Mr. Dubow did not purchase the allegedly counterfeit software through a Google sponsored link and he knew that he was not purchasing from Rosetta Stone directly. His testimony thus is not probative of possible consumer confusion arising from the use of Rosetta Stone’s trademarks in connection with sponsored link advertisements appearing on Google. <i>See</i> Fed. R. Evid. 401, 402, 403.</p>
17.	Spaziano Decl., Tab A, 3/12/10	<p>Google objects that the cited evidence is</p>

<p>deposition of Diana Stanley Thomas.</p>	<p>irrelevant because Rosetta Stone cannot establish that Ms. Thomas purchased counterfeit software and she knew that she was not purchasing from Rosetta Stone directly. [REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>Declaration of M. Caruso², Ex. 53, 124:2-125:7. Rosetta Stone cannot definitively establish whether Ms. Thomas purchased counterfeit software because she destroyed the purportedly counterfeit product. Rosetta Stone failed to preserve the purportedly counterfeit material even though it had the ability to do so, it knew the evidence was relevant, and this lawsuit was pending at the time Ms. Thomas reported her purchase. Because Rosetta Stone made it impossible to determine if she purchased counterfeit software, her testimony should be excluded.</p>
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² The Caruso Declaration was submitted with Google's Motion for Summary Judgment.

		<p>Moreover, any confusion that existed was not caused by Google, since Ms. Thomas's testimony suggests that her purchase was influenced by the confusing nature of the website from which she purchased. <i>See Fed. R. Evid. 401, 402, 403.</i></p>
18.	<p>Spaziano Decl., Tab A, 3/9/10 deposition of Deborah Jeffries, 3/10/10 deposition of Rita Porter, and 3/11/10 deposition of Denis Doyle.</p>	<p>Google objects that the cited evidence is irrelevant because these witnesses testified that they knew they were not purchasing from Rosetta Stone directly. Moreover, whatever confusion existed was not caused by Google, since their testimony suggests that their purchases were influenced by the confusing nature of the websites from which they purchased. <i>See Fed. R. Evid. 401, 402, 403.</i></p>
19.	<p>Spaziano Decl., Tab A, 9/30/2004 deposition of Rose Hagan, and 11/29/06 deposition of Rose Hagan.</p>	<p>Google objects that the probative value of the cited testimony is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. <i>See Fed. R. Evid. 401, 402, 403.</i> This testimony was given in</p>

		<p>different actions, regarding different trademarks and a different Google trademark policy than is currently in place today.</p> <p>Rosetta Stone also failed to identify this prior testimony in its Rule 26(a)(1) disclosures. Instead, Rosetta Stone made a surprise disclosure in its trial exhibit list three weeks <i>after</i> the close of discovery. Given the cumulative nature and minimal importance of the evidence, the lack of any explanation for the late disclosure, and the incurable prejudice to Google resulting from the late disclosure, the testimony is not admissible at trial. <i>See S. States Rack & Fixture, Inc. v. Sherwin-Williams Co.</i>, 318 F.3d 592, 597 (4th Cir. 2003) (excluding testimony of a witness disclosed on the eve of trial); <i>Perkins v. United States</i>, 626 F. Supp. 2d 587, 591 (E.D. Va. 2009) (excluding witness testimony where the propounding party failed to identify witness testimony in its Rule 26(a) disclosures).</p>
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CONCLUSION

For the foregoing reasons, Google respectfully requests that the Court strike this evidence from the record and preclude it from the Court's consideration of the parties' respective motions.

Respectfully Submitted,

GOOGLE INC.
By counsel

/s/

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CERTIFICATE OF SERVICE

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

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