

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION**

ROSETTA STONE LTD.,	)
	)
Plaintiff,	)
	)
vs.	)
	)
GOOGLE INC.,	)
	)
Defendant.	)

**Case No. 1:09-cv-00736 (GBL/TCB)**

**EXHIBITS TO THE DECLARATION OF JENNIFER L. SPAZIANO IN SUPPORT OF  
ROSETTA STONE LTD.’S MOTION FOR SANCTIONS**

**FILED IN PART UNDER SEAL**

# EXHIBIT 1

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

ROSETTA STONE, LTD.,	)	
	)	
Plaintiff,	)	Civil No. 09-736
	)	
VS.	)	February 4, 2010
	)	
GOOGLE, INC.,	)	
	)	
Defendant.	)	

REPORTER'S TRANSCRIPT

MOTIONS HEARING

BEFORE: THE HONORABLE THERESA BUCHANAN  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR THE PLAINTIFF: SKADDEN ARPS SLATE MEAGHER & FLOM  
BY: WARREN THOMAS ALLEN, ESQ.  
JENNIFER LYNN SPAZIANO, ESQ.  
CLIFFORD MYER SLOAN, ESQ.

FOR THE DEFENDANT: QUINN, EMANUEL, URQUHART OLIVER  
BY: MARGARET CARUSO, ESQ.  
ODIN FEKLMAN & PIDDLEMAN  
BY: JONATHAN FRIEDEN, ESQ.

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OFFICIAL COURT REPORTER: RENECIA A. SMITH-WILSON, RMR  
U.S. District Court  
401 Courthouse Square  
Alexandria, VA 22314  
(703)501-1580

1                   (Thereupon, the following was heard in open  
2 court at 2:00 p.m.)

3                   THE CLERK: Rosetta Stone versus Google,  
4 civil action 09cv736.

5                   THE COURT: Good morning.

6                   MR. ALLEN: Good morning, Your Honor.  
7 Warren Allen on behalf of plaintiff, Rosetta Stone. I'm  
8 here with Jennifer Spaziano and Clifford Sloan from  
9 Skadden Arps.

10                  THE COURT: All right, good morning.

11                  MR. ALLEN: Ms. Spaziano will be arguing.

12                  THE COURT: Good morning.

13                  MS. CARUSO: Hi, Your Honor. I'm Margaret  
14 Caruso from Quinn, Emanuel, Urquhart, Oliver & Hedges  
15 for Google, Inc, the defendant.

16                  THE COURT: That's all right. Good morning.

17                  MS. CARUSO: And this is Mr. Jonathan  
18 Frieden.

19                  THE COURT: All right. Thank you all for  
20 coming in today, but I won't be here tomorrow. I've got  
21 an 8 a.m. flight to Florida. Ha, ha, ha. So, hope I  
22 make it. Not to rub it in, but anyway, I've read  
23 everything, and I've read all of the discovery requests.  
24 Do you have anything to add to your motion  
25 to compel?

1 MS. SPAZIANO: Yes, Your Honor.

2 Jen Spaziano on behalf of plaintiff, the  
3 movant, Rosetta Stone.

4 You've read all the pleadings --

5 THE COURT: I have.

6 MS. SPAZIANO: You can basically see that we  
7 have reached agreement on a lot of the document requests  
8 that were at issue in the opening brief.

9 But, that there's really an impasse between  
10 the parties with respect to what's left in issue and I  
11 think irrespective of the number of requests that remain  
12 outstanding, it really boils down to one thing which is  
13 whether Google made the pool from discovery in this case  
14 documents relating to similar issues raised regarding  
15 Google's advertising program. That's really the  
16 question that we're addressing here today.

17 And for many reasons, the simple answer to  
18 the question is no.

19 I've got some background that I'm happy to  
20 tell you about regarding Rosetta Stone and what it does  
21 and how important its marks are to it.

22 It's the leader in language education in the  
23 United States. And it owns numerous federally  
24 registered trademarks that it has worked very hard to  
25 market and protect.

1 THE COURT: And, I'm aware of that.

2 MS. SPAZIANO: I know you are. You hear  
3 Rosetta Stone, you know what it means.

4 THE COURT: Right.

5 MS. SPAZIANO: It doesn't mean the artifact.  
6 It means the language learning software. And you know  
7 Google. Google operates the Internet search engine.  
8 And what's at issue here is their sale of  
9 advertisements -- their sale of trademarks for the  
10 advertisement.

11 THE COURT: Right.

12 MS. SPAZIANO: Basically, Google takes the  
13 position here that essentially information arising or  
14 discussed or communications, documents relating to  
15 either litigation involving Google's practice of selling  
16 trademarks or challenges that don't rise to the level of  
17 litigation where somebody writes them a letter, a cease  
18 and desist letter or asks them not to sell their  
19 trademark, not information that we're entitled to  
20 discover.

21 And they base that position on the argument  
22 that this involves likelihood of confusion and whether  
23 Google's practices resulted in a likelihood of confusion  
24 with respect to other trademarks is not relevant to the  
25 question of whether Google's practices results in

1 likelihood of confusion with respect to Rosetta Stone's  
2 trademarks.

3           And focusing on this very narrow issue of  
4 customer confusion, Google asked the Court basically to  
5 ignore the forest for the trees. Documents relating to  
6 other challenges to Google's practices are not going to  
7 address only the particular marks at issue in those  
8 cases, the trees that Google asks the Court to focus on.  
9 They also will address Google's advertising practices  
10 generally, the forest that's really at issue in this  
11 case.

12           THE COURT: I do have a couple of specific  
13 questions if I could.

14           MS. SPAZIANO: Please.

15           THE COURT: Requests number five and 113  
16 concern me because the apparent breadth of the request,  
17 and I'm not quite sure what you're aiming for in those  
18 requests.

19           Could you explain those to me and why you  
20 need such -- or have you thought about narrowing that --  
21 those two requests?

22           MS. SPAZIANO: The issue of narrowing the  
23 requests I think is something that we're willing to work  
24 with Google on. I think the parties have worked  
25 actually quite effectively --

1 THE COURT: Well, have you talked about  
2 these two requests specifically in terms of narrowing  
3 them?

4 MS. SPAZIANO: In -- the answer is I have  
5 not because we just got involved in the case recently.

6 THE COURT: Uh-huh.

7 MS. SPAZIANO: My understanding is that  
8 there have been discussions with respect to narrowing  
9 the requests and that the parties have worked rather  
10 well in narrowing requests.

11 THE COURT: Uh-huh.

12 MS. SPAZIANO: But the concern here is that  
13 Google has simply taken the blanket position that --

14 THE COURT: I understand that, but I'm  
15 trying to figure out is -- because my specific concern  
16 with regard to five and 113 is that I think by looking  
17 at them that they're too broad.

18 MS. SPAZIANO: They're too broad.

19 THE COURT: Even if I were to grant them to  
20 you, they seem broad to me. And I'm trying to find out  
21 what it is you want, really want in five and 113.

22 MS. SPAZIANO: Sure. What we're looking for  
23 are communications between Google and its customers.

24 THE COURT: Now when you say customers, you  
25 mean paying customers?



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MS. SPAZIANO: We mean --

THE COURT: Advertisers.

MS. SPAZIANO: -- advertisers, exactly. And what we're looking for --

THE COURT: And then you say or with users of their Internet search engine.

MS. SPAZIANO: If a customer, if a user, you or me --

THE COURT: Right.

MS. SPAZIANO: -- who runs the Google search complains about the advertisements, word is sent, a note to Google saying I don't understand how you're ad -- what it means for something to be a sponsored ad.

So users could communicate with Google in a way that could give rise to communications that are relevant to the claims at issue in this case.

THE COURT: Well, except the way you worded this is not so clear or specific. It says relating to the sale -- just generally.

MS. SPAZIANO: Sure.

THE COURT: Relating to the sale, marketing, promotion, offering, designation, use or inclusion of the trademarks.

That's awfully still broad, I think.

MS. SPAZIANO: Broad for you. What we're

1 trying to get at through this request are basically  
2 communications that Google received from its advertisers  
3 or from users that basically question or raise issues  
4 with respect to the use of trademarks in sponsored ads.

5           So, for example, if a -- if I were to sent  
6 an e-mail to Google that says I just searched for  
7 Rosetta Stone, and I was brought to a website that I  
8 purchased pirate software on, and I don't understand how  
9 that could have happened because I thought I was getting  
10 to a Rosetta Stone site.

11           That's the type of --

12           THE COURT: Well, is your question really as  
13 far as users are concerned relating to confusion and  
14 sponsored ads?

15           MS. SPAZIANO: Relating to confusion and  
16 sponsored ads but not specifically the Rosetta Stone  
17 mark.

18           THE COURT: Okay.

19           MS. SPAZIANO: The idea that Google's  
20 practice of using trademarks in sponsored ads creates  
21 confusion.

22           THE COURT: Okay. And in regards to 113, do  
23 you have any reason to believe that there is a rankings  
24 that's already created by Google or is this something  
25 that you're asking them to create?

1 MS. SPAZIANO: In request numbers 107 to  
2 112, there were requests that certain information be  
3 created. And on this one, quite frankly, I'm going to  
4 have to look to Margaret for some assistance in why it  
5 is that 107 to 112 are off the table but 113 remains on  
6 the table, as I was not involved in those discussions  
7 and 113 builds on 107 to 112.

8 THE COURT: Well, let me look back at those  
9 because I really wasn't focusing on those. Hold on a  
10 second.

11 MS. SPAZIANO: May I invite Ms. Caruso to  
12 try to respond to that to help us?

13 THE COURT: Sure.

14 MS. CARUSO: Well, I can't explain why 113  
15 remains on the table, but I can say that 107 and 112  
16 Rosetta Stone's prior counsel agreed to withdraw on the  
17 grounds that those were overly burdensome because they  
18 would require Google to --

19 THE COURT: Okay.

20 MS. CARUSO: -- create because these --

21 THE COURT: So, is 113 -- does Google have  
22 any kind of document that already exists?

23 MS. CARUSO: No, Your Honor. It would have  
24 to create all of those multiple, multiple documents.

25 THE COURT: Okay, all right. Then let me go

1 back to Google -- I mean Rosetta Stone.

2 All right. And what temporal limits have  
3 agreed to? Is it back to 2002 with regard to all of  
4 your requests?

5 MS. SPAZIANO: I believe that Google has  
6 agreed to produce back to 2004. Our position is that  
7 we're entitled to documents that go back further than  
8 that because obviously, documents outside the statute of  
9 limitations would be relevant to documents within the  
10 statute of limitations.

11 My understanding is that there have been  
12 certain categories of documents with respect to which  
13 Google has agreed to produce documents predating 2004,  
14 presumably in recognition of the position that those  
15 documents do, in fact, bear on issues occurring during  
16 the relevant timeframe, the statute of limitations  
17 timeframe.

18 So, our position is that to the extent that  
19 documents are discoverable with respect to particular  
20 topics, challenges to the add words program, litigation  
21 involving the add words program, we would be entitled to  
22 documents that predate 2004 as well.

23 THE COURT: Okay. And, what about the  
24 settlement agreements? I really don't know what those  
25 would show, I mean, or prove. Settlement agreements

1 involve so many factors.

2 MS. SPAZIANO: They do involve so many  
3 factors. But the issue is that we don't know what they  
4 say, and that's the struggle for being in the position  
5 of asking for documents.

6 I can look at the fact that there's been a  
7 litigation and I can say, well, your depositions are  
8 certainly going to have information and interrogatories  
9 are certainly going to be information, and request for  
10 admissions are certainly going to have information.  
11 Expert reports are certainly going to have information.  
12 I don't know what --

13 THE COURT: What kind of useable information  
14 would you have from a settlement agreement, though?

15 MS. SPAZIANO: Whereas clause, whereas  
16 Google --

17 THE COURT: Whereas Google does not admit  
18 liability.

19 MS. SPAZIANO: Well --

20 THE COURT: I mean I guarantee you that's in  
21 there, so are you --

22 MS. SPAZIANO: That's assuming that that's  
23 what it says.

24 THE COURT: Right.

25 MS. SPAZIANO: I mean you guarantee me that

1 it's in there. I suspect that it's in there.

2 THE COURT: Yeah.

3 MS. SPAZIANO: But taking it on face value  
4 that in there, but not asking for the documents that  
5 could contain a damning admission that's relevant to  
6 what they say. Or it could be in the relief that's  
7 requested, they demonstrate that they can engage in some  
8 kind of a practice that would, you know, stop the  
9 trademark infringement and still allow for certain, you  
10 know, certain practices to continue without trademark  
11 infringement. I don't know what's in them.

12 THE COURT: Okay.

13 MS. SPAZIANO: I understand the fact that if  
14 there are standard settlement agreement that just denies  
15 all liability and agrees on some kind of a settlement  
16 payment and results, it might not have information, but  
17 it very well could.

18 THE COURT: Okay.

19 MS. SPAZIANO: And it is reasonably likely  
20 to lead to the discoverable of admissible evidence.

21 THE COURT: All right. Let me hear from  
22 counsel for Google.

23 MS. CARUSO: Thank you, Your Honor. I'd  
24 like to pick up with the settlement agreement point  
25 because I think it's illuminating on a number of these

1 issues.

2           Even if the settlement agreements did say  
3 the very unlikely event they said whereas Google admits  
4 infringement, Rule 408 tells us that's not admissible to  
5 prove infringement.

6           THE COURT: Uh-huh.

7           MS. CARUSO: And given that it's not  
8 admissible to prove infringement, it has no relevance on  
9 the issue of intent. And we cited a case on page eleven  
10 of our opening brief. It's a --

11          THE COURT: I'm satisfied as to those --

12          MS. CARUSO: Okay.

13          THE COURT: -- as to the settlement  
14 agreement, so why don't you address any other issue  
15 you'd like.

16          MS. CARUSO: Sure. I'll continue on from  
17 there --

18          THE COURT: Uh-huh.

19          MS. CARUSO: -- because it raises the same  
20 types of issues. All of the -- any one cease and desist  
21 letters, any e-mail that we've gotten from a third party  
22 saying Google, we don't like your policy, any consumer  
23 who said Google, I bought this product from a website  
24 that was advertised on your site and I don't like it.  
25 It's not what I thought it would be, all of those in

1 order to be relevant to the issue of intent which is  
2 what Rosetta Stone has identified are only going to be  
3 relevant to the extent that those prove or there's proof  
4 that there was infringement. And there's no proof here  
5 that there was ever infringement. Google has never been  
6 held liable for infringing trademarks in any  
7 circumstances, especially the advertising circumstance.

8           And so, this would require trials and I  
9 can't say mini trials because they would be just as  
10 expensive on this trial on every single one of these  
11 things. And it's just going to take us -- really divert  
12 us from the limited time we have left in discovery to  
13 focus on the issues that matter here which are Rosetta  
14 Stone's trademarks.

15           It's important, I think, to understand when  
16 we say we're not using these third party-type documents  
17 it doesn't mean they're not getting any general studies,  
18 any general policy, reasoning, any policies. All of  
19 these things that Google has done with respect to  
20 trademarks generally speaking, it has agreed to provide  
21 and has provided mostly, still in the process of  
22 production.

23           But, these are very far afield. And I can  
24 come back to the issue of relevance because I think it  
25 really -- it's a show stopper.



1           But the issue of burden I think is equally a  
2 show stopper, because in order to collect type of  
3 information they're talking about, there is no  
4 formulated search. There's not even a list of  
5 trademarks to look for.

6           We would have to -- Google would have to  
7 manually review all of the documents at a minimum in its  
8 Trax database which keeps all communications with  
9 advertisers and with consumers about advertising. And  
10 those -- those databases contains ten terabytes of data.

11           THE COURT: How are they collated or  
12 categorized? I mean, it isn't just all dumped in there  
13 together with no organization, is it?

14           MS. CARUSO: I don't think so. If you  
15 looked by advertiser, advertising campaign --

16           THE COURT: Uh-huh.

17           MS. CARUSO: -- you can kind of go into it  
18 that way.

19           THE COURT: Uh-huh.

20           MS. CARUSO: But, there's nothing about  
21 their request that enables it to be narrowed in that  
22 way. We have given them -- we've searched the whole  
23 thing for anything with Rosetta Stone in it.

24           THE COURT: Uh-huh.

25           MS. CARUSO: That -- they have all of that.

1 THE COURT: Uh-huh.

2 MS. CARUSO: But, you know, in terms of some  
3 customer saying I purchased what I thought was a Nike  
4 shoe and it's not a Nike shoe, what are the search terms  
5 that we can use to find that e-mail?

6 THE COURT: So, the only thing they're  
7 organized as to is marketing campaigns?

8 MS. CARUSO: The advertiser -- you can look  
9 by advertiser and then you can look by their advertising  
10 ID number and then by their sub campaigns because  
11 advertisers run -- Amazon, for example, runs numerous  
12 different campaigns at any given point in time.

13 THE COURT: Okay.

14 MS. CARUSO: So, on this issue of, you know,  
15 all these communications with third parties and  
16 communications with consumers, ten terabytes of data,  
17 it's something that's really hard to even conceive of,  
18 but I'm told that it would equivalent -- come out to  
19 greater than two billion pages of text which if you  
20 assumed one second to review every one of those pages  
21 would take someone 74 years, 24/7 review.

22 We certainly don't think that whatever  
23 relevance they may have justifies that burden.

24 THE COURT: But, would that relate just to  
25 request number five?

1 MS. CARUSO: Request number five is not the  
2 only one.

3 THE COURT: -- or is that -- would it be ten  
4 as well?

5 MS. CARUSO: Ten is one that's very broad.  
6 It would require the same thing. 23, the same thing.  
7 79 also would go to that same extent. They're extremely  
8 broad in calling for all --

9 THE COURT: 23 is guidelines and policies,  
10 not letters of complaint.

11 MS. CARUSO: 23. It's -- if I recall  
12 correctly, I just --

13 THE COURT: Actually, ten would not relate  
14 because that's really just with regard to third parties  
15 whose trademarks are used, not just general consumers.

16 I don't see anything else that would relate  
17 to consumer letters.

18 MS. CARUSO: Well, this one reads all  
19 documents relating to any Google policies relating to  
20 the sale, marketing, promotion, offering, designation,  
21 use or inclusion of trademarks owned by third parties is  
22 the key words.

23 So if we just stop right there, I'd be  
24 surprised if Rosetta Stone takes the position that, for  
25 example, a consumer's statement, Google, your trademark

1 policy winds up with me but --

2 THE COURT: Well, what are we talking about  
3 if we delete the consumer letters?

4 MS. CARUSO: We're still talking about a  
5 whole lot of trouble because trademarks owned by third  
6 parties as key words is not a separate and defined  
7 category within Google. We don't have a list of those  
8 things. We don't have --

9 THE COURT: You mean to tell me that the  
10 consumer who complains about what they got linked to  
11 when they clicked on Google is kept with the same  
12 letters from a corporation that complains about how  
13 you're using its trademark?

14 MS. CARUSO: It depends on what exactly that  
15 letter from the corporation says, but in some instances,  
16 yes.

17 THE COURT: Well, how would they normally be  
18 kept if it's a --

19 MS. CARUSO: So a --

20 THE COURT: -- big letter from a big company?

21 MS. CARUSO: Is -- a letter that raises a  
22 violation of Google's trademark policies --

23 THE COURT: Uh-huh.

24 MS. CARUSO: -- would be kept in one place.  
25 And that would be, for example, under a Google's current

1 policy if someone said so -- you know, party X is  
2 advertising and my trademark name shows up in the text  
3 of their advertisement.

4 THE COURT: Uh-huh.

5 MS. CARUSO: And they're not an authorized  
6 reseller and they're not a third party opinion site.  
7 They don't fit into the terms of what Google says you  
8 can use my --

9 THE COURT: Uh-huh.

10 MS. CARUSO: -- trademark for in a text of  
11 the ad.

12 If that is the complaint, then it would go  
13 to Google's trademark team and be processed as a  
14 trademark complaint, and it would be in that batch of  
15 documents.

16 THE COURT: Uh-huh.

17 MS. CARUSO: -- which is a large batch of  
18 documents. But letters that say, it looks like this  
19 person is bidding on my key word and I don't like --

20 THE COURT: This person is doing what?

21 MS. CARUSO: Bidding.

22 THE COURT: Oh.

23 MS. CARUSO: Trying to have their ad  
24 displayed in response to that trademark being entered as  
25 a search query, then those would -- those don't violate

1 Google's current trademark policy and wouldn't go to  
2 that database group. They would remain in the general  
3 Trax database.

4 THE COURT: So, it sounds as though you have  
5 easier access to things that are not in the Trax  
6 database?

7 MS. CARUSO: I -- there are fewer things,  
8 but still a very large magnitude of things in terms of  
9 those types of complaints.

10 And, again, that doesn't seem to me to be  
11 what Rosetta Stone is looking for, or certainly not the  
12 limit of what they're looking for.

13 Again, I'm just talking about complaints  
14 that others are in violation of Google's trademark  
15 policies.

16 THE COURT: But, what if they're not saying  
17 it's Google's trademark policy that I'm complaining  
18 about, just complaining about what I perceive to be your  
19 infringement of my trademark. Does that go into this  
20 trademark policy? Where does that go, legal counsel's  
21 office?

22 MS. CARUSO: That -- it's filed in this  
23 general database. And --

24 THE COURT: Trax.

25 MS. CARUSO: Yes, in Trax.

1 THE COURT: But is it also filed somewhere  
2 else then?

3 MS. CARUSO: Not that I'm aware of, Your  
4 Honor and I've spoken to Google about this.

5 THE COURT: Where else could such a letter  
6 be filed besides in the trademarks policy group?

7 MS. CARUSO: I'm not aware of -- such a  
8 letter as you've just described basically saying this  
9 violates my trademark separate and apart from Google's  
10 trademark policies --

11 THE COURT: Uh-huh.

12 MS. CARUSO: -- would just remain in Trax  
13 database because --

14 THE COURT: They wouldn't go to counsel's  
15 office or this as well?

16 MS. CARUSO: Google wouldn't take further  
17 action on it because it wouldn't -- it doesn't rise to  
18 the level of something that Google has determined it  
19 will take action on.

20 THE COURT: Well, how does Google determine  
21 it will take action on something, only if somebody says  
22 it violates Google's trademark policy?

23 MS. CARUSO: Well, they don't have to use  
24 those magic words.

25 THE COURT: Okay. That's what I'm trying to

1 figure out.

2 MS. CARUSO: Someone would view the  
3 communication as it comes in and make that  
4 determination.

5 THE COURT: I see, okay. I understand.  
6 Anything else?

7 MS. CARUSO: Yes, Your Honor. So, the  
8 trademark infringement and -- the real -- the root issue  
9 here is going to be likelihood of confusion. And  
10 there's no general holding out there in the law that the  
11 sale of -- the use of a trademark as a key word, that in  
12 and of itself is infringing.

13 All the cases say you have to look at the  
14 facts of the case. You have to look at who's doing the  
15 advertising, what is the content of the ad, what is the  
16 website that it's linked to.

17 And those very dramatically -- in the case  
18 of Rosetta Stone, if you've done a recent search on  
19 them, the main non-Rosetta Stone sponsored link that  
20 shows up is Amazon.com, an authorized reseller of  
21 Rosetta Stone.

22 That's very different from if you have  
23 mostly counterfeiters who are bidding. And of course,  
24 that violates Google trademark policy and they would  
25 take those down upon notice, or if you have competitors,



1 or if you have parties who are bidding on the word  
2 because the word has a separate and independent meaning.

3 For example if someone was advertising  
4 British museum tours to see the Rosetta Stone, or Apple  
5 if someone was bidding because they had some other Apple  
6 product not related to the company.

7 So, to take those collectively just doesn't  
8 say very much in this case about these facts.

9 And if what they --

10 THE COURT: Well, how is it really? I mean,  
11 this is a very different type of trademark infringement  
12 case. And normally you really would be looking at, you  
13 know, how close a violation it is and so forth and so  
14 on. It would be unique as to each particular trademark.

15 I really don't see how the trademark holders  
16 in these cases are different from Rosetta Stone.  
17 They're not trying to invade the actual trademark in  
18 terms of making something sound similar to Rosetta  
19 Stone. They're -- you're using the name. You're using  
20 the Geico name, and you're using the Rosetta Stone name  
21 and the -- you know, I forget who the others were,  
22 American Airlines name specifically when it's put into  
23 the search engine to use that to link to advertisers.

24 So I don't know how you have -- there may be  
25 to some degree that they can be differentiated and

1 perhaps that would arise when evidence of the other  
2 manufacturer -- the other companies's trademarks might  
3 be introduced into evidence at trial.

4 But for discovery purposes, I really don't  
5 see how they're very different.

6 MS. CARUSO: Well, let me talk about that a  
7 little bit. I mean in the Geico case, the Court drew a  
8 distinction between links that were just triggered by  
9 the key word which it found no problem with and found  
10 that Google hadn't produced any evidence that consumers  
11 were not confused if it used the name.

12 THE COURT: Well, that's not necessarily the  
13 case. I've read the opinion, and I really don't think  
14 necessarily it says what you're saying it says or that  
15 it goes as far as you'd like to think it does. But I  
16 also don't think that it really is relevant to this case  
17 because it was not an ultimate determination of the  
18 case. That was just for, you know, injunctive purposes,  
19 and it was settled.

20 I mean all of these cases have been settled,  
21 and I find that very interesting. And I don't think  
22 that there's a definitive opinion on here, and I don't  
23 think that you can rely on the Geico case to the extent  
24 that you'd like to. And I think that it's not binding  
25 certainly on Judge Lee. So --

1 MS. CARUSO: I think that --

2 THE COURT: I think we're starting really  
3 from ground zero again, and I don't think even Judge  
4 Brinkema would say her opinion in the Geico case would  
5 necessarily affect the discovery rulings in this case or  
6 any other case.

7 MS. CARUSO: Well, I think -- what she  
8 clearly said in the opinion was that it was her ruling  
9 which was --

10 THE COURT: It was confined to Geico and the  
11 Geico fact, and they had a problem with their expert  
12 report, clearly.

13 MS. CARUSO: Right, exactly. And again, she  
14 said it was on the facts of that case.

15 THE COURT: Right. And I don't think it's  
16 the same thing. I really don't because they had a big  
17 problem with their expert report.

18 MS. CARUSO: Well, Your Honor, I think  
19 there's a big problem with the expert report here, too.

20 THE COURT: Well, I haven't seen that, yet.  
21 I haven't seen that yet.

22 MS. CARUSO: But --

23 THE COURT: She still found that there was  
24 actual confusion.

25 MS. CARUSO: She found that Google had not

1 rebutted it as the use of the name in the ads.

2 THE COURT: Right, right.

3 MS. CARUSO: But that's a distinction right  
4 there, use of the name in the ad versus not using the  
5 name in the ad.

6 And the cases all, even though they aren't  
7 the traditional, you know, Starbucks versus Starchucks  
8 kind of trademark case, all come down to the same  
9 likelihood of confusion analysis.

10 And here, you know, all of these survey  
11 reports and the other cases, they're different types of  
12 advertisers, different types of advertisements,  
13 different types of natural results that are being looked  
14 at.

15 And in deposing the plaintiff's expert on  
16 the likelihood of confusion issue, he admitted -- you  
17 can't talk about how things would be with other  
18 different types of advertisements and different types of  
19 natural links because --

20 THE COURT: You're talking about the Geico?

21 MS. CARUSO: I'm talking about this Rosetta  
22 Stone's expert.

23 THE COURT: Well, I haven't seen that.

24 MS. CARUSO: I understand.

25 THE COURT: And I don't know how that's

1 relevant to the discovery request.

2 MS. CARUSO: Well, it goes to the fact that  
3 whatever Google has done with regard to other companies  
4 doesn't have bearing on whether consumers are likely  
5 to --

6 THE COURT: Doesn't it go to willfulness?

7 MS. CARUSO: It only goes to willfulness if  
8 there is evidence -- if there's proof of intent like  
9 the --

10 THE COURT: Yeah, well what do they mean to  
11 do when they're using -- I don't understand how you can  
12 say that it's not relevant when what we're talking about  
13 is really the exact same act, someone using -- you using  
14 the actual trademark of a company.

15 MS. CARUSO: Your Honor, I appreciate that.

16 THE COURT: And I'm having trouble. Maybe  
17 you think you can convince me somehow, go ahead and give  
18 it a try.

19 MS. CARUSO: The likelihood of confusion  
20 factors don't only focus on the similarity of the marks  
21 at issue. They also --

22 THE COURT: There's no similarity of marks.  
23 You're using the mark.

24 MS. CARUSO: That's correct.

25 THE COURT: Okay.

1 MS. CARUSO: Well, it is being used. Their  
2 case goes beyond just --

3 THE COURT: I understand that, but the main  
4 issue here is you're using their mark.

5 MS. CARUSO: Right. But that's not the only  
6 factor in likelihood of confusion. There are other  
7 factors --

8 THE COURT: Right.

9 MS. CARUSO: -- which include the strength  
10 of the mark.

11 THE COURT: I'd say it's pretty strong.  
12 Let's go ahead.

13 MS. CARUSO: And there's that one mark that  
14 that Rosetta Stone that's pretty strong.

15 THE COURT: Right.

16 MS. CARUSO: They have other marks like  
17 audio companion.

18 THE COURT: I know. Let's just deal with  
19 Rosetta Stone for now. Let's assume that it's strong.

20 MS. CARUSO: All right. All these other  
21 complaints that exist out there, we don't have any  
22 evidence about the strength of their marks. So --

23 THE COURT: American Airlines, or Geico  
24 or --

25 MS. CARUSO: For cases that actually

1 existed. So if you want me just to focus on litigation  
2 versus any person's complaint to Google, then I'll do  
3 that.

4 THE COURT: Well, I'm not talking about any  
5 person. I'm talking about corporations.

6 MS. CARUSO: Any company's complaint --

7 THE COURT: Right.

8 MS. CARUSO: -- versus an actual legal  
9 proceedings. That's the distinction that I'm saying do  
10 you want me to --

11 THE COURT: I'm sorry. I think they're all  
12 the same thing.

13 MS. CARUSO: Okay.

14 THE COURT: And I agree that there might be  
15 some complaints by some companies that perhaps don't  
16 have the same strength as Rosetta Stone or that, but  
17 we're still talking about at least for discovery  
18 purposes now and what we put into evidence at trial, but  
19 we're still talking about what amounts to the same  
20 issue, that a company complains that they used their  
21 actual trademark.

22 MS. CARUSO: And, Your Honor, if you think  
23 about that, think about every comparative advertisement  
24 that exists, they all use the actual trademark. But  
25 they don't all turn out the same way.

1 THE COURT: Uh-huh.

2 MS. CARUSO: They're very different because  
3 it depends on the question of confusion. And so --

4 THE COURT: Right, exactly.

5 MS. CARUSO: Take, for example, Time  
6 Magazine has been sued in the past for running a  
7 comparative ad that a company said infringed its  
8 trademark. If it's sued again for running a different  
9 ad, what happened in that first lawsuit is not relevant  
10 to the second lawsuit.

11 THE COURT: Okay, I understand.

12 MS. CARUSO: I think it really is going to  
13 open up, especially on the issue of expert reports. The  
14 experts that Google has in this case are not the experts  
15 that it's had before. The facts that it had in other  
16 cases are not the facts that we have here.

17 THE COURT: Uh-huh.

18 MS. CARUSO: If we're going to bring those  
19 experts reports in on damages, I don't see how, you  
20 know, what American Airlines' usage was has anything to  
21 do with what the usage is here in Rosetta Stone.

22 But also on the question of confusion, then  
23 you really are inviting a whole new trial of those  
24 issues that were never tried before.

25 THE COURT: Uh-huh.



1 MS. CARUSO: Rosetta Stone didn't bring this  
2 case as a class action or seek to resurrect all those  
3 past cases. It's just bringing this on its own behalf.

4 THE COURT: Uh-huh.

5 MS. CARUSO: And, the volume of these  
6 documents is quite a lot.

7 THE COURT: Okay.

8 MS. CARUSO: Given -- you know, if they want  
9 a stipulation that other people have complained about  
10 Google's trademark policy, Google will provide that.

11 I don't see how having, you know, a stack of  
12 complaints without all -- having full trials on all of  
13 them to present to the jury how it is that all of those  
14 aren't relevant either in addition to this one not  
15 winding up with confusion. It --

16 THE COURT: Well, that's interesting. Would  
17 Google be willing to stipulate that it had X thousands  
18 of complaints about its trademark policy and the way  
19 it's used -- the same issue that Rosetta Stone is  
20 complaining of? Are you willing to stipulate to that?

21 MS. CARUSO: Well, not right here, right now  
22 for one reason because I don't know what the extent of  
23 those numbers are because --

24 THE COURT: Uh-huh.

25 MS. CARUSO: -- it's so burdensome to do.

1 We haven't undertaken it.

2 THE COURT: I wonder how many you'd be  
3 willing to stipulate to.

4 MS. CARUSO: For purposes of discovery, we  
5 probably would be willing to stipulate to some number.  
6 I should check with my client as to what they're  
7 comfortable with on that.

8 THE COURT: Okay. Thank you.  
9 Did you have anything to add?

10 MS. SPAZIANO: Just a couple of comments if  
11 I might on the issue of expert reports and the other  
12 litigation and why those documents would be relevant  
13 here or other deposition transcripts.

14 Let's start with the 30(b)(6) deposition.  
15 30(b)(6) deposition of Google in the American Airlines  
16 case, I don't know if one took place because I don't  
17 know what was there.

18 But if one did, Google testifying about the  
19 practices that are on issue here, clearly relevant.  
20 We're going to take a 30(b)(6) deposition of a Google  
21 person. We're entitled to know what Google has said in  
22 the past about these same issues.

23 The same thing goes for interrogatory  
24 responses if they exist, request for admission which we  
25 specifically asked for, damages expert reports which was

1 something that was specifically commented as can't see  
2 how it could possibly be relevant.

3 Well, putting aside the separateness of the  
4 mark, the damages that are recoverable in these cases  
5 are very similar. And if Google's expert says in the  
6 American Airlines case that damages should be A, B, C or  
7 D and I don't mean the numbers, I mean --

8 THE COURT: How their calculated, uh-huh.

9 MS. SPAZIANO: Or they should exclude X or  
10 Y, and Google's expert here is taking a very different  
11 position, we're entitled to know that. And what is  
12 interesting is you've got case after case that has been  
13 settled as Your Honor noted. And because it's been  
14 settled, we're not entitled to see that information.  
15 And Google in fact is able, therefore, to -- or  
16 attempting to try to shelter, you know, that  
17 discoverable information from us.

18 So, I -- I believe that all of that  
19 information could be very relevant to the issues that  
20 we're dealing with right here as we proceed down the  
21 path of taking some of these depositions and dealing  
22 with the experts.

23 As for the burden argument associated with  
24 these documents because Google chooses to dump all of  
25 its documents in a Trax system, that's not a basis to

1 say you don't get any of it.

2 And if that information is relevant to this  
3 case and discoverable and we believe for all the reasons  
4 we've talked about today and all the reasons Your Honor  
5 has raised it is discoverable, you can't just say, well,  
6 it's in a ten terabyte database and we can't get it.

7 And such an assertion coming from Google  
8 which is the greatest search engine in the world is even  
9 less -- less realistic.

10 THE COURT: Okay.

11 MS. SPAZIANO: So I just raise those points,  
12 and I think that if this information is discoverable,  
13 there are many ways to figure out how to get that  
14 information without imposing undue burden.

15 And we all work through those issues on a  
16 daily basis. But to date, we've been told it's not  
17 relevant and it won't be produced.

18 THE COURT: Okay, thank you very much.

19 I mean, as I said this is a really unique  
20 sort of trademark infringement case, well, aside from  
21 Geico and American Airlines.

22 But normally the Court would be pretty  
23 skeptical of requests relating to third party trademark  
24 infringement. But I think to a great extent it's an  
25 issue in this case in terms of willfulness and intent.

1 And some of the requests that I think relate to third  
2 parties are discoverable, but not everything. And let  
3 me just kind of go through this.

4 As for request number five, I think that  
5 it's still too broad. If they're going to have to do a  
6 search in the Trax system, again, I have to agree with  
7 defendant's counsel that I don't even know how you go  
8 about searching for that.

9 If you want to search the Trax system and  
10 this actually holds true with regard to anything else  
11 that I grant in your motion to compel, as far as --  
12 because you've already agreed to produce and you have  
13 produced everything that's related to Rosetta Stone from  
14 the Trax system. If there's anything else that you  
15 wanted out of the Trax system, you're going to have to  
16 pay for the search.

17 So if you want number five as you have  
18 defined it orally here during argument, I don't have a  
19 problem with that if the plaintiff pays for the search.  
20 So you have to decide how much it's worth to you.

21 As to numbers 6 -- 6, 7, 10, 12, I'm going  
22 to grant those as well. I think -- I don't think it's  
23 burdensome enough to -- too burdensome, rather, to have  
24 to produce any documents that aren't in the Trax system.

25 So I'm going to grant that, and I think it

1 is relevant as to 6, 7, 10 and 12.

2 As to 13, 14, and 15, as I said before, I  
3 think settlement agreements are just so -- involve so  
4 many factors. I just don't think that it's going to be  
5 relevant nor would it be admissible, and I'm going to  
6 deny that.

7 As to 18, 19, 20, 21, 22, 23, 26, 27, 28,  
8 29, 67, 68, 69, 76, 77, 78, 79, 93, and 9 -- excuse me,  
9 93 and then 106, I'm going to grant all of those. I'm  
10 going to limit it to 2002, go back that far. And as I  
11 said, if it relates to the Trax system, I'm not going to  
12 require them to search that any further. But,  
13 everything else I think is reasonably related to  
14 information here that might be relevant at trial. So  
15 I'm going to allow those.

16 As to request number 96, I'm not going to  
17 allow the payments again for the same reason I'm not  
18 going to allow the settlement agreement.

19 And as to request number 13, they've made a  
20 representation they don't have such documents. So I'm  
21 not going to grant the request with regard to that.

22 So basically, I'm granting everything except  
23 for -- let's go over it again and make sure I've got it  
24 correct, except for five. Five is denied. 13 is  
25 denied. 14 is denied. 15 is denied. 96 is denied, and

1 113 is denied, except as I said to the extent that  
2 plaintiff wants to pay to go to the Trax system.

3 Now --

4 MS. CARUSO: Your Honor --

5 THE COURT: I'm sorry, go ahead.

6 MS. CARUSO: I wanted to just seek  
7 clarification on one thing. Those requests, encompassed  
8 within them is a huge amount of attorney work product  
9 information.

10 THE COURT: Well, you're just going to have  
11 to file a privilege log with regard to anything that you  
12 claim is privilege. I'm not saying that non -- that  
13 privileged documents must be produced. You have to do a  
14 privilege log.

15 MS. CARUSO: Okay, but privilege log itself  
16 is going to be pretty burdensome going back to 2002 to  
17 collect those things.

18 THE COURT: I don't think a lot of this is  
19 privileged.

20 MS. CARUSO: Well, one of these request all  
21 analysis about, you know, considering removing anything,  
22 all -- all communications relating to the presence or  
23 absence of it, all documents relating to Google's  
24 policies concerning which I think --

25 THE COURT: Uh-huh.

1 MS. CARUSO: -- picks up literally every  
2 single document relating to a lawsuit. And so drafts of  
3 summary judgment briefs and, you know, it just is a  
4 huge amount of --

5 THE COURT: All right. Well, tell me which  
6 ones specifically you're concerned about because I don't  
7 mean it to be quite that far. You're talking about 18?

8 MS. CARUSO: 18 would definitely be one of  
9 them. 19 and 20 are basically the same except they  
10 changed "removing" to "limiting" and "prohibiting".

11 THE COURT: How many suits have you had?

12 MS. CARUSO: It's fewer than ten, but they  
13 do go back for -- well, I shouldn't say fewer than ten.  
14 I think that it's fewer than ten. But they go back  
15 quite some time.

16 And, you know, it -- finding these -- sort  
17 of tracking down the privileged information in order to  
18 log it is going to be a -- quite an undertaking given  
19 the amount of time that has passed in the past eight  
20 years for all of these things that are theoretically  
21 responsive.

22 So if, Your Honor, you could limit it to  
23 anything that was exchanged, production with counsel or  
24 filed with Court or depositions --

25 THE COURT: I don't think we can do that



1 because, I mean, it may be privileged; it may not.

2 Well, let's see. Number 18 says -- all  
3 right. I see what you're saying. I guess if it related  
4 to a lawsuit that if it was not privileged -- I mean,  
5 well certainly, if you'd communicated to somebody else  
6 that -- to the other party that it would not be  
7 privileged.

8 MS. CARUSO: Right.

9 THE COURT: If you did not communicate it,  
10 then I'm assuming that at some point a privilege issue  
11 would have come up with regard to those documents, that  
12 they would have been privileged to begin with.

13 Wouldn't you agree?

14 MS. SPAZIANO: May I speak to this? One  
15 thing we have talked about is trying to reach an  
16 agreement and not logging the documents that are clearly  
17 privileged. And it's one thing that's under  
18 consideration. We sent a proposal to Google's counsel  
19 that would, you know, not require us to log things that  
20 are clearly privileged --

21 THE COURT: Right.

22 MS. SPAZIANO: -- such as to, you know,  
23 client seeking legal advice or conveying legal advice.

24 And so we're happy to work through that. We  
25 have got a proposal on the table. My concern about the

1 concern raised by counsel is she said that it would be  
2 very burdensome to go back and try to find all of those  
3 things that are privileged.

4 And what worries me is that if you say you  
5 don't have to log any of those things, and they don't go  
6 out and search for those things, they may miss things  
7 that are not privileged and responsive.

8 And so I'm happy to work on minimizing the  
9 burden of the privileged log because we're not going to  
10 come to in and fight over draft summary judgment briefs  
11 and whether or not they should be produced.

12 But I think that the burden to search for  
13 the documents needs to exist. The logging is something  
14 that we're happy to work through.

15 THE COURT: Well, let me ask you something.  
16 I mean wouldn't most -- I mean, Google doesn't usually  
17 represent itself. It has outside counsel, correct?

18 MS. SPAZIANO: Yes.

19 THE COURT: So, most of what you're  
20 concerned about would be in the possession of outside  
21 counsel, would it not, not inhouse?

22 MS. CARUSO: Except to the extent that  
23 drafts were sent to inside counsel and e-mails were  
24 exchanged with inside counsel which I believe happens  
25 fairly frequently.

1 THE COURT: Well, what if -- I mean, what if  
2 we accepted anything that was -- you know, I don't know  
3 how you're going to do this, though.

4 What I'm wondering about is general reviews  
5 and analysis rather than ones that are specific to  
6 litigation with regard to 18, 19, and 20, and 21, 22.

7 MS. CARUSO: Your Honor, with respect to  
8 general ones that are not specific given litigation,  
9 we've already agreed to produce those.

10 THE COURT: Because when I was looking at  
11 those, I was really thinking of general studies not  
12 specific to certain litigation.

13 MS. CARUSO: Right, and we agreed that  
14 that's relevant, general studies, and that's why we have  
15 agreed to produce them.

16 THE COURT: Okay, but I am letting them  
17 have -- okay, so why do you think that that would -- let  
18 me ask plaintiff's counsel again why -- I understand  
19 that you think that there might be something in there.  
20 But if they're agreeing to give you the general ones and  
21 if they're agreeing to give you the specific documents  
22 that you asked for with regard to American Airlines  
23 and -- let's see, contrast for somebody else as well.  
24 But you asked specifically --

25 MS. CARUSO: Asked specifically for --

1 MS. SPAZIANO: About American Airlines, and  
2 that's part of the issue, we don't know what other  
3 litigation out there exists or what other resolutions  
4 existed before matters went to litigation. And that's  
5 exactly the issue.

6 To the extent that there were communications  
7 like those that were provided in the American Airlines  
8 litigation that exist with respect to matters that  
9 didn't need litigation, they're likely to have the same  
10 kind of --

11 THE COURT: You've got the American  
12 Airlines, though, already. I mean, you don't have that.  
13 I mean I'm telling them to produce it. You don't have  
14 anything on that.

15 MS. SPAZIANO: Right.

16 THE COURT: We're going to have to take this  
17 one step at a time I think.

18 MS. SPAZIANO: Sure.

19 THE COURT: You're going to have to produce  
20 the American Airlines as I ordered. And I think you  
21 think that was only one that was a specific suit.

22 Okay. Then, as far as 18, 19, 20, 21, I'm  
23 going to -- and 22, and 23, then I'll relate that to  
24 just general analysis and policies and so forth, not  
25 specific to specific litigation.

1 MS. SPAZIANO: Can I ask for one  
2 clarification for that?

3 THE COURT: Uh-huh.

4 MS. SPAZIANO: If there's a litigation or  
5 you know, say like pick Geico because Geico wasn't  
6 specifically mentioned here where there was a general  
7 analysis and an expert report, is that something that is  
8 being produced or is that being excluded from production  
9 because it was general analysis in the context of a  
10 specific litigation? That's really what --

11 THE COURT: What I'm asking them -- what I'm  
12 telling them to do is to not have to look into specific  
13 litigation files.

14 MS. SPAZIANO: Uh-huh.

15 THE COURT: That they're going to have -- I  
16 mean if they have a general analysis that -- or review  
17 that they conducted and perhaps it was sparked by a  
18 suit, that's fine. But if it's not part of a litigation  
19 process then they don't have to produce it.

20 Now, what I think should happen is, you  
21 should get the American Airlines stuff. And if you  
22 think that there may be additional specific documents  
23 that you might need from another specific suit, then  
24 maybe address that.

25 But I don't think -- you know, and come back

1 and ask me about that. But I don't think I can require  
2 that they go through what I'm sure are boxes and boxes  
3 of litigation files.

4 MS. SPAZIANO: Understood. Would it be  
5 possible for them to create a list of those litigation  
6 matters or those challenges that didn't result in  
7 litigation so we could know what exists that we're not  
8 getting so that we could come to you --

9 THE COURT: You're saying they're list than  
10 ten? You just want to know the names of the suits? Is  
11 that what you're asking me? They're a matter of  
12 public --

13 MS. SPAZIANO: Well, to the extent that  
14 they're public, we're aware of them.

15 THE COURT: Right.

16 MS. SPAZIANO: But to the extent that there  
17 are litigation files before a matter goes to litigation,  
18 I mean, there could very well be and likely are  
19 situations where somebody threatened litigation, and it  
20 was resolved in light --

21 THE COURT: Well, I doubt that any of that  
22 analysis is in there if it never even went to trial, if  
23 it never even went to suit.

24 MS. SPAZIANO: It would certainly depend on  
25 how those negotiations --

1           THE COURT: Right. I think we're digging a  
2 little too deep there. I'm going to limit it as I said  
3 to just general analysis and reviews and then deal with  
4 the American Airlines and we'll go from there, okay.

5           Now, as to producing these documents, when  
6 is Google going to be able to produce them? You should  
7 be able to produce everything up to now already because  
8 you said you were going to do that by February -- excuse  
9 me, January 29th or something.

10          MS. CARUSO: That was our intent. There are  
11 a few stragglers out there. Only since making that  
12 correction there have been more requests served on us,  
13 so fewer I think that 200 documents outstanding for us  
14 to produce from what we'd already agreed to.

15          As far as when we can produce these, I  
16 frankly don't know. I can represent that Google will  
17 work to get it done as quickly as possible. But,  
18 searching for all of this could take some time, so I  
19 just think that --

20          THE COURT: What do you think about by the  
21 19th, a little over two weeks?

22          MS. CARUSO: We will certainly attempt to do  
23 that and make every effort.

24          THE COURT: All right. Then I'll assume  
25 that you're going to produce them by February 19th and

1 I'll extend discovery a little bit then to deal with  
2 that.

3 I'm going to keep the final pretrial  
4 conference on for February 18th. You'll have to just go  
5 and pick a trial date, okay.

6 And then what I'll do is give you until --  
7 how about then until, assuming they produced everything  
8 which I'm -- which I'm strongly encouraging you to  
9 comply with, then let's have the close of discovery by  
10 March 12th, all right.

11 Then you can exchange your pretrial  
12 submissions by the 24th with objections to the pretrial  
13 submissions by the 31st.

14 MS. SPAZIANO: May I ask one question about  
15 the Court's ruling with respect to the Trax system?

16 THE COURT: Uh-huh.

17 MS. SPAZIANO: I think your ruling suggested  
18 that if we want the Trax system to be searched, we'd  
19 have to pay for the search and my question --

20 THE COURT: Beyond what they've already  
21 searched for. As I understand they've been all for  
22 Rosetta Stone searches.

23 MS. SPAZIANO: Understood completely.  
24 Would -- does your order contemplate that we would be  
25 preparing the search that would be done based on the



1 requests that are at issue here such that we can try to  
2 narrow the scope of that and the cost associated with  
3 that?

4 THE COURT: Yes, you can do that. You can  
5 narrow it, and I'd like you all to communicate back and  
6 forth. And if you want to pay for a limited Trax  
7 search --

8 MS. SPAZIANO: Uh-huh.

9 THE COURT: -- then that's all right.

10 MS. SPAZIANO: Understood. Thank you.

11 THE COURT: Okay, all right.

12 Is there anything else that we need to deal  
13 with? No.

14 Okay, thank you. Court's adjourned.

15 (Proceeding concluded at 2:51 p.m.)  
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# EXHIBIT 2

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)

**PLAINTIFF ROSETTA STONE LTD.'S FIRST REQUEST  
FOR THE PRODUCTION OF DOCUMENTS FROM DEFENDANT GOOGLE**

Plaintiff Rosetta Stone Ltd. ("Rosetta Stone") hereby requests, pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, that Defendant Google Inc. ("Google") produce the following documents and electronically stored information at the offices of Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue N.W., Suite 900, Washington, DC 20036, within thirty (30) days after service of this request.

**INSTRUCTIONS**

1. This First Request for the Production of Documents calls for the production of all information and documents in the possession of Google and/or its attorneys, or subject to the custody or control of Google or its attorneys. Google must make a diligent search of its records

(including but not limited to paper records, computerized records, and electronic mail records) and of other papers and materials in its possession or available to Google or its attorneys.

2. Each Request for the Production of Documents (“Request”) herein constitutes a request for documents in their entirety, with all enclosures and attachments, and without abbreviation, redaction, or expurgation. Documents attached to each other, by means including but not limited to a staple, clip, tape, e-mail attachment, or “Post-It” note, should not be separated. The production must also include, where applicable, any index tabs, file dividers, designations, binder spine labels, or other similar information as to the source and/or location of the documents.

3. Defendants shall produce any and all drafts and copies of each document that are responsive to any Request, and all copies of such documents that are not identical in any respect, including but not limited to copies containing handwritten notes, markings, stamps, or interlineations. The author(s) of all hand-written notes should be identified.

4. Responsive documents that exist only in paper form shall be organized as they have been kept in the ordinary course of business. If with respect to any category there are no responsive documents, so state in writing.

5. Responsive documents shall be produced in TIFF format with metadata included. Responsive documents that cannot be produced in TIFF format due to technical reasons shall be produced in a computer-readable and text searchable format to be mutually determined by the parties. Google should produce certain documents in their native format, including copies of all responsive documents maintained in an electronic format where: (a) such responsive documents contain electronically stored information that is only reviewable in such documents’ native electronic format; or (b) such responsive documents are most conveniently viewed in their native

electronic format. This includes but is not limited to Microsoft Excel files, Microsoft Power Point files, HTML files, and database files.

6. In all cases in which metadata associated with any responsive document or electronically stored information is itself reasonably calculated to lead to the discovery of admissible evidence, Google must so notify Rosetta Stone and produce such responsive documents and electronically stored information in an electronic format that will preserve such metadata and make it reasonably accessible to Rosetta Stone, including but not limited to producing e-mails that list visible "bcc" recipients and Microsoft Word documents that preserve and reveal any hidden notations, creation or alteration records, and other responsive file system or document metadata. Google should preserve all metadata associated with all responsive documents, including metadata that is not produced pursuant to this instruction. This instruction should be read in accordance with the requirements and limitations imposed by Rules 26(b) and 34 of the Federal Rules of Civil Procedure.

7. If you object to a portion or an aspect of a Request, state the grounds for your objection with specificity and respond to the remainder of the document request. If any documents, or portion thereof, are withheld because you claim that such information is protected under the attorney-client privilege, work product doctrine, or other privilege or doctrine, you are required to provide a privilege log, specifying for each such document: (i) the title of the document, if any; (ii) the nature of the document, e.g., letter memorandum, telegram, e-mail, etc.; (iii) a description of the subject matter of the document; (iv) the name, title, and business affiliation of each person who prepared, received, viewed, and/or has or has had possession, custody or control of the document; (v) the name of all persons to whom the information in the document was disclosed, such as would enable your privilege claim to be analyzed and

adjudicated; (vi) the date of the document; and (vi) a statement of the basis upon which the privilege or work product claim is made.

8. If you claim that a portion of a document is protected from disclosure for any reason, produce such document with redaction of only the portion claimed to be protected. Any document produced in redacted form should clearly indicate on its face that it has been redacted.

9. If you object that a Request is vague or ambiguous, identify the objectionable aspect of the Request, state your interpretation of the Request and respond to that interpretation.

10. If Google cannot fully respond to a Request, after a diligent attempt to obtain the requested information, Google must answer the Request to the extent possible, specify the portion of the Request Google is unable to answer, and provide whatever information Google has regarding the unanswered portion.

11. If any document called for by the Requests has been destroyed, lost, discarded or is otherwise no longer in Google's possession, custody or control, Google shall identify such document as completely as possible, and shall specify the date of disposal of the document, the manner of disposal, the reason for disposal, the person authorizing disposal, and the person disposing of the document.

12. The following rules of construction apply to all Requests:

- a. The terms "any," "all," "each" and "every" should be understood in either their most or least inclusive sense as necessary to bring within the scope of the Requests all responses that might otherwise be construed to be outside of their scope.

- b. The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the Requests all responses that might otherwise be construed outside of their scope.
- c. The use of the singular form of any word shall be taken to mean the plural as well as the singular, and the use of the plural form of any word shall be taken to mean the singular as well as the plural.
- d. The use of a verb in any tense, mood, or voice shall be construed as the use of the verb in all tenses, moods, or voices, as necessary to bring within the scope of the document requests all responses that might otherwise be construed to be outside of their scope.

13. These Requests shall be deemed continuing in nature in accordance with Rule 26(e) of the Federal Rules of Civil Procedure. Supplemental responses are required if additional responsive information is acquired or discovered between the time of responding to this request and the time of trial.

14. Unless otherwise specified, the relevant time period for these Requests is January 1, 2002, through the present.

#### **DEFINITIONS**

1. “Rosetta Stone” means Rosetta Stone, Inc. and any of its successors, predecessors, divisions, departments, or affiliates, and any of its present or former officers, directors, employees, accountants, agents, attorneys, or other persons acting for, at the direction of, or in concert with such persons or entities.

2. The phrase “Rosetta Stone Marks” means any and all names, logos, symbols, nicknames, and other indicia that consumers use to identify goods or services offered, marketed,



promoted, sponsored, endorsed or approved by Rosetta Stone, including: ROSETTA STONE; GLOBAL TRAVELER; ROSETTA STONE LANGUAGE & LEARNING SUCCESS; LANGUAGE LIBRARY; DYNAMIC IMMERSION; THE FASTEST WAY TO LEARN A LANGUAGE. GUARANTEED; ROSETTASTONE.COM; ROSETTA WORLD, ADAPTIVE RECALL, CONTEXTUAL FORMATION; SHARED TALK; and AUDIO COMPANION.

3. The phrase “Terms Similar To The Rosetta Stone Marks” includes all terms similar to the Rosetta Stone Marks, including but not limited to: “rosettastone,” “roseta stone,” “rose etta stone,” “rosetta sttone,” “rossetta stone,” and all other typographic variants or misspellings of the Rosetta Stone Marks, including pluralized forms of the Rosetta Stone Marks.

4. The phrase “Rosetta Stone’s Competitors” means entities that compete with Rosetta Stone commercially by selling products and/or services that compete with, counterfeit, or imitate Rosetta Stone’s products or by selling copies of Rosetta Stone’s products obtained through unauthorized channels.

5. The terms “Google,” “you,” and “your” mean Google Inc. and any of its predecessors, successors, parents, subsidiaries, divisions, departments, or affiliates, and any of its present or former members, officers, directors, partners, employees, contract employees, accountants, agents, attorneys, or other persons acting for, at the direction of, or in concert with such persons or entities.

6. The term “Google Customer” means any person who has provided or will provide consideration to Google in exchange for any goods or services provided by Google.

7. The phrase “Google’s Advertising Programs” means all of Google’s advertising programs and business solutions, including but not limited to Google AdSense and Google AdWords, both described at <http://www.google.com/intl/en/ads/>, Google Custom Search, as

described at <http://www.google.com/coop/cse>, Google Site Search, as described at <http://www.google.com/sitesearch/index.html>, and Google AdWords Comparison Ads, as described at <http://adwords.blogspot.com/2009/10/introducing-adwords-comparison-ads.html>.

8. The phrase “search query” refers to the entry of search terms and the terms entered by a user of a Google website or Google search technology into a search box.

9. The term “Keyword” refers to any word, phrase, or term that is used by Google or its programming to trigger Internet advertising or any other message or service that causes Google to earn any consideration, directly or indirectly.

10. The term “Related Keywords” refers to Keywords suggested by Google or its programming when a Google Customer designates a particular work or phrase to be used as a Keyword in one of Google’s Advertising Programs.

11. The terms “broad match” or “broad matched” refer to the AdWords matching option whereby the Google AdWords system runs Sponsored Links in response to search queries that do not necessarily contain the exact Keywords chosen by the Google Customer who requests the Sponsored Link, but contain a word or words that are similar to the chosen Keyword.

12. The term “Broad Match Keywords” refers to variants of Keywords or terms related to Keywords that Google designates through its broad match system to trigger the Sponsored Link of a Google Customer in one of Google’s Advertising Programs when an Internet user does not enter into his or her search engine the exact Keyword or Keywords designated by the Google Customer.

13. The term “Sponsored Link” refers to any Internet advertisement or other message that (a) is or was published as a part of Google’s Advertising Programs as a result of the entry of

a Keyword into Google's search engine or other Internet programming and (b) contains a hyperlink to an Internet website.

14. The phrase "AdWords Process" refers to the series of actions taken by Google or its programming as part of Google's AdWords program involving the receipt of a search query and including related revenue journal entries in Google's accounting system, related creation of data accessible through Google Analytics, and any other external or internal reporting or data collection related to Google's Advertising Programs that is generated by a search query. This series of actions includes, but is not limited to, the collection of the user's search query, IP address and Google account user name, the identification of possible Sponsored Links through exact match, phrase match or broad match, the determination of which Sponsored Links are actually served (including any scoring system applied to Sponsored Links or Keywords), tracking of and response to any user Clickthrough on any of the served Sponsored Links, the collection of clickstream data beyond the Sponsored Link Clickthrough, and any analysis, summarizing or reporting done on the data collected or generated by this series of actions.

15. The term "Studies" includes all investigations, surveys, searches, tests, pools, focus groups or studies of any kind, including but not limited to disclaimer studies, consumer confusion experiments, or other user experiments.

16. The term "communication" has the broadest meaning possible and shall mean the transmittal of information, including but not limited to oral, electronic, digital or written means.

17. The terms "concern" or "concerning" shall have the broadest meaning possible and shall mean directly or indirectly, in whole or in part, alluding to, responding to, with respect to, relating to, pertaining to, referring to, describing, mentioning, evidencing, reflecting or

constituting, commenting on, consisting of, in connection with, or otherwise having a connection to the subject matter of the Request.

18. The terms “relate to,” “relates to” and “relating to” shall have the broadest meaning possible and shall mean directly or indirectly, in whole or in part, alluding to, responding to, with respect to, concerning, pertaining to, referring to, describing, mentioning, evidencing, reflecting or constituting, commenting on, consisting of, in connection with, or otherwise having a connection to the subject matter of the Request.

19. The terms “document” and “documents” are defined to be synonymous in meaning and equal in scope to the usage of the term “documents” set forth in Rule 34 of the Federal Rules of Civil Procedure and they shall have the broadest meaning possible and shall mean any form of communication however produced, reproduced or recorded, including all originals, non-identical copies and drafts, including, without limitation: correspondence, letters, electronic mail, enclosures, memoranda, notes or notations, intra-office communications, notes and minutes of telephone or other conversations, conferences or meetings, calendar or diary entries, notices, announcements, requisitions, resolutions, opinions, reports, studies, analyses, evaluations, agreements, ledgers, books or records of account, financial statements, logs, server logs, data compilations, account memoranda, trial balances, spreadsheets, summaries, charts, graphs, sound recordings, photographs, video recordings, records in electronic, mechanical, magnetic, optical, or electric form, records or representations of any kind (including but not limited to computer data, computer files, computer programs, hard drives, floppy disks, compact disks, magnetic tapes and cards, and all other electronically stored information, regardless of the medium in which such records are stored), and things similar to any of the foregoing, whatever the form.

20. The phrase “electronically stored information” is defined to be synonymous in meaning and equal in scope to the usage of the phrase “electronically stored information” set forth in Rule 34 of the Federal Rules of Civil Procedure. It shall have the broadest meaning possible and shall mean any information stored in electronic form.

21. The term “including” means “including but not limited to.”

22. The term “person” means any individual, corporation or any other type of entity, including, but not limited to limited liability companies, partnerships or groups of individuals.

23. The term “associated with” shall have the broadest possible meaning and shall mean physically or logically connected, necessary to, utilized by, created by, or otherwise in a relationship in any direct, indirect, tangible or intangible way.

24. The terms “trademark” and “trademarks” shall also include service marks and trade names and shall include both registered and unregistered trademarks, service marks and trade names.

25. The phrase “Trademarks Owned By Third Parties” refers to trademarks owned by parties other than Google or a Google Customer for whom Google sells, designates, uses, or includes such trademarks in connection with Google’s Advertising Programs.

#### **DOCUMENTS REQUESTED**

1. All documents relating to Google’s policy or policies in the United States in effect up to 2004 that related to Google’s trademark policy, with respect to Google’s Advertising Programs, including but not limited to policies that prevented or were designed to prevent Google Customers from selecting Trademarks Owned By Third Parties as Keyword triggers for their advertisements.

2. All documents relating to Google's change in policy in the United States in or around 2004 regarding the use of Trademarks Owned By Third Parties in Google's Advertising Programs in order to allow advertisers to use Trademarks Owned By Third Parties as Keyword triggers for their advertisements, including but not limited to all documents relating to the reasons that Google changed such policies, as well as documents sufficient to show the date when this change occurred.

3. All documents relating to Google's change in policy in the United States after the settlement of *GEICO v. Google Inc.*, Case No. 1:04-cv-00507 (E.D. Va.) (filed May 4, 2004) on or around September 7, 2005 regarding the use of Trademarks Owned By Third Parties in Google's Advertising Programs, including but not limited to all documents relating to the reasons that Google changed such policies, as well as documents sufficient to show the date when this change occurred.

4. All documents relating to Google's change in policy in the United States on or around May 14, 2009 regarding the use of Trademarks Owned By Third Parties in Google's Advertising Programs in order to, among other things, allow the use of trademark terms in add text, including but not limited to all documents relating to the reasons that Google changed such policies, as well as documents sufficient to show the date when this change occurred.

5. All documents relating to Google's communications with current or past Google Customers or with users of Google's Internet search engine, website, or other Internet-related services relating to the sale, marketing, promotion, offering, designation, use, or inclusion of one or more trademarks of language education companies, including but not limited to the Rosetta Stone Marks or Terms Similar To The Rosetta Stone Marks, as Keywords or other designated

search terms in Google's Advertising Programs, or in the text of Sponsored Links or other messages published as a part of Google's Advertising Programs.

6. All documents relating to Google's analysis of the use of trademarks as Keywords in paid advertisements, including but not limited to data provided by or communicated to third party consultants, data or analysis generated by or stored in third party software, data or analysis generated by or stored in software developed by Google.

7. All documents relating to any senior executive or board meeting, including but not limited to Board of Directors meetings, Executive Management Group meetings, and GPS meetings at which Google's trademark policy or any lawsuit related to that policy was discussed. Such documents shall include, but not be limited to, minutes, notes or reports of meetings.

8. All documents relating to the sale, marketing, promotion, offering, designation, use, or inclusion of one or more of the Rosetta Stone Marks or Terms Similar To The Rosetta Stone Marks, as Keywords or other designated search terms in Google's Advertising Programs or in the text of Sponsored Links or other messages published as a part of Google's Advertising Programs.

9. All documents relating to communications between Google and Rosetta Stone.

10. All documents relating to communications between Google and any third party complaining, objecting to or criticizing Google's sale, marketing, promotion, offering, designation, use, or inclusion of such party's trademarks as a Keyword or other designated search term in Google's Advertising Programs or in the text of Sponsored Links or other messages published as a part of Google's Advertising Programs, including cease and desist letters received by Google from any owner or purported owner of any trademark and any

responses to such cease and desist letters, as well as allegations that the use of trademarks would or had caused consumer confusion.

11. All documents related to policies, decisions, requests, or other efforts by Google to prevent the distribution or publication of, or to remove, redact or otherwise alter the content of presentations made by Google regarding its Advertising Programs or trademarks, including, but not limited to, a 2003 presentation made by Sheryl Sandberg at the Search Engine Strategies Conference & Expo (*see [www.searchenginestrategies.com/sew/summer03/presentations.html](http://www.searchenginestrategies.com/sew/summer03/presentations.html)*), and a 2004 presentation made by David Fischer at the Search Engine Strategies Conference & Expo (*see [www.searchenginestrategies.com/sew/summer04/presentations.html](http://www.searchenginestrategies.com/sew/summer04/presentations.html)*). This request also covers the contents of the presentations themselves.

12. All documents relating to “standing requests” from trademark owners to Google asking to prevent those trademark owners’ trademarks from being used in the text or title of a Sponsored Link, including but not limited to all documents relating to: (a) the statement of Google’s spokesperson to the Washington Examiner as published on October 18, 2007, to the effect that Google’s “Trademark Complaint Form” is “both a way for trademark owners to file a complaint about an existing ad and a way for them to place a ‘standing request’”; (b) copies of all such “standing requests” and Google’s responses thereto; (c) all steps that Google has taken to honor such “standing requests”; (d) all ways that Google has communicated to trademark owners the option of making such “standing requests”; and (e) whether or not Google has considered treating the Rosetta Stone Marks as subject to such a “standing request.”

13. All documents relating to settlement agreements or any other documents memorializing settlement arrangements between Google and a third party relating to Google’s sale, marketing, promotion, offering, designation, use, or inclusion of the third party’s



trademark(s) as Keywords or other designated search terms in Google's Advertising Programs, or in the text of Sponsored Links or other messages published as a part of Google's Advertising Programs, including but not limited to the settlement agreement in *American Airlines, Inc. v. Google Inc.*, Case No. 4:07-cv-00487-A (N.D. Tex.) (filed Aug. 16, 2007).

14. All documents related to any negotiations, agreements, settlements, arrangements or communications with RE/MAX International, Inc. or any of its subsidiaries, affiliates or franchisees related to the use of RE/MAX's trademarks (or those of its subsidiaries, affiliates or franchisees) in Google's Advertising Programs.

15. All documents related to any negotiations, agreements, settlements, arrangements or communications with Time Warner, Inc. or any of its subsidiaries, affiliates or franchisees (including but not limited to AOL LLC) related to the use of Time Warner's trademarks (or those of its subsidiaries, affiliates or franchisees) in Google's Advertising Programs.

16. All documents related to arrangements, negotiations, discussions or communications with any party concerning requested, suggested, considered or otherwise contemplated modifications of the AdWords Process or other Google policies and procedures concerning the presence of trademarked words or phrases in search queries or Keywords.

17. All documents relating to the use of the Rosetta Stone Marks or Terms Similar To The Rosetta Stone Marks, in any lists of "More Specific Keywords," "Similar Keywords" or any other suggestions of terms, phrases or words to be sold, marketed, promoted, offered, designated, used, or included as Keywords or other designated search terms in Google's Advertising Programs, or in the text of Sponsored Links or other messages published as a part of Google's Advertising Programs.

18. All documents relating to any analysis, review, consideration, deliberations, debate, or other communications by or on behalf of Google with respect to the possibility of removing Trademarks Owned By Third Parties, including but not limited to the Rosetta Stone Marks or Terms Similar To The Rosetta Stone Marks, from any lists or sets of words, terms, or phrases available to be used, included, or designated as Keywords or other designated search terms in Google's Advertising Programs, or in the text of Sponsored Links or other messages published as a part of Google's Advertising Programs.

19. All documents relating to any analysis, review, consideration, deliberations, debate, or other communications by or on behalf of Google with respect to the possibility of limiting the sale, marketing, promotion, offering, designation, use, or inclusion of Trademarks Owned By Third Parties, including but not limited to the Rosetta Stone Marks or Terms Similar To The Rosetta Stone Marks, in Google's Advertising Programs.

20. All documents relating to any analysis, review, consideration, deliberations, debate, or other communications by or on behalf of Google with respect to the possibility of prohibiting advertisers or potential advertisers from bidding on, purchasing or otherwise using the Trademarks Owned By Third Parties as Keywords or other designated search terms in Google's Advertising Programs, or in the text of Sponsored Links or other messages published as a part of Google's Advertising Programs.

21. All documents relating to any analysis, review, consideration, deliberations, debate, or other communications by or on behalf of Google with respect to any financial implications to Google, including but not limited to any increase or decrease in the value of Google's stock or stock options, related to the sale, marketing, promotion, offering, designation, use, or inclusion of Trademarks Owned By Third Parties, including but not limited to the Rosetta

Stone Marks and Terms Similar To The Rosetta Stone Marks, as a part of Google's Advertising Programs.

22. All documents relating to any analysis, review, consideration, deliberations, debate, or other communications by or on behalf of Google with respect to any financial implications to Google, including but not limited to any increase or decrease in the value of Google's stock or stock options, if Google were to cease all sale, marketing, promotion, offering, designation, use, or inclusion of Trademarks Owned By Third Parties, including but not limited to the Rosetta Stone Marks and Terms Similar To The Rosetta Stone Marks, as a part of Google's Advertising Programs.

23. All documents relating to any Google policies, guidelines, procedures, or other guidance relating to the sale, marketing, promotion, offering, designation, use, or inclusion of Trademarks Owned By Third Parties as Keywords or other designated search terms in Google's Advertising Programs, or in the text of Sponsored Links or other messages published as a part of Google's Advertising Programs, including all documents relating to any change in, amendment to or modification of such policies, guidelines, procedures or other guidance and the reasons for such changes, amendments or modifications.

24. All documents relating to Google's policies, procedures, and guidelines relating to the sale, marketing, promotion, offering, designation, use, or inclusion of Google's own trademarks, including but not limited to the trademark "Google," as Keywords or other designated search terms in Google's Advertising Programs, or in the text of Sponsored Links or other messages published as a part of Google's Advertising Programs, including all documents relating to any change in, amendment to or modification of such policies, guidelines, and procedures, and the reasons for such changes, amendments or modifications.

25. All documents related to actions taken by Google to prevent the use in commerce of terms confusingly similar to Google's trademarks, including but not limited to letters or emails written to parties in connection with web sites operated at the Universal Resource Locators, www.g00gle.com, www.booble.com, www.prgoogle.com, and www.googlefone.com.

26. Documents sufficient to identify and disclose the conclusions or findings of all Studies conducted by, for, on behalf of, or to the benefit of Google concerning the use of the term "Sponsored Link" as opposed to any other form of designation for the Sponsored Links in Google's Advertising Programs.

27. Documents sufficient to identify and disclose the conclusions or findings of all Studies conducted by, for, on behalf of, or to the benefit of Google concerning ways in which Internet users distinguish between Sponsored Links and natural (organic) search results, including but not limited to Studies that test the effect of any language, colors, design elements, placement, or disclaimers on such Sponsored Links and natural (organic) search results.

28. All documents analyzing or reporting on the effect on consumers of the layout, design or wording of the results page that a consumer sees after conducting a Google search, including without limitation the selection of the fonts, the colors, the placement of ads and the use of Sponsored Links to denote paid advertisements.

29. Documents sufficient to identify and disclose the conclusions or findings of all Studies conducted by, for, on behalf of, or to the benefit of Google concerning the use of any trademark as a Keyword in one of Google's Advertising Programs.

30. All documents concerning the effectiveness for advertisers of Google's Advertising Programs, natural search results, or the use of trademarks or brands as Keywords.

31. Documents sufficient to show calculations and/or estimates of the total amount of revenues, profits, and other consideration that Google has received or expects to receive from Google's Advertising Programs, by quarter, from the inception of such advertising programs to the date Google produces documents responsive to this Request, including documents that substantiate such calculations and/or estimates.

32. Documents sufficient to show calculations and/or estimates of the total amount of revenues, profits, and other consideration that Google has received or expects to receive from the sale, marketing, promotion, offering, designation, use, or inclusion of Trademarks Owned By Third Parties as Keywords or other designated search terms in Google's Advertising Programs, or in the text of Sponsored Links or other messages published as a part of Google's Advertising Programs, by quarter, from the inception of such advertising programs to the date Google produces documents responsive to this Request, including documents that substantiate such calculations and/or estimates.

33. Documents sufficient to show calculations and/or estimates of the total amount of revenues, profits, and other consideration that Google has received or expects to receive from the sale, marketing, promotion, offering, designation, use, or inclusion of Rosetta Stone Marks or Terms Similar To The Rosetta Stone Marks as Keywords or other designated search terms in Google's Advertising Programs, or in the text of Sponsored Links or other messages published as a part of Google's Advertising Programs, by quarter, from the inception of such advertising programs to the date Google produces documents responsive to this Request, including documents that substantiate such calculations and/or estimates.

34. Documents sufficient to show calculations and/or estimates of the total amount of revenues, profits, and other consideration that Google has received or expects to receive from the

sale of Trademarks Owned By Third Parties as Keywords in Google's Advertising Programs, including documents that substantiate such calculations and/or estimates.

35. Documents sufficient to show calculations and/or estimates of the total amount of revenues, profits, and other consideration that Google has received or expects to receive from the sale of one or more of the Rosetta Stone Marks or Terms Similar To The Rosetta Stone Marks as Keywords in Google's Advertising Programs, including documents that substantiate such calculations and/or estimates.

36. Documents sufficient to show quarterly gross or net revenue, profits, costs and expenses attributable to the sale, marketing, promotion, offering, designation, use, or inclusion of Keywords or designated search terms in Google's Advertising Programs, from the inception of such advertising programs to the date when Google produces documents responsive to this Request.

37. All of Google's quarterly and annual audited financial statements and annual reports from 1998 through April 29, 2004, the date of Google's Form S-1 Registration Statement.

38. All documents relating to Google's relationship to EnglishCentral, Inc. ("EnglishCentral"), including but not limited to documents pertaining to Google Ventures' investment in EnglishCentral, Google's promotion or planned promotion of EnglishCentral's products and services; documents analyzing the competitive landscape for EnglishCentral's products and/or services; documents discussing English Central and Rosetta Stone, either directly or implicitly; and Google's or any other party's long-term strategic plans for EnglishCentral.

39. All documents relating to any analysis, review, or consideration of any legal issue relating to, in any way, the sale, marketing, promotion, offering, designation, use, or inclusion by any person of trademarks, or words confusingly similar thereto, in Google's Advertising Programs.

40. All documents relating to any legal opinion created by, obtained by, or provided to Google that relates to the sale, marketing, promotion, offering, designation, use, or inclusion of trademarks as Keywords or other designated search terms in Google's Advertising Programs, or in the text of Sponsored Links or other messages published as a part of Google's Advertising Programs.

41. All documents relating to the role of trademarked terms in consumer search activity, including but not limited to studies, surveys, reports, analyses, opinions, memoranda, or communications, including, but not limited to, documents created by third-parties, such as consumer research organizations, investment banks, consulting firms, and advertising agencies.

42. All documents relating to every instance in which any of the Rosetta Stone Marks or Terms Similar To The Rosetta Stone Marks, has been sold, marketed, promoted, offered, designated, used, or included as a Keyword or other designated search term in any of Google's Advertising Programs, including but not limited to agreements, proposals, the advertisements or "Sponsored Links" triggered by or containing the Rosetta Stone Marks or by Terms Similar To The Rosetta Stone Marks and any screenshots of such advertisements or "Sponsored Links."

43. All documents relating to every instance in which any of the Rosetta Stone Marks or Terms Similar To The Rosetta Stone Marks, has been marketed, promoted, offered, designated, used, or included in the text of Sponsored Links or other messages published as a part of Google's Advertising Programs, including agreements and proposals.

44. All documents relating to every instance in which Google or its programming has included one or more of the Rosetta Stone Marks or Terms Similar To The Rosetta Stone Marks in lists of “More Specific Keywords,” “Similar Keywords” or any other suggestions of terms, phrases or words to be sold, marketed, promoted, offered, designated, used, or included as Keywords or other designated search terms in Google’s Advertising Programs.

45. Documents sufficient to identify and provide the following information concerning all search terms that Google or its programming have designated to trigger the publication of a question on Google’s search results page asking whether the Internet user that entered the search term in question “mean[t]” to use one or more of the Rosetta Stone Marks as an Internet search term:

(a) the number of times that the search term was entered into Google’s search engine and then triggered the publication of the question “Did you mean” one or more of the Rosetta Stone Marks, in terms of page views or another readily available measure; and

(b) the number of times that Internet users followed Google’s suggestion and clicked on the link asking whether they “mean[t]” to search one or more of the Rosetta Stone Marks.

46. Documents including, but not limited to, data dictionaries, data schema, flowcharts, technical manuals, user manuals, data flow diagrams, strategic plans, budgets, business analyst documentation, training materials and internal reports or publications sufficient to describe in detail all systems, programs, procedures, databases (for example, Bigtable), fields columns, tables and metadata associated with the transactional activity related to publication of a question on Google’s search results page asking whether the Internet user that entered the search term in question “mean[t]” to use a certain search query.

47. Documents sufficient to identify and provide the following information concerning all search terms that Google or its programming have identified as a “misspelling” of one or more of the Rosetta Stone Marks when entered into the Google search engine as a search



term such that the correct spelling of the Rosetta Stone Mark will appear within the text of the resulting Sponsored Link(s):

- (a) the number of times that the misspellings have been used as search terms in Google's search engine;
- (b) the number of page views of each Sponsored Link in which a "misspelled" search term was displayed in the text of the Sponsored Link as a Rosetta Stone Mark; and
- (c) the number of times that an Internet user "clicked through" a Sponsored Link in which a "misspelled" search term was displayed in the text of the Sponsored Link as a Rosetta Stone Mark.

48. Documents sufficient to identify and provide the following information concerning all Broad Match Keywords that Google or its programming have designated to trigger the Sponsored Links of a Google Customer that has designated one or more of the Rosetta Stone Marks as a Keyword in one of Google's Advertising Programs:

- (a) the search query and Broad Match Keywords used;
- (b) the name of the Google Customer;
- (c) the contents of the Sponsored Link;
- (d) the number of page views of each Sponsored Link triggered by a use of such a Broad Match Keyword; and
- (e) the number of times that an Internet user "clicked through" a Sponsored Link triggered by a use of such a Broad Match Keyword.

49. Documents sufficient to identify and provide the following information concerning all Related Keywords that Google or its programming have suggested to Google Customers and/or Internet users when such Google Customers and/or Internet users have designated one of the Rosetta Stone Marks or Terms Similar To The Rosetta Stone Marks as a Keyword in one of Google's Advertising Programs:

- (a) the Keywords and Related Keywords used and the identity of the Google Customers in question;

(b) the number of times that Google or its programming suggested that such Related Keyword be used, in terms of page views or other available measure;

(c) the number of times that a Google Customer followed Google's suggestion and designated such Related Keyword to be used as a Keyword in Google's Advertising Program;

(d) the number of page views of each Sponsored Link triggered by a use of such a Related Keyword;

(e) the contents of each Sponsored Link triggered by a use of such a Related Keyword; and

(f) the number of Clickthroughs a Sponsored Link triggered by a use of such a Related Keyword received.

50. Documents sufficient to identify the 50 Related Keywords that Google or its programming have suggested to Google Customers and/or Internet users most frequently when such Google Customers and/or Internet users have designated one of the Rosetta Stone Marks as a Keyword in one of Google's Advertising Programs.

51. Documents sufficient to identify the 100 Broad Match Keywords that Google or its programming have most frequently designated to trigger the Sponsored Links of Google Customers that have designated a Rosetta Stone Mark as a Keyword in one of Google's Advertising Programs.

52. All documents sufficient to identify every search query for which Google or its programming has included or will include one or more of the Rosetta Stone Marks or Terms Similar To The Rosetta Stone Marks in its list of Query Suggestions created by Google Suggest, and the related list of suggestions offered.

53. All documents sufficient to identify the Query Suggestions generated by Google Suggest, Google or its programming when a search query based on a user's entry or partial entry of a query containing one or more of the Rosetta Stone Marks, Terms Similar To The Rosetta

Stone Marks, or fractions thereof which Google or its programming relates to the Rosetta Stone Marks or Terms Similar To The Rosetta Stone Marks, as well as the associated query text.

54. All documents that show every Sponsored Link or other message published as a part of Google's Advertising Programs, in the form it was published, that was triggered by a Keyword or other designated search term that incorporates one or more of the Rosetta Stone Marks or Terms Similar To The Rosetta Stone Marks.

55. Documents sufficient to identify and provide the following information concerning each and every Sponsored Link or other messages published as a part of Google's Advertising Programs that was triggered by a Keyword or other designated search term that incorporates one or more of the Rosetta Stone Marks or Terms Similar To The Rosetta Stone Marks:

- (a) All identifying information in Google's possession relating to the Google Customer associated with such a Sponsored Link or message, and/or on whose behalf such a Sponsored Link or message was created or purchased;
- (b) The Uniform Resource Locator (URL) linked to each such Sponsored Link or message;
- (c) The number of impressions per month that each such Sponsored Link or other message received;
- (d) The monthly total amounts of Internet traffic registered on or through each such Sponsored Link or message, as registered in clickthroughs, clicks, hits, unique Internet users and/or IP addresses;
- (e) The Clickthrough rate for each such Sponsored Link or other message;
- (f) The monthly total amounts of revenue, profits, or other consideration paid or owed to Google that are attributable to each such Sponsored Link or message, or if no such documents are available, the estimated amount of revenue, profits, or consideration to Google that are attributable to each such Sponsored Link or message;
- (g) The monthly total amounts of costs and expenses incurred by Google that are attributable to each such Sponsored Link or message, or if no such documents are

available, the estimated amount of costs and expenses incurred by Google that are attributable to each such Sponsored Link or message;

(h) The amounts charged by Google per month to secure the placement of such a Sponsored Link or message.

(i) The text of all such Sponsored Links;

(j) All other Keywords used by the Google Customer responsible for such a Sponsored Link; and

(k) The price paid per click on each such Sponsored Link.

56. All documents associated with the transactional activity related to the AdWords Process that relates to all search queries received by Google which included one or more of the Rosetta Stone Marks or Terms Similar To The Rosetta Stone Marks, including, but not limited to, the full text of the relevant search queries, all Sponsored Links served in response to those search queries, clickstream data collected in connection with the search queries, any scoring of the Sponsored Link or Keyword related to the search query, the price-per-click bid or impression cost associated with all Sponsored Links served in response to those search queries, and any revenue collected by Google associated with that search query.

57. All documents associated with the transactional activity related to the AdWords Process that relates to all search queries received by Google which did not contain any of the Rosetta Stone Marks but were broad matched to Keywords which are Rosetta Stone Marks or Terms Similar To The Rosetta Stone Marks, including, but not limited to, the full text of the relevant search queries, all Sponsored Links served in response to those search queries, clickstream data collected in connection with the search queries, any scoring of the Sponsored Link or Keyword related to the search query, the price-per-click bid or impression cost associated with all Sponsored Links served in response to those search queries, and any revenue collected by Google associated with that search query.

58. All documents available to Google or Google's advertisers concerning each Sponsored Link or other message published as a part of Google's Advertising Programs that was triggered by a Keyword or other designated search term that incorporates one or more of the Rosetta Stone Marks or Terms Similar To The Rosetta Stone Marks including without limitation:

- (a) click stream data;
- (b) landing pages;
- (c) conversion rate;
- (d) quality score;
- (e) measures of customer loyalty;
- (f) length of visit;
- (g) navigation summaries;
- (h) funneling;
- (i) depth of visit;
- (j) Clickthrough rates and/or other data measured and captured by Google or its advertisers concerning consumer responses; and
- (k) other data available to the advertisers responsible for such Sponsored Links through Google Analytics or any other program, database, or store of knowledge offered or maintained by Google.

59. All documents associated with the use of Google Checkout for the purchase of language education products or services from any source.

60. Documents sufficient to identify the individuals who develop, maintain or are responsible for all systems, programs, procedures and databases associated with the AdWords Process, as well as the individuals' immediate supervisor and any direct reports.

61. Documents sufficient to identify the individuals with responsibility for functions related to Google's Advertising Programs, including individuals with marketing, sales, finance and operational responsibilities, as well as the individuals' immediate supervisor and any direct reports.

62. All documents concerning all reporting on, advertising, marketing, optimizing or selling of Google's Advertising Programs to advertisers or potential advertisers in the language education field, whether or not the information concerns Rosetta Stone Marks or Terms Similar To The Rosetta Stone Marks.

63. All documents concerning all Studies, analyses, reports or presentations prepared by or for Google relating to companies that Google considers to be within the language education field or that sell language learning products and/or services, including but not limited to Compete Studies and Quarterly Reviews.

64. All documents sufficient to analyze the demographic profile or consumer typology of consumers who have or are likely to use Google's search engines to find information or services related to language education products and/or services.

65. All documents concerning every instance in which one or more of the Rosetta Stone Marks or Terms Similar To The Rosetta Stone Marks was purchased as an AdWord or other keyword by an entity other than Rosetta Stone for use in Google's Advertising Programs.

66. Documents sufficient to describe and/or explain Google's Premium Sponsorship Program ("PS Program"), including but not limited to whether the PS Program used Keywords at any time, the policies relating to the PS Program and the reasons for discontinuing the PS Program.

67. All transcripts of depositions and the exhibits thereto, in *American Airlines, Inc. v. Google Inc.*, Case No. 4:07-cv-00487-A (N.D. Tex.) (filed Aug. 16, 2007).

68. All expert reports, consumer or user confusion studies, and all documents relating to such reports or studies prepared in connection with *American Airlines, Inc. v. Google Inc.*, Case No. 4:07-cv-00487-A (N.D. Tex.) (filed Aug. 16, 2007).

69. Copies of all requests to and responses to requests for admission by Google in *American Airlines, Inc. v. Google Inc.*, Case No. 4:07-cv-00487-A (N.D. Tex.) (filed Aug. 16, 2007).

70. All documents relied on by any expert whom Google intends to call as a witness in connection with this action or any other litigation relating to the Google's Advertising Programs.

71. All factual observations, tests, supporting data, calculations, photographs, screenshots, opinions, records or reports of any expert whom Google may call to testify at trial or of any consulting expert whose opinions or impressions have been or will be reviewed by a testifying expert.

72. All documents and tangible evidence prepared by or for each expert who may be called by Google to testify in the trial of the case and as to each consulting expert whose opinions or impressions have been or will be reviewed by a testifying expert.

73. All papers, treatises, reports or other publications authored by (a) each expert who may be called by Google to testify at the trial of this case or (b) each consulting expert whose opinions or impressions have been or will be reviewed by a testifying expert.

74. All magazines, books, periodicals, articles, journals or treatises and any other published information upon which Google or any person who is to testify on your behalf, including experts, intends to rely for any purpose.

75. Curriculum vitae for all expert witnesses designated by Google.

76. All documents relating to consumer or user understanding or perception of Google's Sponsored Links, including but not limited to research or analysis conducted by or for Google on such understandings and perceptions.

77. All documents relating to consumer or user confusion related in any way to Google's Sponsored Links, Google's Advertising Program and/or the use of Keywords in search engines, including surveys conducted by or for Google relating to the sale, marketing, promotion, offering, designation, use, or inclusion of Keywords by Google in any way. This Request specifically includes draft surveys and survey results relating to the potential for likelihood of consumer confusion arising out of the sale, marketing, promotion, offering, designation, use, or inclusion of trademarks as Keywords or designated search terms in Google's Advertising Programs.

78. All documents relating to consumers' ability, or lack thereof, to recognize Google's Sponsored Links as paid advertisements, including but not limited to research or analysis conducted by or for Google on such understandings and perceptions.

79. All documents, including but not limited to those maintained in the Trakken system, that relate to consumer confusion (either showing confusion or lack of confusion) with, criticism of, or suggestions for improvement for: Sponsored Links, the relationship of Sponsored Links to natural search results, the layout of the paid and unpaid search results page, the use of



the terms “Sponsored Links” or the relationship between the consumer’s search query and the paid results presented by Google.

80. All documents on which Google intends to rely to defend against the claims asserted by Rosetta Stone in this lawsuit, including but not limited to all documents that Google intends to use to prove that Google did not willfully or intentionally violate any of Rosetta Stone’s rights.

81. All documents reflecting the absence of documents, failure to maintain documents, or destruction of documents relating to the sale, marketing, promotion, offering, designation, use, or inclusion of trademarks, or words confusingly similar thereto, as Keywords or other designated search terms in Google’s Advertising Programs.

82. All documents relating to Google’s document retention policy from January 1, 2003, to the present.

83. All charts, summaries or calculations of the contents of any voluminous writings, recordings or photographs as defined by Fed. R. Evid. 1001, which cannot conveniently be examined in court, and which Google or its attorneys plan or expect to offer or may offer as evidence at the trial of this lawsuit pursuant to Fed. R. Evid. 1006 or any other law.

84. The contents of voluminous writings, recordings or photographs which Google or its attorneys may present in the form of such summaries, charts or photographs as described in the preceding Request.

85. All documents sufficient to show how Google determines which Sponsored Links it presents to a user when one or more of the Rosetta Stone Marks or Terms Similar To The Rosetta Stone Marks are used as a search term or as part of a search query.

86. All documents that identify or describe the manner in which a particular website is selected or listed as a Sponsored Link when a user enters a search using Trademarks Owned By Third Parties.

87. All documents sufficient to show how Google determines which search terms to suggest through its Google Suggest or Query Suggestions function, as described at <http://www.google.com/support/websearch/bin/answer.py?hl=en&answer=106230>, when a user enters or begins to enter a search query including one or more of the Rosetta Stone Marks or Terms Similar To The Rosetta Stone Marks, or any fraction thereof which Google or its programming relate to one or more of the Rosetta Stone Marks or Terms Similar To The Rosetta Stone Marks.

88. All documents used by Google or its programming to broad match search queries containing one or more of the Rosetta Stone Marks or Terms Similar To The Rosetta Stone Marks to Keywords which are not Rosetta Stone Marks or Terms Similar To Rosetta Stone Marks, including, but not limited to, data tables.

89. All documents used by Google or its programming to broad match search queries not containing Rosetta Stone Marks or Terms Similar To The Rosetta Stone Marks to Keywords which are or contain one or more of the Rosetta Stone Marks or Terms Similar To The Rosetta Stone Marks, including, but not limited to, data tables.

90. All documents related to algorithms, processes, mechanisms or techniques used by Google or its programming to identify Keywords that it suggests, offers, provides or otherwise makes known to Google Customers as part of any optimization or other service provided to Google Customers.

91. All documents related to algorithms, processes, mechanisms or techniques used by Google or its programming to identify words or phrases as part of the “Did You Mean” functionality of Google’s web site.

92. All agreements, including drafts thereof, that reference the Rosetta Stone Marks or Terms Similar To The Rosetta Stone Marks.

Respectfully submitted,

Dated: October 30, 2009

Of Counsel:

Howard S. Hogan, Esq.

Bennett Borden, Esq.

Kyle Amborn, Esq.

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tross@gibsondunn.com

Counsel for Plaintiff,

Rosetta Stone Ltd.

**CERTIFICATE OF SERVICE**

I hereby certify that on the 30th day of October, 2009, I caused the foregoing Plaintiff Rosetta Stone Ltd.'s First Request For The Production Of Documents From Defendant Google to be served by electronic mail and hand delivery upon counsel for Defendant Google Inc. as follows:

Jonathan D. Frieden, Esq.  
ODIN, FELDMAN & PETTLEMAN, P.C.  
9302 Lee Highway  
Suite 1100  
Fairfax, VA 22031  
[jonathan.frieden@ofplaw.com](mailto:jonathan.frieden@ofplaw.com)

*Counsel for Plaintiff Google Inc.*



Terence P. Ross  
VSB # 26408  
GIBSON, DUNN & CRUTCHER, LLP  
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(202) 467-0539 (Facsimile)  
[tross@gibsondunn.com](mailto:tross@gibsondunn.com)

*Counsel for Plaintiff,  
Rosetta Stone Ltd.*

# EXHIBIT 3

**EXHIBIT FILED**  
**UNDER SEAL**

# EXHIBIT 4



**EXHIBIT FILED  
UNDER SEAL**

# EXHIBIT 5

**EXHIBIT FILED  
UNDER SEAL**

# EXHIBIT 6

**EXHIBIT FILED  
UNDER SEAL**

# EXHIBIT 7

**EXHIBIT FILED  
UNDER SEAL**

# EXHIBIT 8



**EXHIBIT FILED  
UNDER SEAL**

# EXHIBIT 9

**EXHIBIT FILED  
UNDER SEAL**

# EXHIBIT 10

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MUNICH  
PARIS  
SÃO PAULO  
SHANGHAI  
SINGAPORE  
SYDNEY  
TOKYO  
TORONTO  
VIENNA

February 22, 2010

**VIA ELECTRONIC MAIL**

Margret M. Caruso, Esq.  
Quinn, Emanuel, Urquhart, Oliver & Hedges, LLP  
555 Twin Dolphin Drive, Suite 560  
Redwood Shores, CA 94065

Re: *Rosetta Stone Ltd. v. Google Inc.*  
Case No.: 1:09-cv-00736-GBL-TCB

Dear Margret:

I am writing in response to Google's February 19, 2010 document production. As you know, on February 4, 2010, the Court granted in part Rosetta Stone's motion to compel and ordered Google to produce all documents, other than those maintained only in Google's Trax system, identified on Exhibit A. (*See* 02/04/2010 Hearing Tr. at 35:21-36:1 and 36:7-9.) The court also ordered Google to produce all documents identified on Exhibit B, other than those maintained only in Google's Trax system, that do not relate to specific litigation. (*See id.* at 36:7-9 and 42:22-25.) The Court assumed that Google would produce these documents by February 19. (*Id.* at 45:20-25.)

We have reviewed the production made late Friday night by Google and believe that it is deficient in many regards. The production consists of just 449 documents, 144 of which constitute communications between Google and Rosetta Stone, which should have been produced weeks ago. The remaining 305 documents plainly do not comport with the Court's Order. Among many other things, Google's production did not include:

Margret M. Caruso, Esq.  
February 22, 2010  
Page 2

- Data relating to Google's analysis of the use of trademarks as keywords in paid advertisements (Request No. 6)
- Minutes, notes or reports of Board of Directors meetings, Executive Management Group meetings and GPS meetings at which Google's trademark policy or any lawsuit related to that policy was discussed (Request No. 7)
- Communications between Google and any third party complaining, objecting to or criticizing Google's sale, marketing, promotion, offering, designation, use, or inclusion of such party's trademarks as a keyword or other designated search term in Google's advertising programs or in the text of sponsored links or other messages published as part of Google's advertising programs (Request No. 10)
- Standing requests from trademark owners to Google asking to prevent those trademark owners' trademarks from being used in the text or title of a sponsored link (Request No. 12)
- Transcripts of depositions from the *American Airlines* litigation (Request No. 67)
- Expert reports from the *American Airlines* litigation (Request No. 68)
- Requests to and responses to requests for admission by Google in the *American Airlines* litigation (Request No. 69)
- Communications between Google and eBay concerning the unauthorized use of eBay's trademarks as keywords in sponsored links

Please advise by close of business today as to the status of Google's production of the documents that the Court ordered Google to produce so that we can assess the need to seek appropriate relief from the Court.

Sincerely,

/s/

Jennifer L. Spaziano

**EXHIBIT A**

<b>Request No.</b>	<b>Request</b>
6	All documents relating to Google's analysis of the use of trademarks as Keywords in paid advertisements, including but not limited to data provided by or communicated to third party consultants, data or analysis generated by or stored in third party software, data or analysis generated by or stored in software developed by Google
7	All documents relating to any senior executive or board meeting, including but not limited to Board of Directors meetings, Executive Management Group meetings, and GPS meetings at which Google's trademark policy or any lawsuit related to that policy was discussed. Such documents shall include, but not be limited to, minutes, notes or reports of meetings
10	All documents relating to communications between Google and any third party complaining, objecting to or criticizing Google's sale, marketing, promotion, offering, designation, use, or inclusion of such party's trademarks as a Keyword or other designated search term in Google's Advertising Programs or in the text of Sponsored Links or other messages published as a part of Google's Advertising Programs, including cease and desist letters received by Google from any owner or purported owner of any trademark and any responses to such cease and desist letters, as well as allegations that the use of trademarks would or had caused consumer confusion
12	All documents relating to "standing requests" from trademark owners to Google asking to prevent those trademark owners' trademarks from being used in the text or title of a Sponsored Link, including but not limited to all documents relating to: (a) the statement of Google's spokesperson to the Washington Examiner as published on October 18, 2007, to the effect that Google's "Trademark Complaint Form" is "both a way for trademark owners to file a complaint about an existing ad and a way for them to place a 'standing request'"; (b) copies of all such "standing requests" and Google's responses thereto; (c) all steps that Google has taken to honor such "standing requests"; (d) all ways that Google has communicated to trademark owners the option of making such "standing requests"; and (e) whether or not Google has considered treating the Rosetta Stone Marks as subject to such a "standing request"
26	Documents sufficient to identify and disclose the conclusions or findings of all Studies conducted by, for, on behalf of, or to the benefit of Google concerning the use of the term "Sponsored Link" as opposed to any other form of designation for the Sponsored Links in Google's Advertising Programs

Request No.	Request
27	Documents sufficient to identify and disclose the conclusions or findings of all Studies conducted by, for, on behalf of, or to the benefit of Google concerning ways in which Internet users distinguish between Sponsored Links and natural (organic) search results, including but not limited to Studies that test the effect of any language, colors, design elements, placement, or disclaimers on such Sponsored Links and natural (organic) search results
28	All documents analyzing or reporting on the effect on consumers of the layout, design or wording of the results page that a consumer sees after conducting a Google search, including without limitation the selection of the fonts, the colors, the placement of ads and the use of Sponsored Links to denote paid advertisement
29	Documents sufficient to identify and disclose the conclusions or findings of all Studies conducted by, for, on behalf of, or to the benefit of Google concerning the use of any trademark as a Keyword in one of Google's Advertising Programs
67	All transcripts of depositions and the exhibits thereto, in <i>American Airlines, Inc. v. Google Inc.</i> , Case No. 4:07-cv-00487-A (N.D. Tex.) (filed Aug. 16, 2007)
68	All expert reports, consumer or user confusion studies, and all documents relating to such reports or studies prepared in connection with <i>American Airlines, Inc. v. Google Inc.</i> , Case No. 4:07-cv-00487-A (N.D. Tex.) (filed Aug. 16, 2007)
69	Copies of all requests to and responses to requests for admission by Google in <i>American Airlines, Inc. v. Google Inc.</i> , Case No. 4:07-cv-00487-A (N.D. Tex.) (filed Aug. 16, 2007)
76	All documents relating to consumer or user understanding of perception of Google's Sponsored Links, including but not limited to research or analysis conducted by or for Google on such understandings and perceptions
77	All documents relating to consumer or user confusion related in any way to Google's Sponsored Links, Google's Advertising Program and/or the use of Keywords in search engines, including surveys conducted by or for Google relating to the sale, marketing, promotion, offering, designation, use, or inclusion of Keywords by Google in any way. This Request specifically includes draft surveys and survey results relating to the potential for likelihood of consumer confusion arising out of the sale, marketing, promotion, offering, designation, use, or inclusion of trademarks as Keywords or designated search terms in Google's Advertising Programs



Request No.	Request
78	All documents relating to consumers' ability, or lack thereof, to recognize Google's Sponsored Links as paid advertisements, including but not limited to research or analysis conducted by or for Google on such understandings and perceptions
79	All documents, including but not limited to those maintained in the Trakken system, that relate to consumer confusion (either showing confusion or lack of confusion) with, criticism of, or suggestions for improvement for: Sponsored Links, the relationship of Sponsored Links to natural search results, the layout of the paid and unpaid search results page, the use of the terms "Sponsored Links" or the relationship between the consumer's search query and the paid results presented by Google
93	All expert reports relating to damages prepared in connection with the lawsuit, <i>American Airlines, Inc. v. Google Inc.</i> , Case No. 4:07-cv-00487-A (N.D. Tex.), including any exhibits thereto
106	All documents relating to communications between Google and eBay concerning the unauthorized use of eBay's trademarks as Keywords and in Sponsored Links

**EXHIBIT B**

<b>Request No.</b>	<b>Request</b>
18	All documents relating to any analysis, review, consideration, deliberations, debate, or other communications by or on behalf of Google with respect to the possibility of removing Trademarks Owned By Third Parties, including but not limited to the Rosetta Stone Marks or Terms Similar To The Rosetta Stone Marks, from any lists or sets of words, terms, or phrases available to be used, included, or designated as Keywords or other designated search terms in Google's Advertising Programs, or in the text of Sponsored Links or other messages published as a part of Google's Advertising Programs
19	All documents relating to any analysis, review, consideration, deliberations, debate, or other communications by or on behalf of Google with respect to the possibility of limiting the sale, marketing, promotion, offering, designation, use, or inclusion of Trademarks Owned By Third Parties, including but not limited to the Rosetta Stone Marks or Terms Similar To The Rosetta Stone Marks, in Google's Advertising Programs
20	All documents relating to any analysis, review, consideration, deliberations, debate, or other communications by or on behalf of Google with respect to the possibility of prohibiting advertisers or potential advertisers from bidding on, purchasing or otherwise using the Trademarks Owned By Third Parties as Keywords or other designated search terms in Google's Advertising Programs, or in the text of Sponsored Links or other messages published as a part of Google's Advertising Programs
21	All documents relating to any analysis, review, consideration, deliberations, debate, or other communications by or on behalf of Google with respect to any financial implications to Google, including but not limited to any increase or decrease in the value of Google's stock or stock options, related to the sale, marketing, promotion, offering, designation, use, or inclusion of Trademarks Owned By Third Parties, including but not limited to the Rosetta Stone Marks and Terms Similar To The Rosetta Stone Marks, as a part of Google's Advertising Programs
22	All documents relating to any analysis, review, consideration, deliberations, debate, or other communications by or on behalf of Google with respect to any financial implications to Google, including but not limited to any increase or decrease in the value of Google's stock or stock options, if Google were to cease all sale, marketing, promotion, offering, designation, use, or inclusion of Trademarks Owned By Third Parties, including but not limited to the Rosetta Stone Marks and Terms Similar To The Rosetta Stone Marks, as a part of Google's Advertising Programs

<b>Request No.</b>	<b>Request</b>
23	All documents relating to any Google policies, guidelines, procedures, or other guidance relating to the sale, marketing, promotion, offering, designation, use, or inclusion of Trademarks Owned By Third Parties as Keywords or other designated search terms in Google's Advertising Programs, or in the text of Sponsored Links or other messages published as a part of Google's Advertising Programs, including all documents relating to any change in, amendment to or modification of such policies, guidelines, procedures or other guidance and the reasons for such changes, amendments or modifications

# EXHIBIT 11

**From:** Cheryl Galvin [cherylgalvin@quinnemanuel.com]  
**To:** Spaziano, Jen (WAS); Margret Caruso; 'jonathan.frieden@ofplaw.com'  
**Subject:** RE: Rosetta Stone v. Google: Deficiencies in February 19 Production  
**Date:** 2/22/2010 11:06:44 PM  
**CC:** Ettinger, Mitchell S (WAS); Sloan, Cliff (WAS); Allen II, Warren T (WAS)  
**BCC:**

**Message:**  
Jen,

I write in response to your letter of today raising issues with Google's document production of Friday. Although you stated that Google produced only 449 documents, in fact Google produced 1006 documents. There were some additional documents that, despite making a good faith effort, Google was not able to process in time for production on Friday, and most of those documents are being produced today. I will address each of your bullet points in turn:

1. Request No. 6: Google has produced most of these documents and is producing the remainder of the documents today.
2. Request No. 7: Only one set of minutes had responsive information. Google is producing a redacted version of those minutes today.
3. Request No. 10: Google has produced documents responsive to this request, including a spreadsheet that contains information about every trademark complaint Google has received and logged. As Margret discussed with you, there is limited additional information related to each of these entries, exemplars of which have also been produced. Please let us know if you would like additional ones once you have reviewed those.
4. Request No. 12: This information is included in the spreadsheet produced for Request No. 10.
5. Request No. 67: Some documents have been produced responsive to this request; Google is working to produce additional documents as soon as possible, which should be in the next 1-2 days.
6. Request No. 68: Google is working to produce additional documents as soon as possible, which should be in the next 1-2 days.
7. Request No. 69: Google is working to produce additional documents as soon as possible, which should be in the next 1-2 days.
8. Request No. 106: Google has produced some documents responsive to this request and will produce the remainder of the documents today.

Google has produced documents responsive to the other requests, excluding those documents maintained only in Google's Trax system.

Thanks,  
Cheryl

Cheryl Galvin  
Quinn Emanuel Urquhart Oliver & Hedges, LLP  
555 Twin Dolphin Drive, 5th Floor  
Redwood Shores, CA 94065  
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---

**From:** Spaziano, Jen [mailto:[Jen.Spaziano@skadden.com](mailto:Jen.Spaziano@skadden.com)]  
**Sent:** Monday, February 22, 2010 9:03 AM  
**To:** Margret Caruso; Cheryl Galvin; 'jonathan.frieden@ofplaw.com'  
**Cc:** Ettinger, Mitchell S; Sloan, Cliff; Allen II, Warren T  
**Subject:** Rosetta Stone v. Google: Deficiencies in February 19 Production

Counsel -

Attached please find correspondence in connection with the captioned matter.

**Jen Spaziano**  
**Skadden, Arps, Slate, Meagher & Flom LLP**  
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# EXHIBIT 12



**EXHIBIT FILED  
UNDER SEAL**



# EXHIBIT 13

**EXHIBIT FILED  
UNDER SEAL**

# EXHIBIT 14

**EXHIBIT FILED  
UNDER SEAL**

# EXHIBIT 15

**From:** Jonathan Oblak [jonoblak@quinnemanuel.com]  
**To:** Spaziano, Jen (WAS); Margret Caruso; Cheryl Galvin  
**Subject:** RE: Rosetta Stone v. Google: Document Request Nos. 10 and 12  
**Date:** 3/2/2010 7:19:50 PM  
**CC:** Ettinger, Mitchell S (WAS)  
**BCC:**

**Message:**

Jen:

We understand your position regarding the spreadsheet and disagree with it. Nonetheless, as I said in my email we will produce the complaints and the process of collecting them is under way. We have advised you of the burden involved – at least one (and perhaps two) manual print screens for each complaint – and are reserving our right to revisit the cost issue with the Court based on what we believe is your unreasonable position. We will produce a new spreadsheet, likely today, and complete production of the complaints as soon as possible.

Regards,  
Jon

---

**From:** Spaziano, Jen [mailto:Jen.Spaziano@skadden.com]  
**Sent:** Tuesday, March 02, 2010 6:59 PM  
**To:** Jonathan Oblak; Margret Caruso; Cheryl Galvin  
**Cc:** Ettinger, Mitchell S  
**Subject:** RE: Rosetta Stone v. Google: Document Request Nos. 10 and 12

Jon -

As explained in my email to Margret on Sunday evening and as we discussed yesterday, the spreadsheet is an insufficient response to Request No. 10 for a number of reasons, including most significantly the fact that it does not include the substance of the complaints that were submitted to Google. Moreover, the spreadsheet is not responsive in any way to Request No. 12. The Court already has ordered that Google produce documents responsive to Requests Nos. 10 and 12, expressly stating "I don't think it's burdensome enough to -- too burdensome, rather, to have to produce any documents that aren't in the Trax system." In contrast, the Court said that any further searching of the Trax system would be at Rosetta Stone's expense. Accordingly, Google is currently under court order to produce -- at its expense -- documents responsive to these requests and Rosetta Stone insists that it do so. If Google does not indicate its intention by close of business tomorrow to comply with the Court's order by Friday, March 5, 2010, Rosetta Stone will have no choice but to seek sanctions for Google's failure to comply with the Court's order.

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---

**From:** Jonathan Oblak [mailto:jonoblak@quinnemanuel.com]  
**Sent:** Tuesday, March 02, 2010 6:30 PM  
**To:** Spaziano, Jen (WAS); Margret Caruso; Cheryl Galvin

**Cc:** Ettinger, Mitchell S (WAS)  
**Subject:** RE: Rosetta Stone v. Google: Document Request Nos. 10 and 12

Jen:

Google will be producing a revised spreadsheet tracking the complaints, which will include the dates where available. We believe this information should be sufficient. The process of collecting the additional documentation you seek requires manual printing for each of the thousands of complaints. This collection process is underway, but if it remains Rosetta Stone's position that the additional documentation must be produced, Google reserves its right to seek fees and costs associated with the collection effort. Please advise if you continue to want the additional documentation.

Thanks,  
Jon

---

**From:** Spaziano, Jen [mailto:Jen.Spaziano@skadden.com]  
**Sent:** Tuesday, March 02, 2010 4:07 PM  
**To:** Margret Caruso; Jonathan Oblak; Cheryl Galvin  
**Cc:** Ettinger, Mitchell S  
**Subject:** Rosetta Stone v. Google: Document Request Nos. 10 and 12

Margret -

Further to my emails of Sunday evening, please advise as to the status of Google's production of documents responsive to Rosetta Stone Request Nos. 10 and 12.

Thanks in advance.

**Jen Spaziano**  
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# EXHIBIT 16

ORIGINAL

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

FILED  
U.S. DISTRICT COURT  
NORTHERN DIST. OF TX.  
FORT WORTH DIVISION

2008 JUL 10 PM 1:52

CLERK OF COURT

AMERICAN AIRLINES, INC.,

Plaintiff,

-v.-

GOOGLE INC.,

Defendant.

No. 4:07-CV-487-A

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR CLARIFICATION  
AND BRIEF IN SUPPORT

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Although styled as “Motion for Clarification,” Google’s July 2 motion seeks two significant modifications of the Court’s June 16, 2008 Order. First, Google wrongly assumes that the Order required it to provide access to only two of its many databases and systems, rather than “all electronically stored information that is responsive to each of plaintiff’s requests for production” as ordered by the Court. No explanation is offered for redefining “all” to mean something much different from “all.” Second, Google now requests that the Court augment the Order with conditions that Google never requested in its opposition to the original motion to compel. These requests are untimely and unwarranted.

**I.  
ARGUMENT**

**A. Google’s Attempt To Limit the Scope of the June 16 Order is Inappropriate.**

The Court’s June 16 Order provided that Google must give American access to “all electronically stored information that is responsive to each of plaintiff’s requests for production,” but Google now pretends that “the AdWords and Analytics databases were the only databases requested by American in its papers” and the only databases that Google need make available to comply with the Court’s June 16 Order. Clarification Motion at 1.

Google’s position is not supported by the words of the Order. The Court’s words, “*all* electronically stored information that is responsive to each of plaintiff’s requests for production” are not subject to misunderstanding. Yet Google attempts to redefine “all” to mean just two databases.

American was aware of Google’s penchant for playing games with definitions, so American was careful to state in its first motion to compel that it was seeking access to “Google Analytics or any other data base, whether or not that function was called out by name” and “stored information . . . in AdWords, Google Analytics or elsewhere.” Plaintiff’s Reply Brief

Relative to its Motion to Compel, May 21, 2008 (Docket No. 56) (“Reply”) at 9-10 (emphasis added).<sup>1</sup> In recent meet and confer correspondence, American pointed Google to its previous requests for information beyond the AdWords and Analytics databases, Exhibits in Support of Plaintiff’s Second Motion to Compel (Docket Nos. 72-73) (“Mot. to Compel App.”) Ex. GG, pp. 260-262 (June 25, 2008 F. Brown letter); Plaintiff’s Appendix of Exhibits in Opposition to Defendant’s Motion for Clarification, dated July 10, 2008 (“Mot. for Clarification App.”) Ex. F, p. 51-52 (June 29, 2008 F. Brown e-mail). Google’s response ignored that record and insisted that American “identify any additional information covered by the Court’s order beyond what is obtainable through AdWords and Analytics.” Mot. to Compel App. Ex. RR, pp. 399-402 (July 1, 2008 R. Tangri letter at 2) (previously appended to Google App. at 25-28). That demand by Google was a rejection of the Court’s Order and a re-litigation of the motion Google had already lost. Moreover, it is Google’s responsibility to identify for American where responsive information resides, not the other way around. *See, e.g., Sithon Maritime Co. v. Mansion*, No. CIV. A. 96-2262-EEO, 1998 WL 182785, at \*9 (D. Kan. Apr. 10, 1998) (“When a party responds to a request for production, it does not necessarily fulfill its duty by producing all documents ‘reasonably accessible’ to it. Parties must produce all responsive documents, assert a legitimate objection to such production, or obtain an extension of time, if necessary.”).<sup>2</sup>

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<sup>1</sup> Plaintiff’s Second Motion to Compel and for Sanctions and Brief in Support, dated July 2, 2008 (Docket No. 71) (“American’s Second Motion to Compel”) lists the many databases that were called out by name in the first motion to compel and accompanying briefs. *See* American’s Second Motion to Compel at 2-3.

<sup>2</sup> In fact, one of the cases cited by Google demonstrates why its approach is flawed. As the Court noted in *U & I Corp. v. Advanced Medical Design, Inc.*, 8:06-CV-2041-T-17EAJ, 2008 WL 821993, at \*9 (M.D. Fla. Mar. 26, 2008), “[i]t is not the court’s role, nor that of opposing counsel, to drag a party kicking and screaming through the discovery process.”

On the second day of the meet and confer session ordered by the Court, and *after Google's in-house representative curiously left the meet and confer session to return to California*, Google's outside lawyers were left behind to make a startling and major revelation: Google had another highly relevant database that it had withheld during ten months of litigation. That database, called "Ads Query Log" contains information long sought by American concerning broad match. The "Ads Query Log" is among the "all electronically stored information" ordered produced by the Court in its June 16 Order, yet it was not revealed until American's counsel asked for a sworn statement that Google had no additional hidden databases or systems containing relevant information. Google's outside counsel explained that the "Ads Query Log" contains electronically stored information related to all search terms that have been entered into the Google search engine. The Ads Query Log, which to date Google has concealed apparently even from its own outside counsel, would allow American to identify Sponsored Links that Google published in response to particular search terms, including those that used broad match functionality, and for each Sponsored Link: what keyword was purchased by an advertiser that led Google to publish the Sponsored Link, and what revenues Google received as a result of the publication of these Sponsored Links. This data goes to the heart of American's contentions in the case.

The Ads Query Log was responsive to several of American's discovery requests concerning broad match that were addressed in American's original motion to compel.<sup>3</sup> That

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<sup>3</sup> In fact, since October, 2007, American has sought "[a]ll documents relating to the . . . designation, use, or inclusion of one or more of the American Airlines Marks or Terms Similar to the American Airlines Marks as . . . designated search terms in Google's Advertising Programs." See Mot. to Compel App., Ex. C, pp. 013-031 (American's First Request For Production No. 5); see also *id.* (Nos. 4, 21, 22, 28, 29, 31, 32); Plaintiff's Motion to Compel and Brief in Support, dated May 7, 2008 (Docket No. 34) ("American's First Motion to Compel") at 4 (listing many of these requests). In fact, on January 2, 2008, American highlighted its need "to

[Footnote continued on next page]



database should have been produced long ago. Google understands the importance of broad match to this case. In fact, Google's recently filed motion for summary judgment uses broad match as a way to attempt to shift responsibility to its advertisers and to escape liability for Google's own actions. *See, e.g.*, Defendant Google Inc.'s Brief in Support of Its Motion for Summary Judgment, dated July 3, 2008 (Docket No. 84) ("Google Summary Judgment Brief") at 8, 34. Google's response throughout discovery, however, has been to insist that the information sought related to broad match does not exist or had already been produced. In particular:

- In a March 21, 2008 letter, Google represented that the broad match information sought "is not tracked on a keyword basis." Mot. for Clarification App. Ex. D, pp. 45-46 (March 21, 2008 K. Hamm letter, at 2-3).
- In an April 4 letter, Google represented that the broad match data sought "is not stored in Google's ads database and thus cannot be included in a spreadsheet of data from that database," Mot. to Compel App. Ex. L, pp. 099-104 (April 4, 2008 K. Hamm letter, at 2).
- In Google's May 15, 2008 Response to Plaintiff American Airlines, Inc.'s Motion to Compel and Brief (Docket No. 44) ("Google Motion to Compel Opposition Brief"), Google represented both (1) that it is "just not feasible" to produce all responsive broad match data, *id.* at 7, and (2) that all the information that was feasible to produce had already been produced, *id.*
- Google claimed that is "does not have or maintain reasonably accessible records" responsive to American's request for "the total number of searches that Internet users have made using any and all Google search engines by entering into such search engines the American Airlines Mark or Term Similar To The American Airlines Marks as one of the words, phrases, or terms designated, included, or used in the search request," Mot. to Compel App. Ex. 3, pp. 013-031 (Google's Response to

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[Footnote continued from previous page]

know what terms Google has designated to trigger a 'broad match' to the American Marks" and the resulting "number of clicks," Mot. for Clarification App. Ex. B, pp. 22 (Jan. 2, 2008 H. Hogan letter); Google itself put broad match further at issue by citing it as the basis of its nominative use defense, *id.* Ex. C, pp. 11-12 (Google's response to American's Interrogatory No. 5), and American propounded many more requests for production asking for this information in many different ways. *See* Mot. to Compel App. Ex. E, pp. 051-054 (American's Second Request for Production No. 3, 11); *id.* Ex I, pp. 080-083 (American's Third Requests for Production, Nos. 2, 13); *id.* Ex. M, pp. 113-117 (American's Fourth Requests for Production, Nos. 1-5, 10-15); American's Second Motion to Compel at 11-12.

Request No. 32 of American's First Requests for Production); *see also id* (Responses to Request Nos. 5, 21, 22, 28, 29, 31).

We now know that each of these statements is grossly misleading at best, and that the "Ads Query Log" contains the information that American has long been seeking.

These misstatements did not stop with Google's discovery responses or Google's statements during the meet and confer process. In the sworn declaration of Paul Yan submitted by Google to this Court, Mr. Yan testified:

Prior to developing the SQP [Search Query Performance report offered to advertisers], there was no practical way for Google to obtain information about the search queries that resulted in the display of particular Sponsored Links.

Mot. for Clarification App. Ex. E, p. 50 (Yan Decl. ¶ 5). At the very best, Google's submission of Mr. Yan's declaration, and the commentary in Google's opposition papers to American's First Motion to Compel, can only be seen as a deliberate attempt to conceal from both American and the Court that Google possessed the highly relevant Ads Query Log database.

**B. Google's Definition of "Access" Is Not Practical or Consistent with its Discovery Obligations.**

The bulk of Google's Clarification Motion is devoted to seeking the Court's approval for a number of restrictions that Google has unilaterally instituted to limit the ways in which it "complies" with the Court's June 16 Order. Specifically, without first moving the Court for permission, Google has limited American to: (1) accessing AdWords and Analytics information at its offices;<sup>4</sup> (2) making all such access subject to the constant supervision and monitoring of a

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<sup>4</sup> Google initially insisted that access be allowed only at its headquarters in Mountain View. Mot. for Clarification App. Ex. G, pp. 53 (June 23, 2008 F. Brown letter). It then allowed access at its counsel's offices in San Francisco. Mot. to Compel App. Ex. FF, pp. 257-259 (June 24, 2008 R. Tangri letter); *id.* Ex. GG, pp. 260-261 (June 25 F. Brown letter); *id.* Ex. HH, pp. 262-265 (June 26, 2008 R. Tangri letter). On July 1, Google offered to allow access at American's counsel's office in San Francisco. *Id.* Ex. QQ, p. 398 (July 1, 2008 M.

[Footnote continued on next page]

Google employee with a Google lawyer nearby; and (3) recording the data provided to American in the form of frozen images of what appears on Google's computer screen as a dynamic database. Clarification Motion at 5. These restrictions are not consistent with the Court's June 16 Order and invade the ability of American's counsel to develop their attorney work product in confidence.

As a preliminary matter, Google's arguments are untimely. Google could have, in opposing American's First Motion to Compel, advanced the argument that the access sought by American should be "carefully monitored and that necessary restrictions must be put in place." Clarification Motion at 4. It did not do so. *See* Google Motion to Compel Opposition Brief, *passim*.<sup>5</sup> Google cannot use a motion for clarification as an opportunity to raise arguments that it should have raised in the first instance but failed to make. *See, e.g., Fresh Am. Corp. v. Wal-Mart Stores, Inc.*, Civ. A. No. 3:03-CV-1299-M, 2005 U.S. Dist. LEXIS 10086, at \*2-4 (N.D. Tex. May 25, 2005) (Lynn, J.) ("Reconsideration of a prior order is an extraordinary remedy that should be used sparingly" and not to rehash "arguments that could have been offered or raised before"); *Computer Acceleration Corp. v. Microsoft Corp.*, Case No. 9:06-CV-140, 2007 U.S. Dist. LEXIS 63760, \*2-3 (E.D. Tex. Aug. 28, 2007) ("To permit such a motion at this point would defeat the purpose of court intervention, which was to obtain finality to a long-running and costly discovery dispute.").

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Miksch e-mail); *id.* Ex. RR, p. 399-402 (July 1, 2008 R. Tangri letter). All such access is limited and supervised.

<sup>5</sup> Moreover, Google's argument that this access should not be allowed, *see* Clarification Motion at 3, is nothing more than a repetition of its argument that the original motion to compel should be denied. *See* Google Motion to Compel Opposition Brief at 9-11.

But even ignoring the timeliness of Google's arguments, the restrictions being unilaterally imposed by Google are burdensome, disruptive, and impermissibly encroach upon the mental processes of American's counsel. With summary judgment motions pending and a trial three months away, American requires access to the database outside the limited business hours that a designated Google employee will be available. To prosecute this action effectively in the face of Google's discovery abuse, American requires that its counsel and experts have access to the database at American's counsel's office in Fort Worth, Dallas, Washington, D.C., and San Francisco. And American requires that it be able to obtain the information in question, not merely the static graphic images printed by Google. The data in question is, as Google has repeatedly pointed out, voluminous. American needs to work with this data to understand it, not merely to browse it or take a still picture of a limited portion of it.

Third, the presence of Google's employees in the accessing process gives Google unfair access to American's work product. None of the cases cited by Google suggests that constant, in-person monitoring is required when a party is given access to its opponent's databases.<sup>6</sup>

Contrary to Google's hyperbole, American does not "claim that the Court's order . . . allows American to rummage, unsupervised, through these databases wherever and whenever it sees fit." Clarification Motion at 8. Instead, American's counsel wrote to Google on June 25 that "American commits not to access electronically stored information beyond that which it

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<sup>6</sup> For example, in *Uniroyal Chemical Co. v. Syngenta Crop Protection*, 224 F.R.D. 53, 58 (D. Conn. 2004), the court ordered the producing party to make the database in dispute "available for inspection by Syngenta's outside counsel and the designated Syngenta employees, provided a confidentiality agreement is signed and no notes or copies are retained by Syngenta employees." This provides for *greater* access than American seeks; American has not demanded direct access by American employees. Google also relies on *In re Ford Motor Co.*, 345 F.3d 1315 (11th Cir. 2003), but in that case, the 11th Circuit only reversed an order granting access to databases where the trial court did not permit the producing party the chance to file an opposition to the motion to compel and where the order did not limit access to responsive information only. These are not the circumstances of this case.

requested in discovery and that which was ordered produced by the Court. Surely Google employees can find a way to issue limited passwords or instruct American on to how to avoid inadvertent access to information that is not within the Court's Order. American's representatives will faithfully follow those instructions." Mot. to Compel App. Ex. GG, p. 261 (June 25, 2008 F. Brown Letter, at 2). Google ignored that commitment when it complained to this Court that American seeks unfettered and potentially destructive access to its data.<sup>7</sup> Moreover, Google's data is subject to the protections of the Confidentiality Agreement that Google itself co-authored. *Id.* Ex. D, pp. 032-042 (Confidentiality Agreement). Google can provide American with such reasonable instructions it deems necessary, consistent with Google's obligations under the Court's order, so that American can avoid taking any steps that might alter or affect this data.

**C. Google's Offers to "Resolve" this Dispute Are Inadequate.**

As set forth in the Report on Court Ordered Conference filed on July 8, 2008 (Docket No. 90), representatives of both Google and American met over the course of two days to try to resolve the issues raised in American's Second Motion to Compel and Google's Clarification Motion. Unfortunately, most of the differences were not resolved. *Id.* Although Google did offer to produce some of the highly relevant information it had previously withheld to partially resolve the issues raised in American's Second Motion to Compel, Google's offers were much too little and much too late. Further, in at least one very significant case, Google's offer was withdrawn without explanation.

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<sup>7</sup> Google also has never explained why it cannot do for American what it does for each of its many thousands of advertisers: issue a user-name, an account number and a password for certain accounts, not for accounts as a group, but for each account separately.

**1. Access To All Electronically Stored Information.** As described above, Google has not agreed to provide American with anything close to “all” responsive electronically stored information as ordered by the Court. At most, Google proposed to make available, on a supervised basis at a single location, access to a limited number of databases and systems in addition to the AdWords and Analytics databases. Google still refuses, however, to provide any access to American Airlines to Google’s: (1) user search log data; (2) internal websites; (3) e-mails or instant messaging systems; (4) the newly disclosed Ads Query Log; (5) Product Design Database; or (6) Keyword Tool Data. Instead, Google has offered only to conduct limited searches of those systems or databases, sometimes limited to only a few days’ of data.

**2. Spoliation Discovery.** The parties also did not reach an agreement as to American Airlines’ request that the Court allow spoliation discovery. Google must understand that its failure to issue a “no destruction” memorandum until far after the lawsuit was threatened and even too long after it was filed puts it a risk of a serious sanction, yet Google continues to act as though it has done nothing unusual or wrong for which it needs to make amends. For a serial, sophisticated litigant like Google with top notch legal talent both within the corporation and on the outside, such an error was, at a minimum, reckless. American already has uncovered the fact that some documents were destroyed and it needs to be allowed to discover the full extent of Google’s destruction of relevant information.

**3. Broad Match Documents.** On the first day of the meet and confer ordered by this Court, Google offered to produce additional responsive documents concerning broad match, including the highly relevant portion of its source code that implements the algorithm used to broad match key words to search terms, such as American’s trademarks. But on the second day of the meet and confer, Google withdrew this offer of source code without explanation. Instead,

Google returned to its pre-Order position of offering only “high-level” descriptions of the Google broad match process and insubstantial information about the millions of dollars that Google has made in using American’s marks in Google’s broad match program.

**4. Related Keyword Documents.** Google has not produced and, as far as it has disclosed, is not even querying its databases for additional information about the “Related Keywords” that it has suggested to advertisers. As described in greater detail by the parties in connection with American’s First Motion to Compel, Google has previously admitted that it possesses additional Related Keyword data. *See* Reply at 3; Mot. for Clarification App. Ex. H, pp. 56 (Haque Decl. ¶¶ 7-8). Its refusal to turn this data over to American in the face of the Court’s June 16 Order defies explanation.

**5. Google Documents Presented to Advertisers.** Google has offered to produce additional responsive documents maintained by account representatives and management of Google who have responsibility for a list of 55 travel accounts identified by American Airlines. At this point, it is unclear whether this will include documents in which Google recommended or discussed with one or more of these advertisers bidding on or use in any way the trademark of a competitor. In any event, Google should provide documentation of all instances in which it has actively encouraged any advertiser to bid on or use the trademarks of a competitor, as Google encouraged American to do. Mot. to Compel App. Ex. LL, pp. 301-336 (Google Mobile presentation as presented on a computer screen to American, encouraging American to buy the marks of its competitors); *see also* American’s Second Motion to Compel at 9-10 (explaining how Google altered this slide in the version initially provided to American). American has alleged that Google has acted in conformity with this practice to encourage the use of American’s or others’ marks – a practice Google falsely denies – and this information is

necessary to allow American to respond to Google's denials and Google's summary judgment argument that it should not be held responsible for the choices it blames on its advertisers. *See* Google Summary Judgment Brief at 25 (arguing that Google is doing nothing more than "helping others to run advertisements"); *id.* at 26 ("American must come forward with proof that Google itself caused or encouraged infringers to place misleading ads on its search results page.").

**6. Evidence of Confusion.** Google has represented, in conclusory fashion, that it will produce non-privileged documents relating to the results of its surveys and studies into consumer confusion and the design of its user interface. Although Google has represented that it will simultaneously produce a privilege log of responsive information to be withheld, it remains unclear whether Google will provide enough information to allow American to test Google's assertions of privilege or to respond fully to Google's assertion in its summary judgment papers that it expends "substantial time and resources to try to prevent advertisers from confusing consumers." Google Summary Judgment Brief at 26. Tellingly, however, Google has declined to represent that it will search its e-mail systems or other relevant databases for instances in which the words "confusing," "confusion," "confused," or other synonyms appear. *See* American's Second Motion to Compel at 17-19 (citing relevant document requests). To the contrary, Google says that it has *not* previously searched its electronic files for these words, although such words have been at the core of the dispute since the litigation was filed. Google's failure to make that basic search could be nothing other than deliberate. *See* Mot. to Compel App. Ex. R, pp. 158-176 (Google's Declaration Submitted Pursuant to the Court's June 16 Order) (search terms used by Google to identify relevant documents do not include these terms).



7. **Other Documents Identified by Google Employees.** Google has represented that it will produce documents identified at pages 20 to 21 of American's Second Motion to Compel for the 55 advertisers selected by American from information previously provided by Google, as well as Objectives and Key Results ("OKR's") for the individuals listed in Appendix Ex. SS of American's Second Motion to Compel. American has agreed that Google may redact from the OKR's limited highly confidential non-relevant information, if necessary, to protect highly sensitive non-relevant data, subject to Google's agreement to allow American's counsel to inspect unredacted copies within 48 hours of a good-faith request and American's ability to challenge these redactions after inspection.

8. **Timing of Production.** Google has promised to produce the above noted information as early as next Tuesday, July 15, and as late as the end of July. Google's timetable makes no sense in view of the Court's Order dated June 16, the July 23 deadline for American's response to Google's summary judgment motion, the discovery cutoff of August 11, the trial date of October 14, and the fact that American's discovery requests that have been pending since late 2007. Google's latest excuse is that it has just begun to look for much of the above information. Google's own delay and obfuscation are not legitimate excuses. At this stage of the case, time is of the essence, and all requested information should be produced to American with 72 hours of the Court's Order.

**D. The Only Fair Remedy for Google's Discovery Violations is an Order Striking Google's Answer.**

This Court may award appropriate sanctions up to and including an order determining issues of liability or eliminating Google's defenses. *See* American's Second Motion to Compel at 7 n.4 (citing cases). Google itself argued in a related lawsuit that discovery violations much less severe than those committed by Google here merited a range of remedies including entry of

“default judgment.” Mot. to Compel App. Ex. B, pp. 004-012 (Google’s December 26, 2006 brief in *Google v. American Blind & Wallpaper Factory, Inc.*, at 18-20).

Rule 37(b)(2) of the Federal Rules of Civil Procedure authorizes this Court to strike pleadings where, as here, the failure to comply with the Court’s order results from “willfulness or bad faith” and “where the deterrent value of Rule 37 cannot be substantially achieved by the use of less drastic sanctions.” *Smith v. Smith*, 145 F.3d 335, 344 (5th Cir. 1998). In making this determination, the Court may consider whether the discovery violation prejudiced the opposing party’s preparation for trial. *United States v. 49,000 Currency*, 330 F.3d 371, 376 (5th Cir. 2003). In particular, when a party is on notice that a violation of a discovery order will result in severe sanctions, orders striking answers are routinely affirmed. *See, e.g., Plasticsource Workers Comm. v. Coburn*, No. 07-50399, 2008 U.S. App. LEXIS 2440, at \*8-12 (5th Cir. Feb. 1, 2008) (affirming order striking an answer where Court had previously warned party that sanctions would be imposed if he failed to comply with the Court’s discovery order).

Here, given the many violations of the Court’s June 16 Order by Google, a sophisticated and experienced litigant, there can be no question that Google’s conduct was both willful and in bad faith. Even if Google were to produce all responsive information immediately, American would remain irreparably prejudiced in its efforts to prove its case against Google. Despite American’s efforts, Google would then stand to benefit from its own misconduct. By its disregard of both this Court’s June 16 Order and its obligations under the Federal Rules of Civil Procedure, Google has demonstrated “flagrant bad faith and callous disregard of its responsibilities.” *Emerick v. Fenick Indus., Inc.*, 539 F.2d 1379, 1381 (5th Cir. 1976) (affirming order to strike pleading even though Court could have ordered production of withheld material in light of “flagrant disregard” for previous discovery order).

American has been severely prejudiced by Google's concealment of the existence of the Ads Query Log, the withholding of information that it now agrees needs to be produced, and the violation of the Court's June 16 Order. At this point, with the deadline for summary judgment passed, the discovery period nearly over, and trial just three months away, Google's strategy has worked as planned to inflict irreparable damage to American's prosecution of its case against Google. Google's withholding of information has resulted in American's not being able to use relevant, discoverable, and properly-requested information in the depositions taken to date, or in the written discovery propounded to Google. These opportunities are forever lost to American. American also has not been able to incorporate the withheld discovery in its expert analyses on confusion or damages, and has been denied the opportunity to learn whether additional experts are needed. American also has been denied the right to use Google's withheld information in a summary judgment motion of its own or to oppose Google's currently filed motion for summary judgment. American has had to make irreversible strategy calls on the limited information that Google chose to parcel out. The time for Google to cure its misdeeds has passed. Also, the amount of information withheld by Google dwarfs the information that Google has produced to date. Even if Google were to produce all the previously hidden information immediately, this avalanche of information may well overwhelm American's ability to use it effectively in the short time left in discovery and for trial. Only a severe sanction can put American back in the place it should be at this time. American respectfully requests Google's answer be struck.

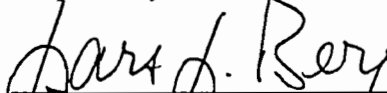
## II. PRAYER

For the foregoing reasons, and for the reasons set forth in American's contemporaneous Second Motion to Compel, American respectfully requests that the Court deny Google's Clarification Motion in its entirety and award American:

- (a) all relief requested in the Prayer to American's Second Motion to Compel;
- (b) an Order striking Google's answer; and
- (c) such further relief as the Court deems to be just and proper.

DATED: July 10, 2008

Respectfully submitted,



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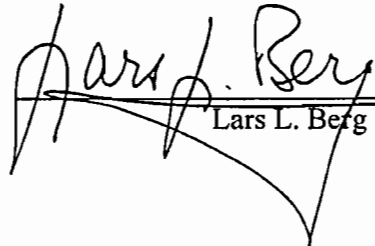
*Attorneys for Plaintiff American Airlines, Inc.*

**CERTIFICATE OF SERVICE**

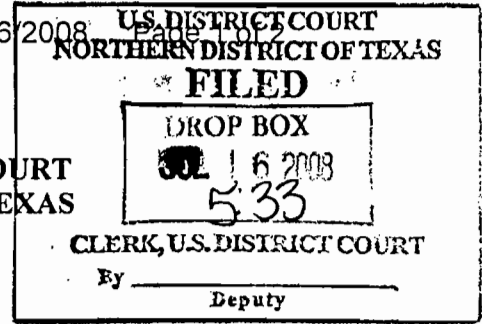
I certify that a true and correct copy of the foregoing was delivered on July 10, 2008 to Defendant's counsel, as follows:

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# EXHIBIT 17



CT/EMT  
68  
ORIGINAL

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

AMERICAN AIRLINES, INC.,

Plaintiff,

-v.-

GOOGLE INC.,

Defendant.

No. 4:07-CV-487-A

STIPULATION OF DISMISSAL

Plaintiff, American Airlines, Inc., and Defendant, Google Inc., hereby stipulate through their designated counsel that the above-styled and numbered action be, and is hereby, dismissed with prejudice pursuant to Fed. R. Civ. P. 41(a)(1), with each party to bear its own costs and attorneys' fees.

Dated this \_\_\_\_\_ day of July, 2008.

CLERK OF COURT  
2008 JUL 16 PM 5:32  
U.S. DISTRICT COURT  
NORTHERN DIST. OF TX.  
FORT WORTH DIVISION



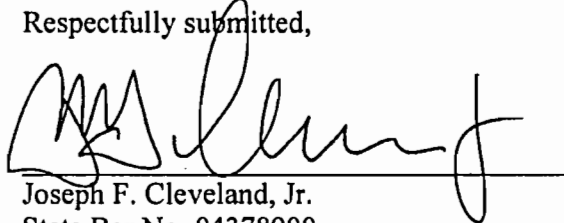
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