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

ROSETTA STONE LTD.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Civ. Action No. 1:09-cv-00736(GBL/TCB)**
	)	
GOOGLE INC.,	)	
	)	
Defendant.	)	
	)	

ROSETTA STONE LTD.'S RESPONSE TO GOOGLE INC.'S
OBJECTIONS TO EVIDENCE AND MOTION TO STRIKE

FILED IN PART UNDER SEAL

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Plaintiff Rosetta Stone Ltd. ("Rosetta Stone") respectfully submits this response to Google Inc.'s ("Google") Objections to Evidence and Motion to Strike (Dkt. 155). For the reasons that follow, Google's motion should be denied.

INTRODUCTION

Through its objections and motion to strike, Google requests that the Court strike certain evidence "from the record and preclude it from the Court's consideration of the parties' motions for summary judgment." (Dkt. 156, Google Inc.'s Objections to Evidence and Motion to Strike ("Objections") at 1.) Among other things, Google wants the Court to ignore:

- Evidence regarding the prevalence of pirates and counterfeiters on Google's search-results pages and the frequency with which Rosetta Stone advised Google of the existence of such pirates and counterfeiters. (Objections 1-3.)
- The testimony of five individuals who were, in fact, confused as to the source of goods being offered on a Google search-results page for "Rosetta Stone" and who purchased counterfeit software as a result. (Objections 16-18.)
- [redacted]
- [redacted]
- [redacted]

As discussed below, no reason exists for the Court to ignore this competent, admissible, relevant and compelling evidence. Google's objections should be overruled and its motion to strike should be denied.

ARGUMENT

I. THE CALHOUN DECLARATION AND ITS EXHIBITS ARE RELEVANT AND ADMISSIBLE

Jason Calhoun, who manages Rosetta Stone's anti-piracy and anti-fraud programs, submitted a declaration that described (i) the activities of pirates and counterfeiters of Rosetta Stone software on Google's website; (ii) Rosetta Stone's anti-piracy monitoring program procedures; (iii) Mr. Calhoun's communications with Google regarding Sponsored Links to websites of pirates and counterfeiters; and (iv) the number of complaints Rosetta Stone has received regarding websites offering counterfeit Rosetta Stone software. (Dkt. 106, Calhoun Declaration.) Google challenges the Calhoun Declaration in three respects: it challenges statements contained in the declaration itself, it challenges the correspondence attached as Exhibit B and it challenges a spreadsheet attached as Exhibit C that summarizes the information presented in Exhibits B and D. Each of these challenges is baseless.

A. The Calhoun Declaration Is Based On Personal Knowledge And Is Relevant

Google challenges multiple statements contained in the Calhoun declaration on the grounds that Mr. Calhoun's declaration "lacks foundation, constitutes hearsay, is irrelevant and is argumentative." (Objection 1.) The Court need only review Mr. Calhoun's statements to conclude that these objections are groundless. In this regard, Mr. Calhoun, the Enforcement Manager of Rosetta Stone with responsibility for Rosetta Stone's anti-piracy and anti-fraud programs, declared that:

- "Sellers of illegal pirated and counterfeit Rosetta Stone language-learning software routinely advertise on Google's search-results pages through Google's AdWords program. Without authorization from Rosetta Stone, these pirates and counterfeiters bid on Rosetta Stone's trademarks through Google's AdWords auction in order to have their paid advertisements, also known as 'Sponsored Links,' appear when a consumer types 'Rosetta Stone' or some variation thereof as a search term. The ad text and URLs for these Sponsored Links often contain the phrase 'Rosetta Stone' or a variation of one of Rosetta Stone's trademarks.

Moreover, the landing pages for these Sponsored Links frequently mirror Rosetta Stone's own web page, copying verbatim or emulating Rosetta Stone's banners and trade dress. I know that products sold through pirate/counterfeit Sponsored Link advertisements are counterfeit as customers have forwarded products purchased from these companies to Rosetta Stone." (*Id.* ¶ 2.)

- [redacted]
- [redacted]
- "In or about August 2009, paid advertisements for pirated and counterfeit Rosetta Stone software increased markedly on Google's search-results pages." (*Id.* ¶ 4.)
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

- [redacted]
- [redacted]
- [redacted]

Foundation. Mr. Calhoun has personal knowledge of these statements, all of which pertain to the company's anti-piracy and anti-fraud programs. *See Barthelemy v. Air Line Pilots Associations*, 897 F.2d 999, 1018 (9th Cir. 1990) (corporate officer's and investment banker's "personal knowledge and competence to testify are reasonably inferred from the positions and nature of their participation in the matters" at issue in their affidavits); *Nader v. Blair*, 549 F.3d 953, 963 (4th Cir. 2008) ("It is well established that employees who are familiar with the record-keeping practices of a business are qualified to speak from personal knowledge that particular documents are admissible business records and affidavits sworn by such employees constitute appropriate summary judgment evidence.").

Hearsay. These statements are not hearsay because they do not constitute out-of-court statements for purposes of a summary judgment motion. *See Pipkin v. Mortgage Creditcorp, Inc.*, 72 F.3d 138 (Table), 1995 WL 747437, at *4 (10th Cir. 1995) (rejecting argument that declarations submitted in support of a motion for summary judgment are "inadmissible hearsay because they are based solely on knowledge gleaned from [corporate] records" on the basis that the declarants' "respective positions and their personal knowledge of the banks' custodial records in connection with [the company's specific program] meet the requirements of Fed.R.Civ.P. 56(e).").

Relevance. These statements are relevant to the claims at issue in this case because they establish Google's unauthorized sale of Rosetta Stone's trademarks to counterfeiters and its display of Sponsored Links of these counterfeiters. (*See* Dkt. 104 at 2-15.)

Argumentative. There is nothing argumentative about the factual statements proffered by Mr. Calhoun. In making this objection, Google relies on cases in which a party attempted to "defeat" or "'stave off'" summary judgment by submitting conclusory and self-serving statements. *See Colemen v. Loudon County School Bd.*, 294 Fed. Appx. 778 (4th Cir. 2008); *U.S. v. Roane*, 378 F.3d 382 (4th Cir. 2004). That is simply not the case here. Rosetta Stone submitted the Calhoun Declaration in support of its *own* motion for summary judgment and not to counter any showing by Google.[1] More importantly, the challenged statements are far from unsubstantiated and conclusory. Even a cursory examination of the Calhoun Declaration reveals the substantial detail and background provided in support of each one of Mr. Calhoun's

[1] Rosetta Stone subsequently cited to the Calhoun declaration in its opposition to Google's motion for summary judgment but that does not change the purpose or the effect of Mr. Calhoun's declaration.

statements. Indeed, Mr. Calhoun attached to his declaration more than 500 pages of documentary support.

B. Exhibit B To The Calhoun Declaration Is Properly Authenticated

Google objects to Exhibit B on the ground that "Mr. Calhoun lacks personal knowledge to authenticate the documents." (Objection 2.) Each of the 48 written communications that comprise Exhibit B, however, was either sent *by* Mr. Calhoun to Google or sent *to* Mr. Calhoun from Google. (*See* Calhoun Ex. B.) Mr. Calhoun, of course, can authenticate his own emails.

C. Exhibit C To The Calhoun Declaration Is An Admissible Summary of Data

Google objects to Exhibit C on the grounds that it constitutes inadmissible hearsay, is not properly authenticated and lacks foundation. (Objection 3.) Exhibit C, however, is a summary spreadsheet that reflects information found in the voluminous documents attached to the Calhoun Declaration as Exhibits B and D. In particular, [redacted] As the Enforcement Manager for Rosetta Stone, Mr. Calhoun is capable of authenticating and providing foundation for this demonstrative exhibit. *See Nader*, 549 F.3d at 963. This summary of voluminous corporate records, moreover, is not hearsay. *See Pipkin*, 1995 WL 747437, at *4.

* * *

In short, no reason exists for the Court to disregard either Mr. Calhoun's declaration or the exhibits thereto. These documents are properly considered in ruling on the pending motions for summary judgment.

II. THE DECLARATION OF VAN LEIGH IS ADMISSIBLE EVIDENCE

Van Leigh, the Director of Online, Direct-To-Consumer Sales at Rosetta Stone, submitted a declaration setting forth his efforts to digitally record a session on the internet during which a Google search-results page for "Rosetta Stone" displayed two Sponsored Links to websites that purported to – but did not – sell genuine Rosetta Stone product. (Dkt. 110, Leigh Declaration.) Google objects to the following paragraph of the Leigh Declaration on the ground that it lacks foundation:

> Two of the sponsored links appearing on the Google search-results page purported to offer genuine Rosetta Stone software but, in fact, do not offer genuine Rosetta Stone software. Specifically, the advertisers that placed the sponsored links appearing on the Google search-results page having the advertisement text "$118 Get **Rosetta** Software" and "Save on **Rosetta Stone"** (i) are not affiliated with Rosetta Stone, (ii) are not authorized to sell Rosetta Stone software and (iii) do not offer genuine Rosetta Stone software for sale. Attached hereto as Leigh Exhibit 2 is a true and correct copy of a screenshot of the landing page for the sponsored link www.softwaresupplier.info. Attached hereto as Leigh Exhibit 3 are true and correct copies of three screenshots taken from the www.softwaresupplier.info website.

In particular, Google contends that Mr. Leigh lacks foundation for these statements because

[redacted]

Indeed, Google does not – because it cannot – contest Mr. Leigh's statements, based on his personal knowledge as the Director of Online, Direct-to-Consumer Sales at Rosetta Stone, that www.softwaresupplier.info and www.learnanylanguages.com "are not affiliated with Rosetta Stone" and "are not authorized to sell Rosetta Stone software." Mr. Leigh's statement that these websites also "do not offer genuine Rosetta Stone software for sale" is based on these two facts and Mr. Leigh's personal experiences. Thus, unlike the circumstances in Google's

cited authorities, Mr. Leigh's assertions are not "unsubstantiated opinions" or "contradicted by substantial evidence to the contrary." *Coleman*, 294 Fed. Appx. at 782; *Williams*, 871 F.2d at 456. Google's objection should be overruled.

III. THE DEPOSITION TESTIMONY CITED BY ROSETTA STONE IS RELEVANT AND ADMISSIBLE

Google objects to a number of the deposition excerpts that Rosetta Stone submitted in support of its motion for summary judgment. As shown below, the majority of Google's objections are moot and the remainder have no merit.

A. Google's Objections To The Completeness Of Rosetta Stone's Deposition Transcript Excerpts Are Moot

Google objects to certain deposition excerpts cited by Rosetta Stone on the sole basis that the cited testimony is incomplete. (Objections 5-12.) Google, however, has submitted additional excerpts from each witness's deposition transcript, thereby mooting this objection. (Dkt. 150.)[2]

B. The Deposition Testimony Of Confused Consumers Is Highly Relevant

Google also objects to the deposition testimony of the five consumers who testified that they were confused by a Google Sponsored Link displayed on a Google search-results page when they conducted a search for "Rosetta Stone," leading them to buy what they thought was genuine Rosetta Stone software but which, in fact, was counterfeit software. (Objections 16-18.) Although both parties agree that actual confusion is "of paramount importance" and "the best

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[2] Rosetta Stone's decision to submit limited excerpts was not the result of an effort to present an "incomplete" record but rather resulted from an effort to limit the amount of paper submitted to the Court. Indeed, Rosetta Stone often submitted several pages surrounding each cited excerpt in order to provide appropriate context for each citation. Should the Court wish to see complete copies of any deposition transcript cited in the parties' papers, Rosetta Stone would be happy to submit such copies to the Court.

evidence" of likelihood of confusion, (Dkt. 153 at 18), Google asserts that this confusion testimony is "irrelevant." (Objections 16-18.) Google's relevancy arguments are unfounded.

Google argues that all the confusion testimony is irrelevant because each witness "testified that they knew they were not purchasing from Rosetta Stone directly." (Objection 18; *see also* Objections 16 & 17.) In order to establish a likelihood of confusion, however, Rosetta Stone does not have to establish that consumers believed they were actually making a purchase directly from Rosetta Stone. Instead, Rosetta Stone must establish that Google's use of Rosetta Stone's trademarks is "likely to confuse an 'ordinary consumer' as to the *source or sponsorship of the goods*." *PETA v. Doughney*, 263 F.3d 359, 366 (4th Cir. 2001) (emphasis added); *Anheuser-Busch Inc. v. L&L Wings, Inc.*, 962 F.2d 316, 318 (4th Cir. 1992). All the confusion witnesses testified that they were confused by Google Sponsored Links on a search-results page for "Rosetta Stone" in that each believed the Sponsored Link was endorsed by or affiliated with Rosetta Stone and that he or she was purchasing genuine Rosetta Stone product. (Doyle Dep. at 12:12-14:6 & 15:4-16:15; DuBow Dep. at 15:2-19:5; Jeffries Dep. at 13:22-14:8, 20:2-21:2; Porter Dep. at 12:25-14:19 & 22:3-12; Thomas Dep. at 12:4-22; 15:2-17:5.)[3]

Google also asserts that the testimony of four of the confusion witnesses is irrelevant because their "purchases were influenced by the confusing nature of the websites from which they purchased" and thus "whatever confusion existed was not caused by Google." (Objection 18; *see also* Objection 17.) This assertion ignores the fact that these four confusion witnesses testified that they entered "Rosetta Stone" as their search term on Google, which displayed Sponsored Links specifically referencing the sale of Rosetta Stone software. (Doyle Dep. at

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[3] Complete transcripts of the depositions of the five confusion witnesses were attached at Tab A to the Declaration of Jennifer L. Spaziano in Support of Rosetta Stone's Motion for Partial Summary Judgment As To Liability. (Dkt. 109.)

12:12-14:6; Jeffries Dep. at 13:22-14:8; Porter Dep. at 12:25-14:19; Thomas Dep. at 12:4-22.) Accordingly, each was directed by Google to a website where they made their purchases after clicking on a Google Sponsored Link. Thus, even assuming *arguendo* that these witnesses were "influenced" by the confusing websites from which they ultimately purchased counterfeit software, they were confused in the first instance by the Sponsored Link appearing on Google's search-results page. Put another way, absent Google's conduct, these individuals would not have been directed to the counterfeit websites.

Google asserts that Steve Dubow's testimony is irrelevant because "Mr. Dubow did not purchase the allegedly counterfeit software through a Google sponsored link." (Objection 16.) Mr. Dubow did not so testify. Indeed, an examination of Mr. Dubow's deposition transcript reveals that Mr. Dubow could not remember whether the link he clicked on was a Sponsored Link. (Dubow Tr. at 78:18-81:14) Other evidence, however, establishes that Mr. Dubow did purchase his counterfeit software through a Google Sponsored Link. Specifically, Mr. Dubow's testimony and records establish that he purchased the counterfeit software from the wesbite www.bossdisk.com on October 6, 2009. (Dubow Tr. at 19:15-20:8, 27:10-16.) On this very date, [redacted]

Finally, Google asserts that Diana Stanley Thomas's testimony is irrelevant because "Rosetta Stone cannot definitively establish whether Ms. Thomas purchased counterfeit software because she destroyed the purportedly counterfeit product." (Objection 17.) This argument misses the mark for two reasons. First, Ms. Stanley Thomas's testimony is relevant because of her mistaken belief that the owner of the Sponsored Link was affiliated with Rosetta Stone. (Thomas Tr. at 16:21-17:5 ("Q: When you clicked on the link, what, if anything, did you believe

about the affiliation between the company that was offering the software that you saw and Rosetta Stone? [Objection] A: I thought that they were people that worked with Rosetta Stone.").) Second, Rosetta Stone can establish that the software Ms. Stanley Thomas purchased is counterfeit. In this regard, Ms. Stanley Thomas purchased her counterfeit Rosetta Stone software from the very same website as confusion witness Denis Doyle. (*Compare* Doyle Tr. at 13:9-16 (identifying www.sourceplaze.com as the website from which Mr. Doyle purchased counterfeit Rosetta Stone software) *with* Thomas Tr. at 12:4-15:11 (identifying www.sourceplaza.com as the website from which Ms. Stanley Thomas purchased counterfeit Rosetta Stone software).) [redacted]

C. Rose Hagan's Prior Testimony is Relevant and Admissible

[redacted] Instead, in the context of the pending motions for summary judgment, Google asserts that "the probative value of the cited testimony is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury." (*Id.*) Google's objection is baseless.

The premise of Google's prejudice argument is that Ms. Hagan's prior testimony "was given in different actions, regarding different trademarks and a different Google trademark

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[4] In any event, Ms. Stanley Thomas was able to locate the software she purchased from www.sourceplaza.com. Ms. Stanley Thomas has agreed to provide her software to Rosetta Stone so that Rosetta Stone can confirm that it is indeed counterfeit and, if necessary, she has agreed to testify at trial.

policy than is currently in place today." (*Id.*) [redacted]

[redacted]

Google also asserts that Ms. Hagan's prior testimony should be excluded because it was not identified in Rosetta Stone's Rule 26(a)(1) disclosures. (Objection 19.) As a threshold matter, nothing in Rule 26(a)(1) requires a party to identify the testimony that it intends to offer at trial. The two cases cited by Google involve the failure to disclose the opinions and identity of *expert* witnesses – which are governed by Rule 26(a)(2) *not* Rule 26(a)(1). Lay witness trial testimony is governed by Rule 26(a)(3). As Google acknowledges, Rosetta Stone did identify Ms. Hagan's prior testimony in its exhibit and witness disclosures pursuant to Rule 26(a)(3). (Objection 19; *see also* Dkt. 141 at 6.) This was not a "surprise" or "late" disclosure – it was a timely disclosure made in accordance with the Federal Rules.

In any event, Rosetta Stone expressly stated in its Supplemental Rule 26(a)(1) disclosures, served by agreement on March 19, 2010, that it may use all documents produced by Google to Rosetta Stone to support its claims in this lawsuit. (Ex. 4.) The deposition transcripts at issue

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[5] The version of the deposition transcript produced to Rosetta Stone is not properly formatted. (Ex. 2.) Rosetta Stone has requested that Google (i) produce a properly formatted copy and (ii) authorize the videographer of the deposition to provide a copy of the videotape to Rosetta Stone.

[6] [redacted]

were produced by Google to Rosetta Stone.[7] Thus, Google's assertion that Rosetta Stone failed to identify Ms. Hagan's prior testimony in its Rule 26(a)(1) disclosures is simply untrue.

Even had Rosetta Stone failed to appropriately disclose its intent to use Ms. Hagan's deposition testimony, there would be no prejudice – much less "incurable prejudice" – to Google.

[redacted]

IV. [redacted]

[redacted]

[7] [redacted]

[redacted]

See Johnson & Johnson Consumer Cos., Inc. v. Aini, 540 F. Supp. 2d 374, 392 & n.31 (E.D.N.Y. 2008) (finding evidence of prior trademark infringement lawsuits admissible as evidence of intent and knowledge: "While these other cases alone do not definitely demonstrate that Defendants acted in bad faith here with respect to Plaintiff's trademark, they do present some evidence of Defendants' intent. . . . At a minimum, these lawsuits should have served to instruct Defendants to exercise greater diligence in ensuring that the products they sold, particularly those they

received from questionable sources, did not infringe on others' trademarks.")).[8] They are not unduly prejudicial as the Court is certainly capable of considering the probative value of these documents in ruling on the pending motions. They are not hearsay as they are not being offered for the truth of the matter asserted. And they were produced by Google in response to the Court's order directing it to produce all trademark complaints.

V. [redacted]

- [redacted]
- [redacted]
- [redacted]

[8] Although not at issue in Rosetta Stone's motion for summary judgment, the [redacted] also are relevant to damages as Google's knowledge demonstrates willfulness, which has been defined as "having knowledge that one's conduct constitutes infringement or showing reckless disregard for [trademark] owner's rights." *Agri-Supply Company Inc. v. Agrisupply.com*, 457 F. Supp. 2d 660, 666 (E.D. Va. 2006).

[redacted]

- [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

9 [redacted]

[redacted]

[redacted] Both cases relate to motions to strike expert witness studies performed on behalf of a plaintiff in connection with ongoing litigation. *Vista Food Exchange, Inc. v. Vistar Corp.*, No. 03-cv-5203, 2005 WL 2371958 (E.D.N.Y. Sept. 27, 2005); *Simon Prop. Group LP v. mySimon, Inc.*, 104 F. Supp. 2d 1033 (S.D. Ind. 2000). [redacted]

CONCLUSION

For the forgoing reasons, Rosetta Stone respectfully requests that this Court overrule Google's objections and deny its motion to strike.

Respectfully submitted,

April 20, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2010 I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system which will then send a notification of such filing (NEF) to the following:

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