Rosetta Stone LTD v. Google Inc. Doc. 192

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

(Alexandria Division)

ROSETTA STONE LTD.

Plaintiff,

v.

GOOGLE INC.

Defendant.

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

GOOGLE INC.'S OPPOSITION TO ROSETTA STONE'S MOTION FOR SANCTIONS

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PRELIMINARY STATEMENT

Rosetta Stone's Motion for Sanctions seeks to covert an innocent discovery error by Google into a win "on the merits" for Rosetta Stone. Such a drastic sanction is particularly unwarranted here, where Rosetta Stone's claims of prejudice are predicated on its argument that Google's belated production provides the first "explicit support" for what Rosetta Stone had "inferred." Rosetta Stone ties this perceived prejudice to the question "Who, if anybody, explicitly endorsed this listing?" Rosetta Stone does not attempt to explain why this particular question is any more illuminating to it *than the exact same question* identified [redacted] [redacted] in the very first document in Google's production, which was made on December 23, 2009. Rosetta Stone's claim of prejudice is thus entirely unfounded.

Rosetta Stone's argument that "Google's conduct reflects bad faith" based on Google's earlier representation that it had conducted a reasonably diligent search and produced all responsive documents rings similarly hollow. As set forth in the accompanying declarations of Google's in-house discovery counsel and the two Quinn Emanuel partners who participated in discovery matters, Google's document collection efforts were sufficient to identify the responsive documents and Google and its counsel had a good faith belief that the responsive documents were among the more than 88,900 documents (not pages) produced. It turned out, however, that due to a miscommunication with outside contract attorneys who preliminarily reviewed the documents for production, a certain group of documents were coded in a way that led them not to be produced. Upon discovering that error, Google had Quinn Emanuel review all the documents in that select group and the small group (fewer than 20), which had not been produced, will be produced imminently. None of these warrants the sanctions Rosetta Stone

seeks either.

This inadvertent error should also be considered in the context of Rosetta Stone having represented to Google on February 24, 2010 that it had completed its production of responsive documents, only to later produce thousands of pages of documents through at least five of their subsequent productions—frequently on the eve of the deposition they most related to, or , in a number of cases, after it. Although these late productions imposed significant challenges to Google in the middle of whirlwind depositions, Google chose to stay focused on the merits, negotiate the issues as best as it could with opposing counsel, and not seek judicial relief.

Under these circumstances, there is no reason to sanction Google, which acted in good faith. There is especially no reason to impose the counter-factual judicial determination Rosetta Stone seeks. In addition, a sanction here would discourage litigants from trying to litigate on the merits and instead invite games of discovery "gotcha" in an attempt to obtain through unintentional error what could not be won on the law and actual facts.

BACKGROUND

Google has provided extensive discovery in response to Rosetta Stone' broad disclosure requests, producing nearly 90,000 documents. Declaration of Margret Caruso ("Caruso Decl."), at ¶ 3. Google and its outside counsel worked closely together and were in regular contact throughout the discovery period so as to ensure collection, review and production of responsive documents, including documents produced in response to the Court's February 4, 2010 Order.[1] *Id.* at ¶¶ 4, 9-10; Declaration of Jonathan Oblak ("Oblak Decl."), at ¶ 3; Declaration of Kris

[1] In providing certain factual information regarding its document collection and review process, Google does not intend to and does not waive any applicable work product or attorney client privilege.

Brewer ("Brewer Decl."), at ¶¶ 3, 8. Google and its outside counsel have engaged in considerable efforts to meet these obligations. *Id.*

Following the Court's February 4, 2010 Order, Google and its outside counsel worked to collect and produce of documents addressed by that Order, and also investigated specific inquiries by Rosetta Stone. Caruso Decl., at ¶¶ 9-12; Brewer Decl., at ¶¶ 4-6. Google produced at least 35,000 additional documents in response to the Court's Order, including a large volume of trademark complaints and various other categories of documents (ordered documents relating to eBay, responsive board meeting minutes, ordered documents relating to the American Airlines case) for which Google and its outside counsel had coordinated specific collection and production efforts. Caruso Decl., at ¶ 10; Brewer Decl., at ¶ 4. Google and its outside counsel specifically investigated discovery inquiries included in Rosetta Stone's letters of February 22 and March 8, 2010, and confirmed their belief, honestly held at the time, that the categories described in the letter of Jonathan Oblak dated March 10, had been produced or were in the process of being produced, and that Google had complied fully with their discovery obligations and the Court's Order. Oblak Decl., at ¶ 3; Caruso Decl., at ¶ 11; Brewer Decl., at ¶ 6.

In preparing Google's opposition to Rosetta Stone's partial summary judgment motion, Google's counsel sought to review documents

Counsel believed that the quickest way to find the production copies of the documents would be to first obtain copies from Google. *Id.* When summary judgment papers were prepared for submission, it became apparent that 11 documents had not, in fact, been produced. *Id.* Google's outside counsel prepared the documents for production on April 8, and some were attached to an April 9 declaration submitted in support of Google's opposition to Rosetta Stone's motion for partial summary judgment. Caruso Decl., at ¶ 13; Brewer Decl., at ¶ 7. While it was intended that the 11 documents would be produced by April 9, they were not produced until April 14, when Rosetta Stone's counsel advised that they had not all been disclosed and Google immediately produced them. Caruso Decl., at ¶ 14.

Google and its outside counsel investigated the cause for the omission. Caruso Decl., at ¶ 15; Brewer Decl., at ¶ 8. Google's outside counsel concluded on April 16 that the cause of the error was a miscommunication between outside counsel and the contract review attorneys. Caruso Decl., at ¶ 16; Brewer Decl., at ¶ 9. Although the documents had been collected and reviewed, they were miscoded and included in a category that was not to be produced, even though they had also been coded in a category for production. *Id.* This conflict was not detected during the regular spot checking of the attorney coding. *Id.* Following this discovery, Google's counsel directed the re-review of the documents that had been given conflicting codes. Caruso Decl., at ¶ 17. Working as quickly as possible, outside counsel identified an additional responsive documents that are being

prepared for production today. *Id.* In total, Google has produced less than 20 new documents. *Id.*

At all times, Google and its outside counsel intended to comply fully with their discovery obligations and this Court's orders

At no time did Google or its outside counsel intentionally withhold or omit from production any document it agreed to produce or was ordered produce. Caruso Decl., at ¶ 18; Brewer Decl., at ¶ 10.

ARGUMENT

I. THE INNOCENT MISTAKE AT ISSUE DOES NOT MEET THE STANDARD TO IMPOSE SANCTIONS

Rosetta Stone correctly states the standard for determining whether sanctions should be issued, but it misapplies the facts. In the Fourth Circuit, Courts should consider four factors in determining whether to issue sanctions: (1) whether the non-complying party acted in bad faith, (2) the amount of prejudice that noncompliance caused the adversary, (3) the need for deterrence of the particular sort of non-compliance, and (4) whether less drastic sanctions would have been effective. *Bizprolink, LLC v. America Online, Inc.*, 140 Fed. Appx. 459, 463-64 (4th Cir. 2005); *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 348 (4th Cir. 2001). Rosetta Stone cannot show that, under the circumstances present here, the requested sanctions are appropriate.

A. Google Did Not Act in Bad Faith.

Rosetta Stone's assertion of bad faith is based on nothing more than unsupported innuendo and speculation. As set forth in the declarations submitted herewith, both Google and its outside counsel believed that all responsive documents relating to the Google experiments had

been produced, and took exhaustive steps to try to locate responsive documents during the course of discovery. Oblak Decl., at ¶ 3; Caruso Decl., at ¶ 11; Brewer Decl., at ¶ 6.

Instead, the late production of documents was the result of a misunderstanding with the outside contract attorneys who conducted the preliminary review of Google's collected documents. Google took seriously the Court's February 4, 2010 order, and produced more than 35,000 documents in response thereto. Caruso Decl., at ¶ 10; Brewer Decl., at ¶ 4. When Rosetta Stone inquired about specific categories, Google investigated and responded to those inquiries and believed those responses to be accurate. Caruso Decl., at ¶ 11; Brewer Decl., at ¶ 5. That Google subsequently discovered documents that are cumulative and/or largely irrelevant is not a basis to call into question the good faith or diligence of its entire discovery efforts.

Notwithstanding Rosetta Stone's conclusory allegations, this inadvertent error does not rise to the level of conduct necessary to demonstrate bad faith. *Haney v. Woodward & Lothrop, Inc.*, 330 F.2d 940, 946 (4th Cir. 1964) (counsel's mistake in not turning over documents did not justify severe sanction); *DiGregorio v. First Rediscount Corp.*, 506 F.2d 781, 790 (3d Cir. 1974) (counsel's mistaken interpretation of law did not constitute bad faith); *Jacobs v. Scribner*, 2009 WL 3157533, at *15 (E.D.Cal. 2009) (denying sanctions motion because mistake did not constitute bad faith).

Finally, Rosetta Stone's suggestions of bad faith are particularly misplaced given its own discovery failings. Rosetta Stone's conduct and the timing of many significant disclosures could just as easily support the same innuendo cast at Google. If Rosetta Stone's position is that no party is permitted to make an honest mistake, then it should justify its own before casting stones at Google.

Rosetta Stone repeatedly produced responsive (and in some cases highly relevant documents) late in the discovery process and long after having represented that its document production on key issues had been complete. Oblak Decl., at ¶ 6.

For example, Rosetta Stone first disclosed virtually all of its purported evidence of "actual confusion" either during or after the deposition of its 30(b)(6) witnesses on the topic. Oblak Decl., at ¶¶ 8-9. Although Google sought disclosure of Rosetta Stone's actual confusion evidence in its very first disclosure requests, including interrogatories to which Rosetta Stone responded on November 23, 2009, Rosetta Stone first disclosed its confusion witnesses three months later during the deposition of Van Leigh, its 30(b)6 witness. *Id.* Mr. Leigh, however, knew nothing more than that confusion witness had been identified. *Id.*

Rosetta Stone later provided a supplemental 30(b)6 witnesses on the topic, as Google had requested, but he was designated as such during the lunch break of his deposition. Oblak Decl., at ¶¶ 10-11. At the time, Rosetta Stone had still not disclosed any documents concerning its confusion witnesses or the process undertaken to identify them. *Id.* at ¶ 13. Further, the witness testified that he had completed his investigation to identify potential confusion witnesses in December 2009 and turned the results over to Rosetta Stone's legal department. *Id.*, at ¶¶ 12-13. Yet Rosetta Stone did not disclose its actual confusion witnesses until two months later and just three weeks before the close of discovery. *Id.* The timing of these disclosures was highly

questionable and raises all types of questions about Rosetta Stone's diligence in complying with its discovery obligations.

Several other instances gave rise to legitimate questions regarding Rosetta Stone's diligence. Mr. Leigh also testified about responsive emails that he had not provided to counsel for production, and another executive testified that he had never been instructed to preserve any documents and had, in fact, routinely destroyed responsive documents after Rosetta Stone's filed its complaint. *Id.*, at ¶ 17.

Rosetta Stone also made other substantial late productions. After representing on February 24, 2010 that it was "not currently aware of any categories of discoverable documents responsive to Google's First Set of Document Requests," Rosetta Stone made at least five productions of documents, substantial portions of which were responsive to Google's first document requests. *Id.*, at ¶ 6. These documents were plainly responsive to Google's first document requests because when Rosetta Stone supplemented its original interrogatory responses after the close of discovery it identified thousands of pages from those later productions. *Id.*

Several specific late disclosures were notable. Just three days before the deposition of its enforcement manager, Rosetta Stone produced thousands of pages of documents from his files, leaving little time to review and prepare them for his deposition; an additional production of his material followed a week after his deposition. *Id.*, ¶ 14.

Finally, Rosetta Stone made a substantial production of documents on March 15, 2010, *after* the close of discovery – approximately 7,500 documents – many of which were admittedly responsive to Google's original document requests, as evinced by their being referenced in supplemental responses to Google's original interrogatories. *Id.*, ¶ 14.

In short, Rosetta Stone's innuendo and speculation as to Google's bad faith is undermined by its own conduct in discovery.

B. Rosetta Stone Cannot Show Prejudice.

Rosetta Stone's contention that it has been prejudiced by the late-production of documents is without basis [redacted] As to other miscellaneous documents identified by Google, those documents are largely cumulative of, consistent with, and/or tangential to Google's earlier document production.

1. [redacted]

[redacted] That the production of some peripheral information that was inadvertently delayed does not prejudice Rosetta Stone.

ii Rosetta Stone cannot show prejudice

[2] Under the 2009 policy, in addition to the brand owner and its authorized licensees, the only advertisers who would be permitted to include the trademark in ad text are those which: (1) actually resell legitimate products bearing the trademark; (2) sell components, replacement parts (footnote continued)

3. Other late-produced documents are cumulative or irrelevant.

All are cumulative of documents produced previously and/or of little or no probative value.

i Google's new sponsored link documents are cumulative and are irrelevant

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or compatible products corresponding to the trademark; or (3) provide non-competitive information about the goods or services corresponding to the trademark term to use the term in ads. Oblak Decl., ¶ 18 Ex. 13.

ii The third-party working paper is irrelevant

Google identified one new document that is a "Working Paper" of an organization called the "Net Institute." Caruso Decl., at ¶ 18. While responsive to Rosetta Stone's broad discovery requests, this academic study of search engine advertising, which was not conducted by, or for, Google, has scant, if any, probative value here. The paper does not attempt to measure consumer confusion, in relation to trademarks or otherwise. It is also publicly available at, among other sites: http://www.netinst.org/Ghose-Yang_07-35.pdf.

* * *

In sum, these documents, while technically "new," are irrelevant and/or cumulative. There is no prejudice to Rosetta Stone from their late production and no basis to impose any sanction.

C. Google's Inadvertent Error Does Not Require Deterrence.

There is no need to sanction Google to deter similar conduct. Google's conduct was not intentional. In the instant action, the failure to produce documents sooner was caused by an unfortunate review and production error rather than an explicit or intentional disregard of the Court's instructions. Because Google endeavored to comply with the Court's order, the error was inadvertent, and Google promptly remedied the mistake, there is no intentional behavior to deter. Admittedly, Google did not attempt to review every single document in the company or start its collection efforts from scratch after receiving the Court's order. Not only did Rosetta Stone's counsel admit to Google's Counsel that no such action was expected, but such efforts would not have been necessary because Google ***had*** collected the documents in question. The failure to produce fewer than 20 documents out of nearly 90,000 responsive, substantive documents was a mistake, but not one deserving of Court-imposed deterrence.

D. If Any Sanction Should Issue, Less Drastic Sanctions Are Appropriate.

"The purpose of the discovery process is to allow both parties to be prepared for any evidence that will be put forward at trial," not to adjudicate the merits of the case. *Bizprolink, LLC v. America Online, Inc.*, 140 Fed. Appx. 459, 463-64 (4th Cir. 2005) (citing *U.S. v. Procter*

& Gamble Co., 356 U.S. 677, 682 (1958)). There is a strong presumption against sanctions that decide the issues of a case. *Poulis v. State Farm Fire and Cas. Co.*, 747 F.2d 863 (3d Cir. 1984) Consequently, a court should issue the least drastic sanction available that would still be effective.[3] *T-Zikssari v. Glendening*, 1995 WL 371666, at *4 (4th Cir. June 21, 1995) (Overturning district court's sanction as too "harsh" because, *inter alia*, "the proper sanction must be no more severe than is necessary to prevent prejudice to the defendants"). This approach strikes the proper balance between "preserving the right of district courts to enforce their discovery orders" while simultaneously allowing "the merits of the damage claim to be adjudicated in the proper forum at trial, rather than in the context of a discovery dispute" *Bizprolink*, 140 Fed. Appx. at 464.

1. Documents do not support Rosetta Stone's requested sanction.

[3] A court that issues potentially dispositive sanctions is subject to closer scrutiny than the general abuse of discretion standard used for non-dispositive sanctions. *Truell v. Regent University School of Law*, 2006 WL 2076769, at *2 (E.D.Va. 2006) (citing *Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494, 503 (4th Cir. 1977); *Peltz v. Moretti*, 292 Fed. Appx. 475 (6th Cir. 2008) (Because the deeming of facts established satisfies the elements necessary to determine outcome of case, circuit court reviewed the decision using the high standard required for a sanction of dismissal);)); *Knowlton v. Teltrust Phones, Inc.*, 189 F.3d 1177, 1182 n.6 (10th Cir. 1999)("Deeming the establishment of certain facts under Federal Rules of Civil Procedure 37(b)(2)(A) can be tantamount to a default judgment, which in turn triggers a greater degree of scrutiny.").

As discussed above, no sanction is appropriate under these circumstances. However, if one were, such an extreme sanction as Rosetta Stone seeks cannot be justified. It is axiomatic

that case dispositive sanctions are the harshest possible and should be avoided if a lesser sanction is equally as effective. *T-Zikssari v. Glendening*, 1995 WL 371666, at *4 (4th Cir. June 21, 1995) (overturning district court's sanction as too "harsh" because, inter alia, "the proper sanction must be no more severe than is necessary to prevent prejudice to the defendants"); *Sawyers v. Big Lots Stores, Inc.*, 2009 WL 55004, at *3 (W.D. Va. Jan. 8, 2009) (limiting evidence used at trial is more tailored and thus more appropriate sanction than dismissal). A case dispositive sanctions also requires a showing of willfulness, bad faith, or fault. *Peltz*, 292 Fed. Appx. at 478 (a case dispositive sanction "in discovery is a sanction of last resort that may be imposed only if the court concludes that a party's failure to cooperate in discovery is due to willfulness, bad faith, or fault."). Taking a fact as established is considered the equivalent of a case dispositive sanction if the established facts satisfy virtually all of the elements of the claim. *J.D. Marshall Int'l, Inc. v. Redstart, Inc.*, 656 F. Supp. 830, 838 (N.D.Ill. 1987) (Court ordered sanction of attorneys fees rather than sanction establishing facts as admitted because latter would be "unduly harsh despite the egregious conduct of defendants' counsel" because "such an order would establish virtually all of the elements of [the] RICO claim."). Rosetta Stone's pursuit of such a sanction is entirely baseless.

As discussed above, Google at all times proceeded with discovery in good faith. Google's delay in disclosing the documents at issue was not willful but rather the result of a mere oversight. Because Google did not act in bad faith the potentially dispositive sanction proposed by Rosetta Stone is unwarranted and a lesser sanction, if any, would be more appropriate. *Bizprolink, LLC v. America Online, Inc.*, 140 Fed. Appx. 459, 463-64 (4th Cir. 2005) (District court's dismissal sanction was an abuse of discretion because court found no evidence of bad faith and a lesser sanction would have been effective); *Estate of Spear v. C.I.R.*,

41 F.3d 103, 116-117 (3rd Cir. 1994) (district court abused its discretion in deeming admitted certain facts because no bad faith and lesser sanctions would have "sent the message"); *Ali v. Sims*, 788 F.2d 954, 957 (3d Cir. 1986) (reversing a sanction deeming certain facts to be true because even if there was inexcusable delay, there was no bad faith, no history of dilatoriness, little prejudice from the delay, and less severe sanctions were probably available). To do otherwise would impose a disproportionate penalty on Google that would effectively prevent its right to a trial on the merits.

3. Lesser sanctions are available

Google respectfully submits that no sanction is appropriate under these circumstances, and that the expense and distraction from summary judgment and trial preparation that it has incurred in responding to this motion is a more than adequate deterrent. Further, Google notes that given its efforts to adjust to Rosetta Stone's repeatedly late disclosures of documents and witness without resorting to motion practice, any sanction imposed here would encourage litigants to file motions based on every delay and perceived slight, if only as insurance against any inadvertent errors in its own discovery process. Such a result would be at odds with the very purpose of the Federal Rules of Civil Procedure, which provide that they are to be "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

If the Court nonetheless determines that a sanction is appropriate, and that the discovery error was intentional, and that it was prejudicial to Rosetta Stone, and that there is a need to deter future inadvertent errors by Google, the sanctions sought by Rosetta Stone are too severe. Lesser sanctions would strike an appropriate balance between addressing any prejudice caused by discovery violations and litigating the case on the merits. Fed. R. Civ. P. 37(b)(2)(A)(i)-(vii) provides a non-exclusive sampling of potential alternative sanctions. Lesser available sanctions

include attorneys' fees incurred in connection with motion practice associated with violation. (*In re Mbakpuo*, 1995 WL 224050, at *3 (4th Cir. April 17, 1995)), granting a deposition, (*State Farm Mut. Auto. Ins. Co. v. New Horizont, Inc.*, 250 F.R.D. 203, 219 (E.D.Pa. 2008)), or excluding late-disclosed exhibits from being offered at trial (*Webster v. Secretary of Army*, 1991 WL 807, at *2 (4th Cir. Jan. 9, 1991)). All of these alternatives offer a less harsh, yet effective sanction that placates any alleged prejudice suffered by Rosetta Stone while preserving the merits of the case for trial.

CONCLUSION

For the foregoing reasons, Google respectfully requests that the Court deny Rosetta Stone's Motion for Sanctions.

Dated: April 21, 2010

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21th day of April, 2010, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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