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

ROSETTA STONE LTD,	)	
Plaintiff,	)	Civil No. 09-736
VS.	)	September 18, 2009
GOOGLE, INC.,	)	
Defendant.	)	

REPORTER'S TRANSCRIPT

MOTIONS HEARING

BEFORE: THE HONORABLE GERALD BRUCE LEE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: GIBSON DUNN & CRUTCHER, LLP
BY: TERENCE P. ROSS, ESQ.

FOR THE DEFENDANT: ODIN FELDMAN & PITTLEMAN, PC
BY: JONATHAN DAVID FRIEDEN, ESQ.
QUINN EMANUEL URQUHART OLIVER & HEDGES
BY: MARGRET MARY CARUSO, ESQ.

OFFICIAL COURT REPORTER: RENECIA A. SMITH-WILSON,RMR,CRR
U.S. District Court
401 Courthouse Square, 5th Floor
Alexandria, VA 22314

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(Thereupon, the following was heard in open court at 12:32 p.m.)

THE CLERK: 1:09 civil 736, Rosetta Stone, LTD versus Google, Incorporated.

MR. ROSS: Good morning, Your Honor. Terrance Ross for the plaintiff, Rosetta Stone, Limited.

THE COURT: Good morning, Mr. Ross.

MR. FRIEDEN: Good morning, Your Honor. John Frieden for the defendant, Google.

It's my pleasure to introduce Margret Caruso who is admitted pro hac vice in this action.

THE COURT: Good afternoon.

MS. CARUSO: Good afternoon.

THE COURT: I'm ready.

MS. CARUSO: Good afternoon, Your Honor. Margret Caruso for the defendant, Google, Inc.

We're here on Google's motion to dismiss Rosetta Stone's complaint. The primary basis for the motion is the party forum selection clause.

This forum selection clause is very plain language, and it requires that all claims relating to Google's programs, defined as Google's advertising programs, "be litigated exclusively in the federal or state courts of Santa Clara County, California, USA".

Unlike the earlier forum selection clause,

there is no mention here in the clause between exclusively and the federal state courts. It's simply right there. It applies to all claims relating to Google programs.

And the plaintiff, Rosetta Stone, has not contested that its complaint relates to Google's advertising programs.

What they've tried to do, instead, is a -- those words or the Google programs don't have meaning. They don't add anything at all to the forum selection clause. The forum selection clause simply applies to the agreement of the parties.

That, of course, as contrary to basic principles of contract interpretation which all words of the contract have meaning and they're not superfluous words, that all the words have to be accredited here. And the explanation that Rosetta Stone offers does not give any meaning to those words.

THE COURT: So does a conspiracy claim against Google, is that encompassed in the forum selection clause if it involves third party?

MS. CARUSO: Yes, Your Honor, it is because the only defendant here is Google. And that claim is based entirely on Google's advertising programs.

All the allegations in the complaint are directed to actions that are taken in connection with

third parties advertising through Google AdWords program.

THE COURT: The plaintiff's claim here involves trademark infringement. Is it your view that because the trademark infringement asserted has to do with Google's website that that would encompass the forum selection clause?

MS. CARUSO: Yes, Your Honor, but more particularly every allegation of trademark infringement is based on the Google AdWords program and the operation of Google AdWords program.

So because that is -- it's not because the AdWords program is a covered Google program under this clause, yes, it relates to this clause and is covered by it.

THE COURT: Well, help me with the -- your view of the clause is really straightforward. Anything that -- any lawsuit that a client of Google wants to bring has to be brought in California under the forum selection clause; is that right?

MS. CARUSO: Any claim that relates to the Google advertising programs that's brought by a customer of the Google advertising programs, yes.

THE COURT: And you already said trademark infringement is encompassed in that.

MS. CARUSO: Yes, as alleged in Rosetta

Stone's complaint.

THE COURT: Okay. Well, if you would address the issue of the false endorsement claim.

MS. CARUSO: Yes, Your Honor. This claim as under the Lanham Act, and as Rosetta Stone admits in the false endorsement claim what matters is whether or not there's a perception that the plaintiff endorses the defendant -- the defendant's products.

And, uniformly, you look at those cases and any other false endorsement cases, they're all about whether the plaintiff is endorsing the defendant.

And, Rosetta Stone has not alleged that. They've alleged that there is -- the public is under the misimpression that Rosetta Stone endorses third parties, not the defendant.

And that's a critical distinction for the language of the Lanham Act and all of the cases construing it in false endorsement claims.

THE COURT: Does the Lanham Act require that the parties be competitors?

MS. CARUSO: No, Your Honor, not for purposes of a false -- false endorsement claim. That -- in our opening brief, we were not sure exactly what the contours of their allegations were so we addressed all the various theories that section of the Lanham Act. And

false advertising claims require competitors, but most -- any other claim filing under that section of the Lanham Act does not.

THE COURT: Okay. And, would the conspiracy claim be barred by the Communications Decency Act because Google is an information content provider?

MS. CARUSO: We believe that Google is not an information content provider under the CDA. Instead, Google is solely a provider of an interactive computer service.

Google has been held in numerous cases to be a provider of interactive computer services, and there aren't any cases that hold the kind of activities alleged in Rosetta Stone's complaint constitute activities that give rise to an information content provider.

THE COURT: Okay.

MS. CARUSO: If Your Honor would like, I can go through some of the cases that they cited and highlight how different those facts are from the ones we have here.

THE COURT: Well, I'm not sure that that's necessary, and I have received your reply brief.

I've focused on the questions that I want to ask you at the outset.

Let me hear from Mr. Ross and I'll give you a chance to respond.

MS. CARUSO: Thank you, Your Honor.

THE COURT: I'm sorry. I should ask you if there's something else you felt you wanted to say that you weren't given a chance to say right now.

MS. CARUSO: If there's anything else remaining at the end.

THE COURT: Okay, all right.

MR. ROSS: Your Honor, I think this is a fairly straightforward contract interpretation issue as presented to the Court here.

THE COURT: I've been told that many times today.

MR. ROSS: Yes. I couldn't believe when I heard the first case. It was a forum selection clause. That's an incredible coincidence.

THE COURT: What are the chances that would happen twice in the same docket. I understand.

MR. ROSS: I've practice 20 years and I've only had a couple of these and now two on the same docket.

Your Honor, the very first rule of contract interpretation, all that's required day one in contracts is that every part, every provision, every clause of the contract has to be given meaning. You don't read any out.

And the fundamental argument that Google is making here is you have to ignore the preamble.

Now, there's actually a way to do that. I've drafted clauses like that. You put it towards the end of the contract and you say all the captions in the foregoing sections and the whereas clauses are not to be used in interpreting contract.

There is no such provision here. And that's a noticeable absence. And without such a provision, this Court has to interpret this contract to give meaning to that second sentence which Ms. Caruso so studiously ignores.

And that second sentence says, "these terms" and the forum selection clause is one of "these terms govern customer's participation in Google advertising programs". Customer's participation, meaning Rosetta Stone.

And so the forum selection clause must be interpreted in light of that second sentence of the preamble. The forum selection clause must be understood to mean that claims arising out of the contract or relating to Rosetta Stone's participation in the Google program must be pro --

THE COURT: Where are you reading from?

MR. ROSS: Your Honor --

THE COURT: Is that tab one of your --

MR. ROSS: Do you have the Google

advertising contract in front of you?

THE COURT: I have tab one, the terms and conditions of AdWords select advertising program.

MR. ROSS: If you look at the very opening brief of Google's, Your Honor, there's an affidavit at the back of that brief --

THE COURT: Oh, I see it.

MR. ROSS: Exhibit A.

THE COURT: I have it. Hold on. I have it here. Okay. I see it. I see it.

MR. ROSS: So you see there on that very second sentence --

THE COURT: Right.

MR. ROSS: Because fundamentally, what is the contract about? The second primary rule of contract interpretation is we look to interpret provisions of the contract as a whole.

What is this contract about? Well, the second sentence tells us it's about advertising by Rosetta on the Google's network. But if you read every other section of this contract, it is all about what Rosetta Stone does to advertise with Google.

It's nothing about third party. It imposes a bunch of requirements on Rosetta Stone for advertising with Google. And so when we get to this forum selection

clause at the very end, applying the two fundamental rules of contract interpretation, how -- we got to make sure we give every clause meaning and we look at a contract as a whole. We have no choice but to conclude that the claims that have to be sent to Santa Clara County are claims that deal with breach of contract, breach of this contract, or that relate to Rosetta Stone's participation, i.e., advertising on Google.

Now, Ms. Caruso said well, that would give no meaning to this word, the second part of the forum selection clause claims or claims arising out of the program. That's not true.

There could be lot of claims that don't involve a breach of contract by Rosetta Stone that would have to go out to California.

I'll give you an example, Your Honor. There's nothing in the contract that says you, Rosetta Stone, don't put any viruses on our Google network when you advertise with us.

So if we did, if Rosetta Stone put a virus on the Google's network, it could not bring a breach of contract claim that would have to go out to California. But it could bring a tort claim against us, and that would have to go out to California.

So the clause she's planning on does have

meaning when you use our interpretation which of course is limited to Rosetta Stone's participation in this advertising.

And of course, Your Honor, this is drafted by Google, and the uniform rule in all the circuit courts is that if a forum selection clause, if there's any doubt or uncertainty as to what it should mean or how it should apply, then it's not enforced. Uniform rule of all the circuits.

So that's our argument with respect to forum selection clause unless you have other questions.

THE COURT: Well, the claims that are brought here don't necessarily turn on the contractual relationship between Google and Rosetta Stone. Trademark infringement claims can be brought in any event against Google or any others that infringe the trademark.

MR. ROSS: That's correct, Your Honor. And you obviously have in mind the case that's not before the Fourth Circuit because we haven't dealt with this, but other circuits said the only time you use these forum selection clause but not on breach of contract cases is when they somehow revolve around this contract or they somehow require interpretation of contract, for example, *Manetti* case in the Ninth Circuit.

Your Honor is absolutely right. We -- these

claims have absolutely nothing to do with our advertising on their system or this contract. You're right.

THE COURT: Well, as it relates to this lawsuit here, the claim of Rosetta Stone is all about what appears on the Google ads and the Google website, isn't it?

MR. ROSS: That's true. And we --

THE COURT: Doesn't that relate to Google's advertising program?

MR. ROSS: No, Your Honor, because the contract here is dealing exclusively with Rosetta Stone's advertising on that network.

We aren't complaining in the underlying lawsuit that we did anything wrong or that we committed trademark violation. We're saying some third party did that, and therefore, it has nothing to do with this contract.

In our lawsuit, this contract will never be entered into evidence, talked about, testified to by us or by Google because it's completely irrelevant to those third party trademark suits. It's limited to Rosetta Stone's advertising of the network.

THE COURT: But, when you say third party trademark suits, what you're really complaining of is the display of an ad for a so-called sponsored link that might

refer to another corporation or a competitor of Rosetta Stone; is that right?

MR. ROSS: Yes, Your Honor. There are ads that Rosetta Stone has nothing to do with them. They are being brought -- they are ads by some third party completely unrelated to Rosetta Stone or our contract with Google.

THE COURT: Those third parties are not before the Court. So, for example, if there is some company called, you know, Language, Inc, that you think is using Rosetta Stone's mark in the similar fashion because they have authorized Google to present an ad for Language, Inc on their website, you have not brought them into this suit, have you?

MR. ROSS: You're absolutely right. We have not and we are not required to under the Lanham Act. We could have brought if we wanted to a direct claim for -- a claim for direct trademark infringement against them. But, why? They would just change their name and morph into something else.

The only way to stop this sort of conduct is to bring it against the party that's facilitating and making it possible and that's Google. And the Lanham Act clearly allows that. No dispute here. They have not moved to dismiss our trademark claims.

THE COURT: Let's turn to the conspiracy claim and the issue of whether Google is an interactive computer service provider rather than an information content provider under the CDA.

MR. ROSS: Your Honor, there's absolutely no doubt that they're an interactive computer system. That's only one of the three prongs that they have to fulfill.

We're arguing the other two prongs which is that they are an information content provider and this is not Speech Online. Let me deal with Speech Online first.

What's happening -- what their claim fundamentally is -- there are permutations of it. But we, Rosetta Stone, have people out there who are called resellers. We have contracts with them. They're authorized to sell our product. They're not authorized to put ads on the Google network. The contract says that. You can't use our trademark in that context.

Google is going to them and saying, hey, come put an ad on our network, notwithstanding that contract.

THE COURT: So, induce them to breach their contract with Rosetta Stone?

MR. ROSS: They're conspiring, yes. And that has nothing to do about online speech. That's a completely offline activity.

And the CDA, the immunity for the CDA which is originally passed for AOLs of the world service providers, is all about online speech. It's not about this offline conduct. And that's what that claim is about, and therefore it's not encompassed.

Now the second argument we make is that they are also considered for purposes of the CDA information content provider. And specifically because it's a 12(b)(6) motion, if you look at paragraph 57 of our complaint we expressly said that they create content. And that's the definition of an information content provider under the CDA.

THE COURT: They create content by displaying -- creating the writing or the graphics that appears on the sponsored links on their website.

MR. ROSS: Yes, sir. And they say that they're more like editors of a newspaper. They're neutral. They're just providing some, you know, editorial discretion. And that's not true.

If you wanted to advertise on Google, you would have to have the words sponsored link on your ad. Even if you thought that was misleading and want to say this is a paid advertisement, they make you put the word sponsored link.

THE COURT: That leads to another question.

What does sponsored link means to you? Is there consumer confusion about what a sponsored link is?

MR. ROSS: That's part of the case, yes, Your Honor. So part of the confusion they're responsible for and therefore they're creating content and therefore they don't get the immunity of the CDA.

Does that make -- does that make sense to you, Your Honor, because I can elaborate some more. Here's --

THE COURT: I think that I understand what you're saying. You're saying that to the extent that Google creates the ad that is displayed on their website, even if the information is supplied by the client, they are a content provider.

MR. ROSS: Yes, Your Honor. Now, there are a couple of cases that they cite in their brief, correctly cite that say if somehow you're doing that in a neutral manner, you know, that the final decision -- here is the way it's expressed -- the final decision is with the advertising customer.

You suggest to them, oh, why don't you brighten this ad up. You'd get more business. But it's a suggestion. They have the final decision.

Then you don't become an information content provider. What I'm saying to you is that's not the case.

It's not a suggestion. You have to use their term sponsored link. You have to have the ad either at the top or the side. You have to have that little blue -- it's yellow now, yellow background coloring. Those are all things they make you do. It's not a suggestion like the cases they cite. And therefore, they're an information content provider within the unique definition of CDA.

THE COURT: Have you set forth a false endorsement claim here?

MR. ROSS: Yes, Your Honor.

THE COURT: And I'm focused more specifically on the issue of the likelihood of confusion as to the source or origin of the goods or services. What does sponsored mean to you?

MR. ROSS: Sponsored means to somehow convey to the consuming public that you are giving an endorsement to this product or that you approve it.

And our claim is that the way Google goes about this, the people surfing online are under the misimpression that Rosetta Stone is sponsored -- is the sponsor of those sponsored link. We think they deliberately used that word sponsored link for the purpose.

THE COURT: Well, you know, in another context, a sponsor is someone who pays money for permanent

display. For example, a charitable activity, a sponsor is listed as a sponsor of the X, Y, Z Ball. That does not necessarily suggest that the organization has adopted the sponsor, does it?

MR. ROSS: No, it doesn't. You're absolutely right, Your Honor, and remember this is a 12(b)(6) motion and so --

THE COURT: Yeah, the issue is -- the test is one of plausibility.

MR. ROSS: Yes, Your Honor. That's absolutely right, under Twombly. Let me put it this way. There are specific academic studies out there that say in the context of the Internet, common users perceive that to mean, sponsored link to mean that their search for a specific company, Rosetta Stone.

You know, this all starts when you the searcher put in the term Rosetta Stone. You don't put in language software. We wouldn't be here complaining.

You punched Rosetta Stone. In your mind you're thinking I'm going to get results to tell me how to get there. You punch in Rosetta Stone and you get the top of the page, the sponsored link.

All the academic studies show that people commonly think that that means Rosetta Stone sponsored that. And so it's a little bit different where in a

football, you know, college bowl series, year after year we all know that when they say the Tortilla Doritos Fiesta Bowl, we know what sponsored means there. It's different here. Now, if I may add one other point. I know you've been here very long time this morning. Thank you.

THE COURT: This is honest government work.

MR. ROSS: Yes, it is. Thank you.

Their argument sort of morphed the opening brief that Ms. Caruso admitted, and they're no longer arguing about competition. They're saying that we didn't -- they didn't put there name Rosetta Stone on their products. And that's just not required in the Lanham Act and the words of the Lanham Act answer this question directly.

So, if I may just read to you from Title 15 of the United States Code Section 1125(a), if you'd bear with me, the words are right here.

It says "any person who, or in connection with any goods or services or containers for goods uses in commerce, any word, term, name, symbol, device, any combination thereof" --

THE COURT: Slow down, slow down. The court reporter's got to take this down.

MR. ROSS: I'm so sorry.

THE COURT: And I can't even think as fast

as you can talk.

MR. ROSS: She is actually very fast. She's very good.

So, false or misleading representation of fact which, in commercial advertising, what they do "misrepresents the nature, characteristics, qualities or geographic origin of his or her or another person's goods or services". Another person's goods or services.

The notion that the false endorsement has to be on a Google product is directly belied by the words of the statute. We don't need a case for that because the statute says Google can put our name falsely endorsing some other person's goods, and that's a clause of action.

THE COURT: All right. I've asked you the questions that I have. Thank you very much.

MS. CARUSO: Thank you, Your Honor. I'll pick up right where Mr. Ross left off with the language of the Lanham Act. And the portion he was reading of the Lanham Act is not the portion that controls here. That's the preamble that gets to where the Lanham Act lays out what the claims can be.

And, there if again -- the language is a little cumbersome, but I'll read it for the record.

THE COURT: Slowly.

MS. CARUSO: Yes. To state this type of

claim under Lanham Act, the allegation has to be that "the use of the word, term or trademark is likely to cause confusion as to the affiliation, connection, or association of such person" and that means the one alleged to have used the false designation of origin here, the defendant, "with another person", which the case law tells us is the plaintiff, "or as to the origins, sponsorship or approval of his or her", the defendant's "goods, services or commercial activities by another person", the plaintiff.

And what's important, Your Honor, because it's not immediately apparently maybe the first time you look at it, this by-another-person language. Uniformly, the case law tells us that that is the plaintiff.

The cases that the defendant -- the Rosetta Stone cites all say the defendant, the defendant's goods. It has to be confusion as to the plaintiff's endorsement of the defendant's goods.

And, Rosetta Stone has not offered any case that is to the contrary. It's just not simply what the law is.

I'd like to go back to the forum selection clause because I think that really moots this issue.

First of all, the language about -- in the preamble that these terms govern the customer's

participation, this language, we don't need to shy away from it in any way. It -- these terms are the requirements. They're the rules under which the customer has to agree to participate in Google's programs.

The customer could separately -- it could choose not to be a customer and not to advertise to the AdWords program and separately bring this case. That's true.

That's not what they did. They agreed to play it by these rules, the rules in which they agreed to bring any claim relating to Google advertising programs in California.

And one of the cases that they cite even makes this point. It says that -- what is the *Transfirst* case.

It points out in a forum selection clause that the plaintiff's claims relate to their employment agreements but they would exist independently of those employment agreements.

But, given the language of that forum selection clause, it covers those claims, even though they could have been brought in the absence of a contractual relationship.

And, what's important here is that there is this contractual relationship. And, it's not necessary

that the claims to be brought in California relate to the contractual relationship.

And again, going back to the language of the contract, this is clear. So, the forum selection clause says all claims, not just arising out of but relating to this agreement.

So, if you just stopped right there, already you have enough language to see that Rosetta Stone's argument is not correct, that their interpretation of the -- of Google programs would add anything else because tort claims that relate to this agreement would clearly be covered by it.

So, the "or Google programs" has to add something.

THE COURT: All right.

MS. CARUSO: And they don't identify or fill us in with what that might be.

In addition, I think it's worth pointing out that the terms of -- the advertising program terms aren't just limited to what's necessary for Rosetta Stone to advertise on the AdWords program.

In paragraph four, section B, it specifies that the customer shall not use any automated means or form of scraping or data extraction to access, query or otherwise collect Google's advertising related information

from any program, website or property.

So whatever ability Rosetta Stone had to do that technically or lawfully otherwise, they've now agreed, just like they've agreed to bring any claims relating to the program in California, not to do that.

So, these program terms are all required, do govern the conditions of Rosetta Stone's participation, but they're not limited just to that advertising relationship.

THE COURT: Thank you very much.

MS. CARUSO: You're welcome, Your Honor. If you would like to hear more about the CDA, I can talk about that.

THE COURT: I'm trying to be polite. When I say thank you very much, that means that I think I understand your position.

MS. CARUSO: Okay.

The --

THE COURT: In California, that -- in Virginia, that means the judge has heard enough.

MS. CARUSO: Thank you very much, Your Honor.

THE COURT: Thank you.

This matter is before the Court on the defendant's motion to dismiss. And the parties have

properly briefed the matter, and there are, I think, three critical issues, and the first that has to be decided at the outset is whether or not this lawsuit belongs in Virginia under the forum selection clause of the AdWords contract submitted by Google.

And, of course, such clauses are enforceable under Virginia law and federal law. And what we're dealing with here is terms that are set forth in the AdWords program contract in paragraph nine.

And both parties have briefed the matter. So, I have to, as I am supposed to, determine if the clause is clearly communicated to the other side, whether it's mandatory permissive, whether the claims involved are subject to the clause, and whether the resisting party has rebutted the presumption of enforceability under the *Phillips versus Audio Active* case.

Obviously, the first and the second are met because the clause is obvious and it is, I think, a mandatory clause. And it was communicated electronically to the Rosetta Stone's marketing manager.

And as it relates to the issue of whether or not the claims are subject to forum selection clause, I hold that they are not, because none of the claims concern Rosetta Stone's participation in Google's advertising programs.

Three of the claims concern Virginia business law, and five are based on the Lanham Act.

Obviously, the *Yahoo* case from the Fifth Circuit is not controlling. But in that case, the Fifth Circuit upheld District Court's judgment to not enforce a forum selection clause because the clause in that case required American Airlines to submit claims to California forums and claims brought by Yahoo against it and the clause is ambiguous. And the claims between American Airlines and Yahoo arose out of different circumstances.

Here what we're dealing with is a trademark infringement claim that could have been brought notwithstanding the contract. The cause of action do not turn on the contractual relationship between Google and Rosetta Stone.

The claims arguably turn on Google's relationship with other advertisers, that is to say the relationship that Google has with other advertisers who are being presented on the website as sponsored links. And if that's an independent relationship between Google and Rosetta Stone, obviously, the facts would be different if Rosetta Stone brought a breach of contract claim which would require interpretation of the AdWords contracts.

So, because the claims are not subject to forum selection clause, I'm going to deny the motion to

dismiss as it relates to the forum selection clause.

That brings us to the false representation claim under 12(b)(6). Obviously, I'm applying *Bell Atlantic versus Twombly* and *Ashcroft versus Iqbal*. And it seems to me that I'm going to grant the motion to dismiss as it relates to the false representation of the so-called false endorsement claim because the plaintiff here has not sufficiently asserted that there is a likelihood of consumer confusion as to the origin, approval or endorsement of the product under the *Comins* -- and *Comins* is C-O-M-I-N-S *versus Discovery Communication* case.

And I think that a false endorsement claim can be viable even if the parties are not competitors under the *Holland versus Psychological Assessment* case.

But what we have here is a failure to, I think, sufficiently set forth a likelihood of confusion as it is required in the Fourth Circuit under the *Synergistic* case. And *Synergistic* is spelled S-Y-N-E-G-I-S-T-I-C case, Fourth Circuit, 2006.

Focusing on the seventh factor which is actual confusion, while the plaintiff sets forth background about the information on the Internet, Google Search Engine being based on keyword "advertising", I do not think that they sufficiently set forth a showing that would demonstrate confusion by web users or confusion by

web users that would allow web users to think that sponsored link means that Rosetta Stone somehow endorses the link.

I think that it has -- sponsored links means arguably paid ads, not necessarily ads paid by or approved or endorsed by Rosetta Stone. And obviously, I give Rosetta Stone a chance to revisit if they want to replead that. But I'm going to grant the motion as it relates to the false endorsement claim.

As it relates to the issue of whether the conspiracy claim is encompassed in the immunity afforded by the Communications Decency Act, depending upon the status of Google, I think that Google is an interactive computer service provider. And there's no indication here that Google creates the contents of the ads.

I understand the theory about the banners and the headings. And I think my Neiman Ford -- Neiman Chevrolet case address something about the banners and headings. But in any event, I do not think that is sufficient to plead that Google would fall outside the Communications Decency Act's immunity.

Rosetta Stone has cited to the *Fair Housing Council of San Fernando Valley* case, and I think that that case is distinguishable in about three ways.

First, the Roommates.com requires an

interested member to complete a questionnaire. Second, Roommates.com sends out e-mails containing member's profile to other members; and third, information provided by Roommates.com members in a comment box are displayed for others to view.

In that case, the Court found that Roommates.com is an information content provider because as to the contents of the questionnaire and the e-mail distribution, its content ads formulated by Roommates.

Here, Google is displaying its sponsored links based upon the web user query. And a web user has to decide to use Google. It's open. It's the marketplace on the web. It's not the only game in town. Obviously there is Yahoo and Bing, B-I-N-G and others.

So, the displaying of a formatted advertising is passive. It's not the same as sending out e-mails and soliciting private information which is shared with others. And similarly the *800-JR Cigar* case is distinguishable in at least two ways.

First the Court did not determine whether the defendant's conduct made it an information content provider. Rather it found that the defendant does not qualify as an interactive computer service provider.

And second, the Court held that immunity was inapplicable because the alleged fraud is use of the

plaintiff's trademark in the advertiser's bidding process, not necessarily adds information from the third party that may appear on the search results page.

So, seems to me that Rosetta Stone's claims turn on the Google's relationship with other paid advertisers regarding the use of Rosetta Stone's marks.

And since the purpose of the CDA is not to shield parties from fraud or abuse, arise from their own pay for priority advertisement but from the actions of third parties, it is applicable for this case.

For those reasons, I'm going to grant the motion to dismiss as it relates to Count VIII.

Thank you for the quality of your preparation and your patience.

We're in recess.

(Proceedings concluded at 1:11 p.m.)

CERTIFICATE OF REPORTER

I, Renecia Wilson, an official court reporter for the United State District Court of Virginia, Alexandria Division, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had upon the motions in the case of Rosetta Stone, LTD vs. Google, Inc.

I further certify that I was authorized and did report by stenotype the proceedings and evidence in said motions, and that the foregoing pages, numbered 1 to 31, inclusive, constitute the official transcript of said proceedings as taken from my shorthand notes.

IN WITNESS WHEREOF, I have hereto subscribed my name this 25th day of September , 2009.

/s/
Renecia Wilson, RMR, CRR
Official Court Reporter