

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

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

Civ. Action No. 1:09-cv-00736(GBL/TRJ)

**ROSETTA STONE LTD.’S OPPOSITION TO
GOOGLE INC.’S OMNIBUS MOTION *IN LIMINE***

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Rosetta Stone Ltd. respectfully submits this opposition to Google Inc.’s Omnibus Motion *In Limine* (the “Motion”) through which Google seeks to exclude extensive evidence of consumer confusion and contributory infringement. Because the Fourth Circuit and/or this Court already have found the vast majority of this evidence to be *relevant and admissible*, the mandate rule and the law of the case doctrine compel denial of Google’s motion with respect to such evidence. As to the evidence the Court has not yet considered, Google’s arguments are equally unavailing because this evidence is demonstrably relevant and Google proffers no sound basis for its exclusion. For these reasons, the Motion should be denied in its entirety.

INTRODUCTION

Through this action, Rosetta Stone challenges Google’s unauthorized use and sale of the Rosetta Stone Marks¹ as keywords that trigger third-party Sponsored Links that appear on Google’s search-results pages when a user queries a Rosetta Stone Mark. To prove its claim for direct trademark infringement, Rosetta Stone must demonstrate that Google used the Rosetta Stone Marks in a manner likely to confuse consumers. 15 U.S.C. § 1114; *PETA v. Doughney*, 263 F.3d 359, 364 (4th Cir. 2001).

In its April 9, 2012 opinion in this case, the Fourth Circuit concluded that “there is sufficient evidence in the record to create a question of fact on each of the ‘disputed’ [likelihood of confusion] factors--intent, actual confusion, and consumer sophistication--to preclude summary judgment.” *Rosetta Stone Ltd. v. Google Inc.*, 676 F.3d 144, 160 (4th Cir. 2012). In reaching this conclusion, the Fourth Circuit analyzed, among other things:

- Google’s internal studies, which “suggested that there was significant source confusion among Internet searchers when trademarks were included in the title or

¹ The “Rosetta Stone Marks” include ROSETTA STONE, ROSETTA STONE LANGUAGE LEARNING SUCCESS, ROSETTASTONE.COM and ROSETTA WORLD.

body of the advertisements.” *Id.* at 156. The Fourth Circuit found that (i) as a result of these studies, “a reasonable trier of fact *could* find that Google intended to cause confusion in that it acted with the knowledge that confusion was very likely to result from its use of the marks,” *id.* (emphasis in original); (ii) the studies “are probative as to actual confusion in connection with Google’s use of trademarks,” *id.* at 158; and (iii) the studies are evidence “that even well-educated, seasoned Internet consumers are confused by the nature of Google’s sponsored links,” *id.* at 160.

- The testimony of two Google in-house trademark attorneys who “were unable to determine without more research which sponsored links were authorized resellers of ROSETTA STONE products.” *Id.* at 158. The Fourth Circuit found that this testimony should have been accepted “as evidence of actual confusion for summary judgment purposes,” adding that “whether it is entitled to enough weight to carry the day on the ultimate issue *is a matter for trial.*” *Id.* at 159 (emphasis added).
- The report of Rosetta Stone’s confusion expert Kent D. Van Liere, which found that “17 percent of consumers demonstrate actual confusion.” *Id.* (quoting Dr. Van Liere’s Report). The Fourth Circuit stated that the results of Dr. Van Liere’s confusion survey are “clear evidence of actual confusion for purposes of summary judgment.” *Id.*

Prior to the appeal, this Court also held that (i) “Google’s consumer confusion studies have significant bearing on this case and have a tendency to make more probable Rosetta Stone’s trademark infringement claim” (Dkt. 229 at 3); (ii) evidence of third parties’ trademark complaints and prior litigation against Google “are relevant and non-prejudicial, and do not constitute hearsay or lack foundation” (*id.*); (iii) the prior depositions of former Google employee Rose Hagan “are not prejudicial” (*id.* at 4); and (iv) Dr. Van Liere’s opinions are admissible (Dkt. 220).

Disregarding these specific findings of the Fourth Circuit and this Court, Google now seeks to exclude *all* of this evidence at trial, claiming that doing so may “assist the parties in identifying what, if any, material issues of fact remain for trial.” (Google’s Brief in Support of

Omnibus Motion *In Limine* (“Google Br.”) at 1.)² In so arguing, Google simply ignores the history of this case. Google disregards the fact that this Court already *denied* its March 26, 2010 motion to strike the opinions of Dr. Van Liere. (Dkt. 220.) Google brushes aside this Court’s Order denying its April 9, 2010 motion to strike Rosetta Stone’s summary judgment evidence and pays no attention to the Court’s conclusions regarding the admissibility of such evidence. (Dkt. 229.) Google presents to this Court *the same arguments* it presented to the Fourth Circuit in its November 2010 brief, which the Fourth Circuit necessarily found unpersuasive. And Google completely ignores the Fourth Circuit’s April 9, 2012 opinion, which identified numerous material issues of fact that remain for trial. *See Rosetta Stone*, 676 F.3d at 156 (“[W]e conclude that a reasonable trier of fact *could* find that Google intended to cause confusion in that it acted with the knowledge that confusion was very likely to result from its use of the marks.”), 159 (“The district court should have accepted [the testimony of Google’s in-house trademark attorneys] as evidence of actual confusion for summary judgment purposes; whether it is entitled to enough weight to carry the day on the ultimate issue is a matter for trial.”), 160 (“We conclude that there is sufficient evidence in the record to create a question of fact as to consumer sophistication that cannot be resolved on summary judgment.”), and 165 (“We conclude that the evidence recited by the district court is sufficient to establish a question of fact as to whether Google continued to supply its services to known infringers.”).

² Google also asserts that a ruling on its motion *in limine* now will somehow “streamline the parties’ current process of ‘updating’ their discovery.” (Google Br. at 1.) That is not accurate. The vast majority of additional discovery will be completed before the Motion is even heard by the Court. Google’s true intention is to encourage the Court to ignore the holdings of the Fourth Circuit, abandon its earlier rulings, and strike much of Rosetta Stone’s evidence to position Google for another attempt at summary judgment. (*See* Dkt. 247 at 3-4 (indicating Google’s intent to file another motion for summary judgment on Rosetta Stone’s non-dilution claims).)

Google cannot escape these critical rulings. ““When matters are decided by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court.”” *Doe v. Chao*, 511 F.3d 461, 465 (4th Cir. 2007) (quoting *Ins. Group Comm. v. Denver & Rio Grande W. R. Co.*, 329 U.S. 607, 612 (1947)). Moreover, “when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.” *TFWS, Inc. v. Franchot*, 572 F.3d 186, 191 (4th Cir. 2009). Thus, “once the decision of an appellate court establishes the law of the case, it ‘must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal.’” *Id.* (citation omitted).³ Because the Fourth Circuit and this Court already have ruled that the vast majority of the evidence challenged by Google *is admissible*, the mandate rule and the law of the case doctrine compel denial of the vast majority of Google’s motion. (See Sections I-VI, VII.B and VIII, *infra*.)⁴

³ The three narrow exceptions to this rule have no application here. See *TFWS, Inc.*, 572 F.3d at 191 (law of the case doctrine applies ““unless (1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to the issue, or (3) the prior decision was clearly erroneous and would work manifest injustice””) (citation omitted).

⁴ Google cannot avoid these fundamental legal principles by arguing that the admissibility questions presented in the Motion are somehow different from those previously answered by this Court and the Fourth Circuit when considering summary judgment. See *Kennedy v. Joy Techs., Inc.*, 269 F. App’x 302, 308 (4th Cir. 2008) (“In assessing a summary judgment motion, a court is entitled to consider only the evidence that would be admissible at trial.”) (citing *Maryland Highways Contractors Ass’n, Inc. v. State of Maryland*, 933 F.2d 1246, 1251 (4th Cir. 1991)); *Greensboro Prof’l Fire Fighters Ass’n v. City of Greensboro*, 64 F.3d 962, 967 & n.5 (4th Cir. 1995) (courts may consider only competent admissible evidence in considering motions for summary judgment); Fed. R. Civ. P. 56(c)(4) (providing that “[a]n affidavit or declaration used to support or oppose a motion [for summary judgment] must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated”). Nor can Google argue that the Motion raises new arguments not previously advanced. See *Doe*, 511 F.3d at 465 (under the mandate rule, “any issue that could have been but was not raised on appeal is waived and thus not remanded”) (quotation omitted).

With respect to the remaining evidence that Google seeks to exclude, Google's arguments are baseless. Contrary to Google's assertion, Rosetta Stone is not limited to offering "relevant, *non-prejudicial* evidence." (Google Br. at 1 (emphasis added).) To be sure, Rosetta Stone must offer *relevant* evidence – that is, evidence that has any tendency to make a fact of consequence in determining the action "more or less probable than it would be without the evidence." Fed. R. Evid. 401. As discussed below, the challenged evidence readily meets this standard. (See Sections VII.A, IX and X, *infra*.)

But relevant evidence cannot be excluded merely because it is "prejudicial" to Google's position. (See Google Br. at 1.) As the Fourth Circuit has stated, "[e]vidence that is highly probative invariably will be prejudicial to the defense," and "damage to a defendant's case is not a basis for excluding probative evidence." *United States v. Grimmond*, 137 F.3d 823, 833 (4th Cir. 1998). Rather, evidence may be excluded as prejudicial only if "its probative value is substantially outweighed by . . . unfair prejudice." Fed. R. Evid. 403. In the Fourth Circuit, exclusion is warranted only when there is "a genuine risk that the emotions of a jury will be excited to irrational behavior, and this risk is disproportionate to the probative value of the offered evidence." *United States v. Wells*, 163 F.3d 889, 896 (4th Cir. 1998) (quotation omitted). Google has not met – and cannot meet – this standard. (See Sections VII.A, VIII and IX, *infra*.)

For all these reasons, which are discussed more fully below, the Motion should be denied.

ARGUMENT

I. EVIDENCE THAT GOOGLE'S CURRENT AND FORMER CHIEF TRADEMARK COUNSEL COULD NOT TELL THAT THREE SPONSORED LINKS – TWO ADS FOR COUNTERFEITERS AND ONE FOR A ROSETTA STONE COMPETITOR – WERE NOT ADVERTISING THE SALE OF GENUINE ROSETTA STONE SOFTWARE IS ADMISSIBLE

Google first seeks to exclude evidence that two Google employees – current and former Chief Trademark Counsel Rose Hagan and Terri Chen – could not tell by looking at a Google

search results page which advertisements for Rosetta Stone software linked to websites that offered genuine Rosetta Stone products. (See Google Br. at 1-4.) Google argues that “[t]he testimony of these employees does not reflect actionable trademark confusion; it reflects that *they expressed uncertainty about the relationship between the good advertised and Rosetta Stone.*” (*Id.* at 2 (emphasis added).) But the Fourth Circuit already has held that this evidence is relevant and admissible:

Additionally, when testifying on behalf of Google as its Rule 30(b)(6) designees, two of Google’s in-house trademark attorneys were shown a Google search results page for the keyword phrase “Rosetta Stone,” and they were unable to determine without more research which sponsored links were authorized resellers of ROSETTA STONE products. The district court rejected this evidence as proof of actual confusion because the testimony appeared to the district court to “reflect a mere uncertainty about the source of a product rather than actual confusion.” *Rosetta Stone [Ltd. v. Google Inc., 730 F. Supp. 2d 531, 544 (E.D. Va. 2010)]*. **“[U]ncertain[ty about] the origin” of a product, however, is quintessential actual confusion evidence. [Sara Lee Corp. v. Kayser-Roth Corp., 81 F.3d 455, 466 (4th Cir. 1996)]. The district court should have accepted it as evidence of actual confusion for summary judgment purposes; whether it is entitled to enough weight to carry the day on the ultimate issue is a matter for trial.**

Rosetta Stone, 676 F.3d at 158-59 (emphasis added).

Absent from Google’s brief is any discussion of the Fourth Circuit’s analysis of this evidence. Instead, Google attempts to blunt its impact by asserting that “the Fourth Circuit’s opinion did not account for helpful guidance of recent trademark decisions (issued after summary judgment briefing in this case) that explain the nature of internet searches.” (Google Br. at 3.) This statement is just not true. The only “recent trademark decision” cited by Google is the Ninth Circuit’s decision in *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171 (9th Cir. 2010). (See Google Br. at 3.) Google, however, cited *Tabari* in its

Fourth Circuit brief. (*See Spaziano Ex. 1, Brief of Appellee at 16.*)⁵ Remarkably, Google included in that brief *the same quote* that it presents to this Court now as the basis to avoid the Fourth Circuit’s holding. (*See id.*) Thus, the Fourth Circuit had before it this same “helpful guidance” from the Ninth Circuit when it concluded – based on its own decision in *Sara Lee* – that the testimony of Ms. Hagan and Ms. Chen constitutes evidence of actual confusion.⁶ Google cannot avoid this controlling authority which puts to rest the issue of whether this evidence is admissible. *See Doe*, 511 F.3d at 465 (“The mandate rule prohibits lower courts, with limited exceptions, from considering questions that the mandate of a higher court has laid to rest.”). Under this authority, the testimony of Ms. Hagan and Ms. Chen constitutes admissible “evidence of actual confusion” that a jury must consider in resolving “the ultimate issue . . . [at] trial.” *Rosetta Stone*, 676 F.3d at 159.

II. EVIDENCE REGARDING THE CONFUSION EXPERIMENTS CONDUCTED AND RELIED UPON BY GOOGLE IS ADMISSIBLE

Google next seeks to exclude evidence regarding experiments that Google conducted and relied upon in developing the trademark policies at issue in this case. (Google Br. at 4-9.) These experiments fall into two categories: (i) experiments regarding confusion resulting from the appearance of Sponsored Links displayed on Google’s search-results pages (the “Sponsored Link Studies”); and (ii) experiments regarding confusion resulting from the use of trademarks in Sponsored Link text (the “Trademark Studies”). Again, the Fourth Circuit already has resolved

⁵ References to “Spaziano Ex.” herein are to the exhibits attached to the Declaration of Jennifer L. Spaziano submitted concurrently herewith.

⁶ In the opening paragraph of its brief, Google asserts that the challenged evidence must be “considered in light of recent precedent” (Google Br. at 1), thereby implying that the arguments presented differ in some material legal respect from those previously advanced by Google and rejected by this Court and the Fourth Circuit. But the only post-2010 authority cited by Google is the Fourth Circuit’s decision *in this case*.

this issue against Google. The Fourth Circuit found the Sponsored Link Studies relevant to the issue of consumer sophistication, stating:

The evidence also includes an internal Google study reflecting that even well-educated, seasoned Internet consumers are confused by the nature of Google's sponsored links and are sometimes even unaware that sponsored links are, in actuality, advertisements. At the summary judgment stage, we cannot say on this record that the consumer sophistication factor favors Google as a matter of law. **There is enough evidence, if viewed in a light most favorable to Rosetta Stone, to find that this factor suggests a likelihood of confusion.**

Rosetta Stone, 676 F.3d at 160 (emphasis added). Moreover, the Fourth Circuit found the Trademark Studies “probative as to actual confusion in connection with Google’s use of trademarks”:

The record also includes various in-house studies conducted by Google “to analyze user confusion (if any) associated with ads using [trademark] terms.” J.A. 4362. One of the studies showed that “the likelihood of confusion remains high” when trademark terms are used in the title or body of a sponsored link appearing on a search results page. J.A. 4366. The study recommended “that the only effective [trademark] policy . . . is: (1) [to] [a]llow [trademark] usage for keywords; (2) [but] not allow [trademark] usage in ad text – title or body.” *Id.* And, in fact, Google’s official policy change in 2004 that continued to prohibit trademark usage in ad text was based, in part, on these internal studies. The district court concluded these studies were not evidence of actual confusion because the studies did not test consumer impressions of the ROSETTA STONE mark specifically, but of a broad cross-section of 16 different brand names of varying strengths. **We conclude that these studies, one of which reflected that “94% of users were confused at least once,” are probative as to actual confusion in connection with Google’s use of trademarks; indeed, Google determined that there was “[n]o difference between strong and weak trademarks” with respect to confusion.** J.A. 4375.

Id. at 158 (emphasis added). Finally, the Fourth Circuit found the studies relevant to Google’s intent, concluding that “a reasonable trier of fact *could* find that Google intended to cause confusion in that it acted with knowledge that confusion was very likely to result from the use of the marks.” *Id.* at 156 (emphasis in original).

This Court also determined that both the Sponsored Link Studies and the Trademark Studies are relevant, concluding that “Google’s consumer confusion studies have **significant**

bearing on this case **and have a tendency to make more probable Rosetta Stone's trademark infringement claim.**" (Dkt. 229 at 3 (emphasis added).) Yet Google persists in its assertion that the results of these experiments are "irrelevant and unduly prejudicial." (Google Br. at 4-9.) The Court need go no further than the Fourth Circuit's opinion and its own conclusions on this issue: evidence regarding Google's internal studies is highly relevant to the issues in this case and admissible.⁷

III. DR. VAN LIERE'S OPINIONS ARE ADMISSIBLE

Google also seeks to exclude the testimony of Rosetta Stone's confusion expert Dr. Kent D. Van Liere. (Google Br. at 9-15.) This Court, however, already denied a motion by Google to strike Dr. Van Liere's testimony. (Dkt. 220). Moreover, the Fourth Circuit expressly found this evidence relevant and admissible:

Rosetta Stone also presented a consumer confusion survey report from Dr. Kent Van Liere. Dr. Van Liere is an expert in market analysis and consumer behavior, with "experience conducting and using focus groups and surveys to measure consumer opinions . . . regarding products and services," J.A. 5448, and "design[ing] and review[ing] studies on the application of sampling and survey research methods in litigation for a variety of matters including trademark/trade dress infringement," J.A. 5449. Dr. Van Liere "tested for actual confusion regarding the appearance of sponsored links when consumers conducted a Google search for 'Rosetta Stone.'" J.A. 5449. Based on this study, Dr. Van Liere concluded that

a significant portion of consumers in the relevant population are likely to be confused as to the origin, sponsorship or approval of the "sponsored links" that appear on the search results page after a consumer has conducted a Google search using a Rosetta Stone trademark as a keyword and/or are likely to be confused as to the affiliation, endorsement, or association of the websites linked to those "sponsored links" with Rosetta Stone.

⁷ See also Dkt. 183, Rosetta Stone's Response in Opposition to Google's Motion to Strike and Objections to Evidence at 16-19 (explaining in detail why Google's studies are relevant and admissible); Dkt. 215, Response in Opposition to Google's [Initial] Omnibus Motion in Limine at 14-18 (same).

J.A. 5450. Specifically, Dr. Van Liere’s survey “yield[ed] a net confusion rate of 17 percent”—that is, “17 percent of consumers demonstrate actual confusion.” J.A. 5459. **This result is clear evidence of actual confusion for purposes of summary judgment.** Cf. *Sara Lee Corp.*, 81 F.3d at 467 n.15 (suggesting that survey evidence “clearly favors the defendant when it demonstrates a level of confusion much below ten percent” but noting caselaw that “hold[s] that survey evidence indicating ten to twelve percent confusion was sufficient to demonstrate actual confusion”).

The district court, however, concluded that the survey report was “unreliable evidence of actual confusion because the result contained a measure of whether respondents thought Google ‘endorsed’ a Sponsored Link, a non-issue.” *Rosetta Stone*, 730 F. Supp. 2d at 544. Thus, the court did not consider this survey evidence to be viable proof of actual confusion for much the same reason it rejected the deposition testimony of the five individuals who purchased counterfeit software. As we previously stated, however, trademark infringement creates a likelihood of “confusion not only as to source, but also as to affiliation, connection or sponsorship.” 4 *McCarthy on Trademarks* § 23:8. Accordingly, **this evidence should have been added to the other evidence of actual confusion to be considered in the light most favorable to Rosetta Stone.**

Rosetta Stone, 676 F.3d at 159 (emphasis added).

Notwithstanding this Court’s prior Order and the Fourth Circuit’s conclusion, Google *again* asks this Court to exclude Dr. Van Liere’s opinion. Yet Google makes the same arguments here that it presented to the Fourth Circuit – that the survey is not relevant because “Dr. Van Liere’s survey tested only for initial interest confusion” and because “Dr. Van Liere improperly counted as *confused* the respondents who answered that Amazon.com’s and Coupon Cactus’s advertisements were endorsed by Rosetta Stone.” (Google Br. at 9.)⁸ The Fourth Circuit, however, *rejected* these *same* arguments, concluding that the survey constituted

⁸ In particular, Google argued to the Fourth Circuit: “Rosetta Stone’s only justification for not allowing participants to click any of the displayed links was that the survey tested initial interest confusion. JA(45)-5188. Unless this Court adopts the initial interest confusion theory, this renders Dr. Van Liere’s survey irrelevant.” (Spaziano Ex. 1, Brief of Appellee at 25.) Google further argued: “[T]he survey did not show genuine confusion” because “Dr. Van Liere counted as confused all participants who responded that they thought the Amazon.com and CouponCactus.com links were endorsed by Rosetta Stone.” (*Id.* at 27.)

probative evidence of confusion.⁹ This conclusion is binding. The survey is admissible evidence that must be “added to the other evidence of actual confusion” for consideration at trial. *Rosetta Stone*, 676 F.3d at 159.

IV. ANECDOTAL EVIDENCE OF ROSETTA STONE CUSTOMER CONFUSION IS ADMISSIBLE

Next, Google seeks to strike anecdotal evidence of individuals who have been confused by Google Sponsored Links involving Rosetta Stone’s products. (Google Br. at 16-19.) For example, in its verified interrogatory responses, Rosetta Stone stated that:

- Its customer care center has received numerous complaints from individuals who have purchased counterfeit software believing the software to be genuine Rosetta Stone product, with a marked increase in the number of complaints during the period December 9, 2009 through March 8, 2010, when Rosetta Stone observed a proliferation of Sponsored Links to counterfeit sites. (Spaziano Ex. 2 at 2.)
- Rosetta Stone kiosk employees have reported that customers have requested that the kiosk match the prices set forth in a web printout from a counterfeit site and that individuals have attempted to return to the kiosks counterfeit software. (*Id.* at 3.)
- Rosetta Stone call center representatives also have reported that individuals have raised questions about Rosetta Stone’s pricing as a result of information they have gathered through the internet. (*Id.*)
- Individuals who purchased genuine Rosetta Stone software from Amazon.com have attempted to return the software to Rosetta Stone under the six-month guarantee that is available only when the product is purchased directly from Rosetta Stone. (*Id.*)

Employees deposed by Google also testified regarding similar evidence of customer confusion. (See, e.g., Spaziano Ex. 3, Leigh Dep. at 77:13-78:18, 79:17-80:9, 135:19-136:8, 137:5-19, 140:12-141:24, 147:1-149:12, 151:9-16.)

⁹ See also Dkt. 148, Rosetta Stone’s Opposition to Google Inc.’s Motion to Exclude Expert Report and Opinion of Dr. Kent Van Liere (explaining in detail why Dr. Van Liere’s opinions are relevant and admissible).

Google asserts that such evidence fails to satisfy “Federal Rules of Evidence 401 through 403.” (Google Br. at 16; *see also id.* at 17 (asserting that customer service complaints are “almost entirely irrelevant to this case”).) The Fourth Circuit, however, concluded that this anecdotal evidence *is relevant and admissible*:

Rosetta Stone presented evidence that from April 1, 2009, through December 9, 2009, Rosetta Stone’s customer care center received 123 complaints “from individuals who ha[d] purchased pirated/counterfeit software believing the software to be genuine Rosetta Stone product,” J.A. 5427, and Rosetta Stone received 139 additional complaints from December 9, 2009, through March 8, 2010. Although this evidence does not indicate whether each customer logging a complaint made the purchase via a sponsored link, **it is reasonable, for purposes of summary judgment, to infer that a great number of these individuals were confused by the apparent relationship between Rosetta Stone and the sponsored link given that Google began allowing trademarks to be displayed in the ad text in 2009 and in light of the evidence showing a substantial “proliferation of sponsored links to pirate/counterfeit sites.”**

Rosetta Stone, 676 F.3d at 158 (emphasis added). As the Fourth Circuit recognized, Google’s arguments go to the weight – not the admissibility – of this evidence.

Google also asserts that such evidence is excludable hearsay because “Google would not have the ability to cross-examine the source of the complaint, assess if and how the customer actually used Google, or determine the precise source of any alleged confusion.” (Google Br. at 19.) The Fourth Circuit’s opinion, however, resolves this issue too as the Fourth Circuit could not have considered this evidence had it been hearsay. *Kennedy*, 269 F. App’x at 308 (“Hearsay evidence, which is inadmissible at trial, cannot be considered on a motion for summary judgment.”). In short, anecdotal evidence of consumer confusion is “highly probative of actual confusion.” *Lyons P’ship L.P. v. Morris Costumes Inc.*, 243 F.3d 789, 804 (4th Cir. 2001). It cannot be excluded on the basis of hearsay or because Google believes it is prejudicial to its legal position. *See id.* (“[T]he existence of actual confusion is often dispositive of a trademark infringement analysis.”) (citing *Sara Lee*, 81 F.3d at 467).

V. THE SPREADSHEET MAINTAINED BY ROSETTA STONE ENFORCEMENT MANAGER JASON CALHOUN REGARDING NOTICE TO GOOGLE OF PIRATE/COUNTERFEIT SPONSORED LINK ADVERTISEMENTS IS ADMISSIBLE

Google also argues that Rosetta Stone should not be permitted to introduce a spreadsheet maintained by Rosetta Stone Enforcement Manager Jason Calhoun that shows “the dates upon which Rosetta Stone found a pirate/counterfeit Sponsored Link advertisement on Google, the date upon which Rosetta Stone advised Google that the Sponsored Link advertisement was fraudulent, the domain names associated with each such Sponsored Link advertisement, the text of each such Sponsored Link advertisement, and the date and substance of Google’s response.” (Google Br. at 17.) Google included this argument in a section of its brief relating to “evidence regarding purported confusion.” (*See id.* at 16-19.) The spreadsheet at issue, however, does not purport to track consumer confusion. Rather, it summarizes Rosetta Stone’s communications *with Google* regarding pirate/counterfeit Sponsored Link advertisements and thus provides powerful evidence of Google’s contributory infringement. *See Rosetta Stone*, 676 F.3d at 163 (referring to the spreadsheet as “significant evidence” regarding “Google’s purported allowance of known infringers and counterfeiters to bid on the Rosetta Stone marks as keywords”).

In seeking to exclude this spreadsheet, it appears that Google misunderstands the contents of the spreadsheet and its origins. In this regard, Google argues that the spreadsheet “is a collection of documents from two databases (‘Parature’ and ‘Quickbase’)” that “allegedly evidence [] consumer complaints tied to counterfeit purchases from Google.” (Google Br. at 17.) This is patently incorrect.¹⁰

¹⁰ Although not relevant to the admissibility of the spreadsheet, the Fourth Circuit already has concluded that evidence of the consumer complaints reflected in the Parature and Quickbase databases is admissible. (*See* Section IV, *supra.*)

As Mr. Calhoun explained in the declaration he submitted in connection with summary judgment, “Rosetta Stone’s Enforcement Team actively employs its own piracy/counterfeit surveillance practices, including, among other measures, manual monitoring of paid advertisements on Google’s search-results pages.” (Spaziano Ex. 4, Calhoun Decl. ¶ 3.) “At least once per day, Enforcement Team members enter up to 102 branded search terms into Google’s search engine and capture screenshots of the search results.” (*Id.*) “Thereafter, Sponsored Link advertisements generated by these searches are reviewed to determine whether the advertisers are selling pirated, counterfeit, or unauthorized reproductions of Rosetta Stone’s software.” (*Id.*) “The Enforcement Team notifies Google whenever it identifies a Sponsored Link offering counterfeit or pirated Rosetta Stone software.” (*Id.*) It is these efforts – and not reports tracked in the Parature and Quickbase database – that underlie Mr. Calhoun’s spreadsheet. (*Id.* ¶ 5 (“Attached hereto as Exhibit C is a true and correct copy of a spreadsheet reflecting the dates upon which Rosetta Stone found a pirate/counterfeit Sponsored Link advertisement on Google, the date upon which Rosetta Stone advised Google that the Sponsored Link advertisement was fraudulent, the domain names associated with each such Sponsored Link advertisement, the text of each such Sponsored Link advertisement, and the date and substance of Google’s response.”).) No basis exists for the Court to exclude the spreadsheet.

Indeed, this Court already has held that the spreadsheet “does not constitute inadmissible hearsay and does not lack foundation,” finding that “Mr. Calhoun, in his capacity as Rosetta Stone’s Enforcement Manager, can authenticate the spreadsheets that comprise Exhibit C, which summarize the numerous occasions in which Rosetta Stone notified Google that many of Google’s Sponsored Link advertisers were selling counterfeit Rosetta Stone products.” (Dkt. 229 at 2.) Accordingly, the spreadsheet is admissible.

VI. THE TESTIMONY OF STEVE DUBOW IS ADMISSIBLE

In a footnote, Google suggests that the Court also should exclude the testimony of confusion witness Steve Dubow because “he did not purchase his allegedly counterfeit Rosetta Stone software through a sponsored link advertisement.” (Google Br. at 19-20 n.1.) Although Mr. DuBow could not confirm at his deposition exactly where the link from which he purchased counterfeit software appeared on the Google search results page, his records establish that he purchased the software on October 6, 2009 from bossdisk.com, a Sponsored Link that Rosetta Stone complained to Google about on the *very same day*, October 6, 2009. (See Spaziano Ex. 5, Dubow Tr. at 19:15-20:8, 27:10-16; Spaziano Ex. 4, Calhoun Ex. C at 1419.) Google has not – and cannot – offer any evidence to establish that the bossdisk.com website appeared in its organic search results.

Indeed, Google advanced this same argument to this Court in its Motion to Strike and Objections to Evidence. (Dkt. 156 at 10.) This Court rejected those arguments, concluding that the testimony was “relevant” because it “concern[ed] Rosetta Stone’s allegations that consumers were actually confused as to the origin of the Rosetta Stone products they purchased, which aims to establish an essential element of Rosetta Stone’s trademark infringement claim.” (Dkt. 229 at 3.) Moreover, the Fourth Circuit quoted extensively from Mr. Dubow’s testimony in finding that Rosetta Stone presented evidence of actual confusion. *See Rosetta Stone*, 676 F.3d at 156-157.

Perhaps recognizing the weakness of its argument with respect to Mr. Dubow, Google also argues that because “four other confusion witnesses are slated to testify, Mr. Dubow’s testimony would be cumulative and should be excluded on that basis as well.” (Google Br. at 20 n.1.) This is a remarkable statement given Google’s repeated refrain that the five actual confusion witnesses proffered by Rosetta Stone were *de minimis*.

VII. THE PRIOR DEPOSITION TESTIMONY OF CURRENT AND FORMER GOOGLE EMPLOYEES IS ADMISSIBLE

Next, Google seeks to exclude the testimony from Google co-founder and president Larry Page, its former Chief Trademark Counsel Rose Hagan (who was designated as a Rule 30(b)(6) witness in this case), and its former Group Product Manager Prashant Fuloria. (Google Br. at 20-23.) The testimony Google seeks to exclude was given in actions that raised the *same* claims regarding the *same* practices that Rosetta Stone challenges here. The testimony, moreover, does not pertain to the specific trademarks at issue in those cases but rather to Google's general trademark practices. As discussed below, no reason exists to exclude this testimony. Indeed, this Court denied Google's motion to strike Ms. Hagan's testimony in connection with summary judgment, finding the testimony "not prejudicial." (Dkt. 229 at 4.)

A. Larry Page's Prior Testimony Is Admissible

In January 2007, Google co-founder and president Larry Page was compelled to testify in a case involving American Blind and Wallpaper Factory's claim that Google's trademark practices resulted in trademark infringement. During that deposition, Mr. Page – Google's co-founder and president – testified that (i) he did not know in 2007 whether it was "okay" for an advertiser to buy its competitors' trademarks as keywords in connection with Google's advertising program; (ii) www.oogle.com was "obviously confusing" with www.google.com; (iii) he believed in 2007 that the use of trademarks in ad text could cause confusion; and (iv) he desired to "differentiate" Google from its competitors. (See Dkt. 188, Oblak Decl. Ex. 24 at 70:13-22, 72:8-19, 82:17-83:7 and 97:19-98:4.) This testimony is highly relevant to the issues in this case as these are exactly the same points that Rosetta Stone is trying to establish: (i) it is not "okay" for an advertiser to buy its competitors' trademarks as keywords in connection with Google's advertising program; (ii) advertisers that use websites similar to www.rosettastone.com

or that use “rosetta stone” in their URLs are “obviously confusing”; (iii) the use of trademarks in ad text *does* cause confusion; and (iv) it is appropriate for trademark holders to want to differentiate themselves from their competitors. That Mr. Page’s testimony was directed at competitors does not render Mr. Page’s testimony any less relevant (*see* Google Br. at 21) because, in practice, Google regularly permits competitors to use Rosetta Stone’s trademarks in their Sponsored Link text. Mr. Page’s testimony thus is probative as to whether these *practices* result in confusion.

Moreover, far from supporting Google’s motion to exclude, the fact that Judge Buchanan granted Google’s motion for a protective order, thereby precluding Rosetta Stone from deposing Mr. Page in this case, supports the conclusion that Mr. Page’s testimony should be admitted. (*Id.*) In this regard, Google cannot have it both ways – it cannot preclude Mr. Page from being deposed in this case because he is too important and too busy to sit for a deposition and then seek to exclude his prior deposition testimony on the ground that it was offered in different litigation. No reason exists to exclude this relevant testimony.

B. The Prior Testimony Of Rose Hagan And Prashant Fuloria Is Admissible

Nor is there any reason to exclude the prior testimony of Rose Hagan and Prashant Fuloria regarding Google’s general trademark practices. Rosetta Stone intends to present the following testimony from Ms. Hagan’s September 30, 2004 deposition in the *GEICO* case:

Q: The pending question is what was your factual basis for making the statement to him that the new [2004] policy was designed to reduce user confusion.

* * *

A: Generally if terms are used in the ad text, if trademark terms are used in the ad text by parties who are not the trademark owner, there seems to be more user – potential user confusion about whether or not that advertiser is somehow affiliated with the trademark owner or offers those products.

(Spaziano Ex. 6, Hagan Tr. at 93:18-94:5.) Rosetta Stone intends to present the following testimony from Ms. Hagan's November 29, 2006 deposition in the *CNG* case:

Q: Okay. On 61837, "Why's the Policy Chan[ging]? The] third point, "The policy aims to avoid mislead[ing] users into believing particular ads are sponsored [or] affiliated with a trademark company when they a[re not.] How does it do that?"

A: By making the advertiser remove the trademarked term from the ad text.

Q: Okay. This talks about why the policy is changing. How did the change in policy further t[hat] objective, if at all?

A: Actually that was a goal under the old po[licy] as well, but I think this was explaining why the p[olicy] change was only as to key words, why we were having a policy with regard to the ad text.

Q: So you're not – so this isn't intended to suggest that the change was done to avoid misl[eading] users?

A: Retaining the ad text portion of the compl[aint] procedure was done to avoid misleading users.

(Spaziano Ex. 7, Hagan Tr. at 90:12-91:5.) Google obviously anticipated the relevance of this testimony as it used the transcripts of Ms. Hagan's testimony in the *GEICO* and *CNG* cases to prepare one of its Rule 30(b)(6) witnesses in this case.¹¹ With respect to Mr. Fuloria, Rosetta Stone intends to present testimony regarding the confusion experiments conducted by Google in the 2003/2004 time frame. (Dkt. 188, Oblak Decl. Ex. 25 at 22:4-20, 23:8-18, 23:24-24:9, 25:23-26:23, 28:1-29:25, 31:14-33:11, 34:4-37:18, 40:9-23, 41:20-45:3, 45:24-47:1, 47:22-48:10, 49:14-50:4, 51:19-52:7, 57:1-7, 77:14-78:1, 79:6-80:16, 83:6-17, 85:16-89:2, 98:14-99:25.) This

¹¹ Google's Rule 30(b)(6) witness Terri Chen testified that she reviewed Rose Hagan's testimony from the *GEICO* and *CNG* cases in preparing for her February 23, 2010 deposition in this case. (Spaziano Ex. 8 at 20:24-21:8 ("Q: So, from the Geico case, do you remember how many [transcripts] you reviewed? A: Yes. One. Q: Whose deposition was that? A: Rose Hagan. Q: From the CNG case, how many depositions did you review? A: One. Q: And whose deposition was that? A: Rose Hagan."))

testimony is not case-specific or trademark-specific and it pertains directly to the claims that Rosetta Stone is advancing here.

Google argues that this testimony should be excluded because Rosetta Stone did not depose Mr. Fuloria or question Ms. Hagan regarding the substance of her prior testimony during her deposition in this case. (Google Br. at 22.) But Rosetta Stone was not obligated to do either. Instead, during Ms. Hagan’s deposition in this case – where she was designated as a Rule 30(b)(6) witness by Google – Rosetta Stone confirmed that Ms. Hagan testified truthfully and accurately in both the *GEICO* and *CNG* cases and that she made only minor typographical changes to the deposition transcripts. (Spaziano Ex. 9 at 17:9-19:24.)

The fact that Google cannot compel the attendance of these witnesses at trial also does not provide a basis for excluding this testimony. (Google Br. at 22.) Google was free to ask questions of Ms. Hagan at her deposition and to depose Mr. Fuloria and offer *that* testimony at trial. That Google did not do so provides no basis for excluding this highly relevant, admissible evidence. (*See* Dkt. No. 229 at 4 (holding use of Hagan transcripts “not prejudicial because they were produced by Google to Rosetta Stone”).)

In short, while Google may want to exclude pre-2009 testimony because it is harmful to Google’s position with respect to its 2009 policy change, there is no legal basis to exclude this admissible, highly relevant testimony.¹²

¹² Perhaps recognizing the futility of its efforts to exclude this evidence, Google asserts that, if admitted, its use should be limited to “calculation of damages for the alleged harm *at the time the policies existed.*” (Google Br. at 23.) This makes no sense. The testimony of Mr. Page, Ms. Hagan and Mr. Fuloria shows Google’s knowledge that confusion was likely to result from the policy implemented in 2009 and is therefore relevant both to Google’s intent when it implemented the 2009 policy change – for purposes of the likelihood of confusion analysis – and to willfulness – for purposes of damages resulting from the 2009 policy change. Moreover, contrary to Google’s assertion (*see id.* at 7), the Fourth Circuit has not concluded that Google did not engage in willful infringement. It found only that there was no evidence
(*cont’d*)

VIII. EVIDENCE REGARDING THIRD-PARTY TRADEMARK COMPLAINTS AND PRIOR LITIGATION IS ADMISSIBLE

In response to the Court’s order directing Google to produce a subset of the trademark complaints it has received from third parties, Google produced more than 100,000 pages that demonstrate that thousands of trademark owners lodged complaints with Google regarding the infringing nature of Google’s practices. Based on its review of approximately 65,450 pages of these documents, Rosetta Stone identified 9,862 complaints from 5,024 trademark owners during the period 2004 to 2009. In addition to these complaints, Rosetta Stone is aware of at least eighteen lawsuits – seven of which were filed before 2009 – in which trademark owners have contended that Google’s practices infringed their trademarks.¹³ In one of the pre-2009 lawsuits, Judge Brinkema of this Court found the evidence before her “sufficient to establish a likelihood of confusion regarding those Sponsored Links in which [plaintiff’s trademark] appears either in

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that Google “intentionally copied or adopted Rosetta Stone’s mark *in an effort to pass off its own goods or services*” and thus that Rosetta Stone was not entitled to a presumption of confusion. *See Rosetta Stone*, 676 F.3d at 150 n.5 (emphasis added).

¹³ *See, e.g., Google Inc. v. Am. Blind & Wallpaper Factory, Inc.*, 5:03-cv-05340-JF (N.D. Cal. counterclaim filed Nov. 26, 2003); *GEICO v. Google, Inc. et al.*, 1:04-cv-00507-LMB-TCB (E.D. Va. filed May 4, 2004); *CNG Fin. Corp. v. Google, Inc.*, 1:06-CV-00040 (S.D. Oh. filed Jan. 24, 2006); *Vulcan Golf, LLC et al. v. Google, Inc.*, No. 07CV3371 (N.D. Ill. filed June 15, 2007); *Rescuecom Corp. v. Google Inc.*, 5:04-cv-01055-NAM-GHL (N.D.N.Y. filed Sept. 7, 2007); *Am. Airlines Inc. v. Google Inc.*, 4:07-cv-00487-A (N.D. Tex. filed Aug. 16, 2007); *Global Law, LLP v. Google, Inc.*, 3:08-CV-05147 (N.D. Cal. filed Nov. 12, 2008); *Ezzo v. Google Inc. et al.*, 2:09-CV-00159 (M.D. Fla. Mar. 17, 2009); *FPX, LLC v. Google, Inc. et al.*, 2:09-CV-00142 (E.D. Tex. filed May 11, 2009); *John Beck Amazing Profits, LLC v. Google Inc.*, 2:09-CV-00151 (E.D. Tex. filed May 14, 2009); *Soaring Helmet Corp. v. Bill Me Inc. et al.*, 2:09-cv-00789-JLR (W.D. Wash. filed June 6, 2009); *Ascentive, LLC v. Google, Inc.*, 2:09-cv-02871-JS (E.D. Pa. filed June 25, 2009); *Flowbee Int’l Inc. et al. v. Google, Inc.*, 2:09-cv-00199 (S.D. Tex. filed Aug. 13, 2009); *Jurin v. Google Inc.*, 2:09-cv-03065-MCE-KJM (E.D. Cal. filed Nov. 3, 2009); *Parts Geek, LLC v. U.S. Auto Parts Network, Inc. et al.*, 3:09-cv-05578-MLC-LHG (D.N.J. filed Nov. 2, 2009); *Dazzlesmile et al. v. Epic Adver. et al.*, 2:09-cv-01043-PMW (D. Utah filed Nov. 23, 2009); *Cybersitter, LLC v. Google, Inc. et al.*, 2:12-CV-05293 (C.D. Cal. filed June 18, 2012); *Home Decor Ctr. v. Google, Inc.*, CV12-05706 (C.D. Cal. notice of removal filed July 2, 2012).

the heading or text of the ad.” *GEICO v. Google, Inc.*, No. 1:04CV507, 2005 WL 1903128, at *7 (E.D. Va. Aug. 8, 2005). Notwithstanding these complaints, prior lawsuits and judicial findings, Google *broadened* its trademark policy in the United States in June 2009 to expressly permit certain of its customers to use trademarks in Sponsored Link text.

Google seeks to exclude all evidence of these trademark complaints, lawsuits and findings on the grounds that such evidence is irrelevant, inadmissible hearsay and unduly prejudicial. (Google Br. at 23-27.) However, this Court already has rejected these arguments, holding that the trademark complaints “**are relevant and non-prejudicial, and do not constitute hearsay or lack foundation** because (1) they are relevant to establishing Google’s knowledge and intent for purposes of Rosetta Stone’s trademark infringement claim; (2) they were not being offered to prove the truth of the matter asserted; and (3) they were produced in response to the Court’s order directing Google to produce all trademark complaints.” (Dkt. 229 at 3 (emphasis added)); *see also 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 definitively 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.”).¹⁴

¹⁴ The cases cited by Google for the contrary position are inapposite as they involved evidence of complaints arising from “dissimilar events,” evidence involving “different decision-makers” and “different departments,” and “collateral misconduct.” (See Google Br. at 24.) For example, in *Vukadinovich v. Zentz*, a Section 1983 action against a city and several police officers, the court excluded evidence of prior complaints against the officers because
(*cont’d*)

The trademark complaints and prior lawsuits, moreover, are relevant to damages as Google's knowledge demonstrates willfulness – “having knowledge that one's conduct constitutes infringement or showing reckless disregard for [trademark] owner's rights.” *Agri-Supply Co. Inc. v. Agrisupply.com*, 457 F. Supp. 2d 660, 666 (E.D. Va. 2006) (quotation omitted). Possessing thousands of complaints from trademark owners that its practices resulted in trademark infringement and a judicial finding that Google's use of GEICO's trademark in the text of Sponsored Links resulted in a likelihood of confusion, Google nevertheless *broadened* its United States trademark policy to expressly permit certain customers to use trademarks in the text of Sponsored Links. This evidence demonstrates, at a minimum, Google's reckless disregard for trademark owners' rights and therefore is relevant to damages.

The cases cited by Google for the contrary position are inapposite as they all involve situations where the plaintiff sent the defendant a cease and desist letter. (Google Br. at 24-25.)

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they “arose from dissimilar events and were filed for a number of different reasons,” noting that “to be admissible, such evidence must pertain to events similar to the events in the instant case.” 995 F.2d 750, 756 (7th Cir. 1993). In *Palmer v. Board of Regents of the University System of Georgia*, a Title VII action, the court affirmed the exclusion of evidence relating to other lawsuits against the University System, finding that they “involved different decision-makers, different departments, and different hiring processes.” 208 F.3d 969, 973 (11th Cir. 2000). In *Westmont Tractor Co. v. Touche Ross & Co.*, an unpublished accounting case, the court affirmed the district court's decision to exclude evidence regarding an unrelated transaction that the court found to be “collateral.” 862 F.2d 875, 1988 WL 126273, at *2 (9th Cir. Nov. 10, 1988). *Lifshitz v. Walter Drake & Sons, Inc.* did not involve allegations of wrongdoing at all but rather the defendant's attempt to introduce a design certificate that undermined the plaintiff's assertion that his product was original. 806 F.2d 1426, 1431-32 (9th Cir. 1986). The court affirmed the exclusion of this evidence, finding that there was a “substantial danger” that the “jury would mistakenly conclude that the case before it involved a patent issue.” *Id.* at 1432. And in *Coursen v. A.H. Robins Co., Inc.*, a products liability case involving the Dalkon Shield, the court affirmed the district court's decision to exclude evidence that the defendant published false pregnancy rates, finding that “the overwhelming thrust of this evidence was to have the jury believe that because defendant lied about the effectiveness of the Dalkon Shield, it lied about the safety of the device as well.” 764 F.2d 1329, 1335 (9th Cir. 1985).

The fact that courts have declined to find willful infringement where a defendant in good faith disagrees with a single trademark holder's claim of infringement does not support Google's assertion that thousands of complaints and a court finding of confusion are irrelevant to the question of willfulness. Moreover, the cases cited by Google do not even suggest that prior complaints of trademark infringement are not *admissible*.

While Google understandably does not want the jury to know that it had received thousands of complaints regarding its trademark practices and a judicial finding of confusion at the time it broadened its policies in 2009, the admission of this relevant evidence is entirely appropriate and Google has provided no legitimate basis to exclude this evidence.¹⁵

IX. EVIDENCE REGARDING GOOGLE'S "SUGGESTION" OF TORRENT WEBSITES TO ITS USERS IS ADMISSIBLE

As Google explains in its motion *in limine*, when an Internet user inputs a search query, a drop down box appears suggesting possible searches that may complete or refine the user's query. (Google Br. at 27.) When an Internet user input "Rosetta Stone" as a search query on Google's home page, two of the possible searches *suggested* by Google were "Rosetta Stone Torrent" and "Rosetta Stone Spanish Torrent." A "torrent" site is a site that offers the free – and illegal – download of pirated software. For example, the first link that typically appeared when a user

¹⁵ The cases cited by Google in support of its prejudice argument are factually distinguishable. (See Google Br. at 26.) For example, in *Adams v. Cooper Industries, Inc.*, a case arising out of contamination caused by chemical emissions from an electric plant, the court excluded epidemiological studies regarding the incidence of cancer in two zip codes. No. 03-476-JBC, 2006 WL 3759619, at *3 (E.D. Ky. Dec. 19, 2006). In *Hott v. VDO Yazaki Corp.*, a sexual harassment case, the court excluded "rumors and innuendo regarding sexual affairs at VDO and speculation that promotions at VDO were regularly awarded to the sexual partners of supervisors." No. 94-00064-H, 1996 WL 650966, at *1-2 (W.D. Va. Nov. 6, 1996). And in *Fiberglass Insulators, Inc. v. Dupuy*, the court excluded, pursuant to Federal Rule of Evidence 408, "statements made by attorneys in the course of settling prior related litigation between the same parties," finding that "the public policy of encouraging settlement . . . requires exclusion of such testimony." 856 F.2d 652, 652 (4th Cir. 1988).

clicked on the Google suggested torrent link was thepiratebay.org, a notorious site for illegally downloading software. Google's inclusion of, and refusal to filter, the term torrent from its "Google Suggest" tool is a relevant company practice and is indicative of its disregard for the intellectual property rights of third parties and therefore relevant to the issues in this case. *See Agri-Supply Co. Inc.*, 457 F. Supp. 2d at 666 (defining willfulness in trademark infringement context as "having knowledge that one's conduct constitutes infringement or *showing reckless disregard for [trademark] owner's rights*") (quotation omitted) (emphasis added). Google seeks to exclude evidence and argument referring to "Rosetta Stone Torrent" in the Google Suggest tool on the ground that Google "spends significant resources fighting counterfeiting activities." (Google Br. at 28.) Such argument, however, is an argument Google can make to the jury. It does not provide a basis for excluding this relevant evidence.

X. EVIDENCE REGARDING GOOGLE'S TRADEMARK POLICIES FOR FOREIGN JURISDICTIONS IS ADMISSIBLE

Finally, Google argues that the Court should exclude reference to Google's trademark policies for foreign jurisdictions because such policies "are not relevant to its compliance with U.S. trademark law." (Google Br. at 28.) This argument stems from the fact that Google's 2004 policy change, which permitted customers to bid on trademarks as keywords, applied only in the United States and Canada, and its 2009 policy change, which permitted certain customers to use trademarks in Sponsored Link text, applied only in the United States.

Although Rosetta Stone does not intend to introduce Google's trademark policies for foreign jurisdictions as evidence of Google's violation of United States law, the fact that Google has different practices in the United States than it has in other jurisdictions is relevant to *many* issues in this case, including (i) that the 2004 and 2009 policy changes at issue were not necessary to Google's business; (ii) that the practices at issue in this case do not affect Google's

search engine in any respect; and (iii) that Google has the technology and know-how to stop the infringing conduct if it chooses. These facts are relevant to the jury's understanding of the practices that Rosetta Stone challenges, Google's own abilities to address those challenged practices and Google's liability for the infringement of its customers.

CONCLUSION

For all the foregoing reasons, the Motion should be denied in its entirety.

Respectfully submitted,

August 24, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2012, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system that will then send a notification of such filing (NEF) to the following:

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