

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 /TRJ)

**DEFENDANT GOOGLE INC.'S REPLY BRIEF IN SUPPORT OF  
OMNIBUS MOTION IN LIMINE**

## TABLE OF CONTENTS

	<u>Page</u>
ARGUMENT .....	1
I. ROSETTA STONE MISSTATES THE NATURE OF THE FOURTH CIRCUIT’S AND THIS COURT’S RULINGS .....	1
II. THE COURT SHOULD EXCLUDE EVIDENCE AND ARGUMENTS THAT HAVE MINIMAL RELEVANCE TO LEGALLY ACTIONABLE “CONFUSION” .....	4
A. Evidence of Google’s Employees’ “Confusion” Should Be Excluded. ....	4
B. Google’s “Sponsored Link” Experiments Should Be Excluded. ....	5
C. Dr. Van Liere’s “Confusion” Opinions Should Be Excluded. ....	7
D. Anecdotal and Tertiary Evidence Regarding Purported Confusion Should Be Excluded. ....	9
III. PREJUDICE FROM UNRELATED EVIDENCE SUBSTANTIALLY OUTWEIGHS ANY SUPPOSED RELEVANCE .....	12
A. Testimony From Other Litigations Should Be Excluded. ....	12
1. Larry Page’s Testimony From A Different Lawsuit Should Be Excluded. ....	12
2. Prashant Fuloria and Rose Hagan’s Testimony From Other Actions Should Be Excluded. ....	13
B. Third Parties’ Trademark Complaints Should Be Excluded. ....	14
IV. EVIDENCE OF FACTS NOT AT ISSUE IN THIS LAWSUIT IS UNDULY PREJUDICIAL AND IRRELEVANT .....	15
A. Evidence of Rosetta Stone “Torrent” in Google Suggest Should Be Excluded. ....	15
B. Google’s Trademark Policies And Practices for Foreign Jurisdictions Should Be Excluded. ....	16
CONCLUSION.....	17

**TABLE OF AUTHORITIES**

**Page**

**Cases**

Adams v. Cooper Indus. Inc.,  
2006 WL 3759619 (E.D. Ky. Dec. 19, 2006) .....15

Am. Winds Flight Acad. v. Garmin Int'l,  
2010 WL 3783136 (N.D. Ohio Sept. 17, 2010).....2

Anderson v. Liberty Lobby, Inc.,  
477 U.S. 242 (1986).....3

CDX Liquidating Tr. v. Venrock Associates,  
411 B.R. 591 (N.D. Ill. 2009) .....10

Fuji Photo Film Co. v. Shinohara Shoji Kabushiki Kaisha,  
754 F.2d 591 (5th Cir. 1985) .....16

Garraghty v. Jordan,  
830 F.2d 1295 (4th Cir. 1987) .....11

Goldberg v. B. Green & Co., Inc.,  
836 F.2d 845 (4th Cir. 1988) .....2, 3

Hott v. VDO Yazaki Corp.,  
1996 WL 650966 (W.D. Va. Nov. 6,1996) .....15

Kennedy v. Joy Technologies, Inc.,  
269 F. App'x 302 (4th Cir. 2008) .....2

Lifshitz v. Walter Drake & Sons, Inc.,  
806 F.2d 1426 (9th Cir. 1986) .....15, 16

New York v. Microsoft Corp.,  
224 F. Supp. 2d 76 (D.D.C. 2002), aff'd, 373 F.3d 1199 (D.C. Cir. 2004) .....10, 13

PBM Prods., LLC v. Mead Johnson & Co.,  
639 F.3d 111 (4th Cir. 2011) .....6, 8

Palmer v. Bd. of Regents of Univ. Sys. of Ga.,  
208 F.3d 969 (11th Cir. 2000) .....14

Prestonettes, Inc. v. Coty,  
264 U.S. 359 (1924).....9

Rambus, Inc. v. Infineon Technologies AG,  
222 F.R.D. 101 (E.D. Va. 2004) .....15

Rosetta Stone, Ltd. v. Google, Inc.,  
676 F.3d 144 (4th Cir. 2012) .....3, 5, 6, 7, 10

Seabulk Offshore, Ltd. v. Am. Home Assur. Co., 377 F.3d 408 (4th Cir. 2004) .....	2
Shell Oil Co. v. Commercial Petroleum, Inc., 928 F.2d 104 (4th Cir. 1991) .....	9
Simms v. Mut. Benefit Ins. Co., 137 F. App'x 594 (4th Cir. 2005).....	2
Toyota Motor Sales, USA, Inc. v. Tabari, 610 F.3d 1171 (9th Cir. 2010) .....	4, 8
Tre Milano LLC v. Amazon.com, Inc., No. B234753, 2012 WL 3594380 (Ca. Ct. App. Aug. 22, 2012) .....	11
U.S. v. Wellons, 32 F.3d 117 (4th Cir. 1994) .....	7
United States v. Love, 134 F.3d 595 (4th Cir. 1998) .....	3
United States v. Simpson, 910 F.2d 154 (4th Cir. 1990) .....	3
United States v. Udeozor, 515 F.3d 260 (4th Cir. 2008) .....	6
Vukadinovich v. Zentz, 995 F.2d 750 (7th Cir. 1993) .....	14
Westberry v. Gislaved Gummi AB, 178 F.3d 257 (4th Cir. 1999) .....	9
Westfield Ins. Co. v. Harris, 134 F.3d 608 (4th Cir. 1998) .....	15
Westmont Tractor Co. v. Touche Ross & Co., 1988 WL 126273 (9th Cir. Nov. 10, 1988).....	14

**Statutes**

18B Fed. Prac. & Proc. Juris. § 4478 (2d ed.) .....	3
Fed. R. Evid. 403 .....	passim
Rule 26(a)(3) .....	14

The purpose of Google’s Omnibus Motion in Limine is to ensure that only relevant evidence that is more probative than prejudicial is put before the jury. Neither this Court nor the Fourth Circuit has considered the probative value of the evidence Google seeks to exclude relative to the considerations of Rule 403 of the Federal Rules of Evidence, because on a motion for summary judgment, all inferences must be taken in favor of the non-movant, without considering the relative value of the evidence. Rosetta Stone’s Opposition rests on the mistaken assertion that the Fourth Circuit and this Court have already determined that “the vast majority of [Rosetta Stone’s] evidence [is] relevant and admissible,” and, by extension, support Rosetta Stone’s case. (Dkt. No. 261, Rosetta Stone’s Opposition to Google’s Omnibus Motion in Limine (hereinafter “RS Opp.”), at 1.) That flawed premise mischaracterizes the Fourth Circuit’s standard of review on appeal and this Court’s obligations on remand. Unresolved evidentiary issues under the Federal Rules of Evidence are squarely within this Court’s authority to decide at this stage, and Google’s Motion in Limine is the proper method for raising them. Rosetta Stone’s arguments about the law of the case and the mandate rule are thus misplaced, and its remaining arguments fail to rebut the numerous reasons for striking the evidence that is the subject of this motion. Google’s Motion in Limine should be granted in its entirety.

## **ARGUMENT**

### **I. ROSETTA STONE MISSTATES THE NATURE OF THE FOURTH CIRCUIT’S AND THIS COURT’S RULINGS**

Rosetta Stone misunderstands the Court of Appeals’ role in reviewing a grant of summary judgment. Contrary to Rosetta Stone’s assertions, the Court of Appeals did not find “the vast majority of this evidence to be relevant and admissible,” nor does “the mandate rule and the law of the case doctrine compel denial of Google’s motion with respect to such evidence.” (Dkt. No. 261, RS Opp. at 1.) The Court of Appeals simply applied presumptions in favor of Rosetta Stone dictated

by the procedural posture of the case. See e.g., *Seabulk Offshore, Ltd. v. Am. Home Assur. Co.*, 377 F.3d 408, 418 (4th Cir. 2004) (“We review de novo a district court’s award of summary judgment, viewing the facts and all inferences drawn properly therefrom in the light most favorable to the nonmoving party.”). Moreover, as Rosetta Stone’s cited precedent explains, “[i]n opposing a summary judgment motion, the nonmoving party is entitled to have the ‘credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, [and] all internal conflicts in it resolved favorably to him.’” (Dkt. No. 261, RS Opp. at 4 n.4 (citing *Kennedy v. Joy Technologies, Inc.*, 269 F. App’x 302, 308 (4th Cir. 2008)).) In other words, the Court of Appeals viewed all of the evidence in this case as Rosetta Stone would have wished.

Where the trial court has not ruled on the admissibility of evidence for trial, the Court of Appeals will treat as proper even evidence likely to be irrelevant or inadmissible at trial. The decision in *Goldberg v. B. Green & Co., Inc.*, 836 F.2d 845 (4th Cir. 1988), is illustrative. As here, the defendant in *Goldberg* had filed a motion in limine to exclude certain evidence, but the district court granted summary judgment before ruling on the motion. *Id.* at 848. Accordingly, in reviewing the grant of summary judgment, the Court of Appeals explained that, “for purposes of this appeal, we assume that the [the evidence defendant sought to exclude] constituted admissible evidence.” *Id.* (emphasis added); see also, e.g., *Am. Winds Flight Academy v. Garmin Int’l*, 2010 WL 3783136 (N.D. Ohio Sept. 17, 2010) (explaining that, for the purposes of summary judgment, the court would assume without deciding that certain expert testimony would be admissible even though the testimony was subject to a pending motion in limine).

Neither a trial court nor an appellate court’s consideration of evidence on summary judgment compels the determination that all of the evidence considered would be properly presented to a jury. Rather, the trial court is charged with ensuring that the evidence at trial – as distinct from the

judicial determination of summary judgment – is not unduly prejudicial or otherwise inadmissible. “Rule 403 judgments are preeminently the province of the trial courts.” *Simms v. Mut. Benefit Ins. Co.*, 137 F. App’x 594, 597 (4th Cir. 2005) (citing *United States v. Love*, 134 F.3d 595, 603 (4th Cir. 1998)). The Court of Appeals will review such decisions with great deference, and will leave them undisturbed unless the court’s “discretion has been plainly abused.” *Id.* (citing *United States v. Simpson*, 910 F.2d 154, 157 (4th Cir. 1990)).

Here, just as in *Goldberg*, this Court had not ruled on motions in limine before granting summary judgment. By making all inferences in Rosetta Stone’s favor, the Fourth Circuit did not “find” any facts to be admissible. Assuming without conceding that the Fourth Circuit stated that certain evidence was relevant for summary judgment, it does not follow that the probative value of that evidence outweighs a tendency to cause undue prejudice or confusion. See Fed. R. Evid. 403. Courts of Appeal do not weigh evidence, find facts, or rule on its admissibility when reviewing summary judgment; they simply look to see if the evidence as it is presented to them creates a material issue of fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986), (“[A]t the summary judgment stage the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.”). Consistent with its obligations, the Fourth Circuit explicitly noted the standard of review when examining the facts and its obligation to make every inference in Rosetta Stone’s favor. *Rosetta Stone, Ltd. v. Google, Inc.*, 676 F.3d 144, 155-56 (4th Cir. 2012).<sup>1</sup>

In short, Rosetta Stone’s argument conflates the standard of review for summary judgment,

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<sup>1</sup> Questions of admissibility not presented to the Court of Appeals or issues where admissibility was simply assumed *arguendo*, result in no “decision of law” that implicates the law of the case or the mandate rule. § 4478 Law of the Case, 18B Fed. Prac. & Proc. Juris. § 4478 (2d ed.) (collecting cases and noting that a “position that has been assumed without decision for purposes of resolving another issue is not the law of the case”).

which is subject to de novo review, with a ruling on the admissibility of evidence, which is subject to abuse of discretion review—a standard not applied to any of this Court’s rulings in the Fourth Circuit’s decision. The Fourth Circuit was not asked to and did not conclude that any of evidence in this matter was ultimately proper for the jury or non-prejudicial. Those decisions are left to this Court, in its ruling on this motion. For the reasons set forth in Google’s opening brief—which Rosetta Stone has not meaningfully challenged beyond mistakenly invoking the mandate rule and law of the case—this Court should grant Google’s motion in full.

**II. THE COURT SHOULD EXCLUDE EVIDENCE AND ARGUMENTS THAT HAVE MINIMAL RELEVANCE TO LEGALLY ACTIONABLE “CONFUSION”**

**A. Evidence of Google’s Employees’ “Confusion” Should Be Excluded.**

Rosetta Stone continues to argue for the relevance and admissibility of two Google employees inability to tell whether a website printout referred to counterfeit goods. (Dkt. No. 261, RS Opp. at 5-7.) But the probative value of this testimony, if any, is negligible. Rosetta Stone does not contest that only consumer confusion is relevant to a determination of actionable trademark infringement or dilution. (See also Dkt. No. 251, Google’s Memorandum in Support of its Omnibus Motion in Limine (hereinafter Google MIL), at 2-3.) And Rosetta Stone does not dispute that it adduced no evidence that Rose Hagan or Terri Chen were likely consumers of Rosetta Stone products or that its “test” of a static printout of search results accurately replicate marketplace conditions of dynamic search result links that consumers may click on and evaluate the associated landing pages. Indeed, Ms. Chen and Ms. Hagan were never consumers that can be reasonably said to have been “actually confused” about anything at issue in this case – that is, they never tried to purchase anything, never clicked on any ad for which Rosetta Stone seeks a finding of infringement, and never conducted a search for “Rosetta Stone” that yielded links to the websites in question. Accordingly, this evidence has little if any relevance to the task confronting the jury. Any slight



relevance of this testimony is further minimized when considered in light of persuasive authority not previously available to this Court, *Toyota Motor Sales, USA, Inc. v. Tabari*, 610 F. 3d 1171 (9th Cir. 2010) (“[R]easonable, prudent and experienced internet consumers are accustomed to such exploration by trial and error. . . . They skip from site to site, ready to hit the back button whenever they’re not satisfied with a site’s contents. They fully expect to find some sites that aren’t what they imagine based on a glance at the domain name or search engine summary.”). When weighed against its prospect for causing confusion or requiring a mini-trial on the lack of Ms. Hagan and Ms. Chen’s consumer status or the substantive deficiencies of assessing the quality of a website’s goods based on exposure to a static piece of paper, this testimony should be excluded.

As explained above, the Fourth Circuit did not consider or rule on the prejudicial likelihood of this testimony or determine that it must be admitted at trial; it merely surmised what use this evidence might have. *Rosetta Stone*, 676 F.3d at 158-59 (“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.”) (emphasis added). *Rosetta Stone*’s assertion to the contrary is incorrect, and the evidence should be excluded.

**B. Google’s “Sponsored Link” Experiments Should Be Excluded.**

The Google experiments that *Rosetta Stone* refers to as “Sponsored Link Studies” and “Trademark Studies” are irrelevant, unduly prejudicial, and likely to confuse the jury. The experiments studied general consumer perceptions regarding paid advertisements and organic search results and measured the potential for consumer confusion if trademark terms were permitted in ad text without restriction. (See Dkt. No. 251, *Google MIL*, at 6-9 (discussing experiments).) Other documents describe or refer to various inquiries by Google into how consumers perceive sponsored links. (See *id.*) There is no connection between these studies and any alleged harm suffered by *Rosetta Stone*. *Rosetta Stone*, again, argues that the Fourth Circuit passed on the admissibility of

these studies. (Dkt. No. 261, RS Opp. at 7-8 (“The Fourth Circuit found the Sponsored Link Studies relevant to the issue of consumer sophistication . . . confusion . . . [and] Google’s intent.”).) But as explained above, this assertion is not correct.

It is true that this Court overruled Google’s objections to the inclusion of these studies in the record for summary judgment purposes, when the Court was itself assessing the evidence. (See Dkt. No. 229 at 3.) But those determinations do not deprive the Court of its authority and wide discretion to control what evidence is admissible at trial. *PBM Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 125 (4th Cir. 2011) (“[A] district court’s decision to admit [or exclude] evidence over a Rule 403 objection will not be overturned except under the most extraordinary circumstances, where that discretion has been plainly abused.” (quotation omitted)); *United States v. Udeozor*, 515 F.3d 260, 265 (4th Cir. 2008) (“District judges enjoy wide discretion to determine what evidence is admissible under [Rule 403].”). It is one thing to accept Rosetta Stone’s superficial characterizations of evidence for the purpose of a judicial summary determination; it is quite another to evaluate the probative weight of what the evidence actually is capable of showing, and the confusion it is capable of causing, for a jury.

Here, in a trademark action concerning ads by resellers such as Amazon.com, and authorized Rosetta Stone affiliates, such as Coupon Cactus, Rosetta Stone has offered no substantive explanation for the relevance of experiments from more than seven years ago about the ability to identify an ad or associations perceived between an advertiser that has no affiliation with the trademark owner, or how any probative value is not substantially outweighed by unfair prejudice. As demonstrated in Google’s opening brief, these experiments never even mention the Rosetta Stone mark and would unduly prejudice Google. (See Dkt. No. 251, Google MIL, at 4 ((explaining that the experiments demonstrate only how web users interact with advertisements).)

The Sponsored Link Studies by Google that identify distinct types of confusion that cannot support liability should be excluded so as not to confound the jury on an essential element of the case. *U.S. v. Wellons*, 32 F.3d 117 (4th Cir. 1994) (upholding district court’s exclusion of testimony “given likelihood that this extrinsic evidence... would confuse the jury”). Similarly, the eight-year old Trademark Studies explored an approach to trademarks that Google never implemented – a fact Rosetta Stone does not contest. Because Rosetta Stone cannot prove a likelihood of confusion, nor could the jury make any rational inferences of bad intent, based on Google’s consideration and rejection of a policy—i.e., allowing unrestricted use of a trademark in ad text—that Google never adopted, not in 2004, nor 2009, nor at any other time, these studies have minimal relevance. Rosetta Stone’s silence on this fact is telling. This Court has the authority to preclude this material, and it should do so here.

**C. Dr. Van Liere’s “Confusion” Opinions Should Be Excluded.**

Google’s opening brief explains why Dr. Kent Van Liere’s opinions regarding confusion are irrelevant and prejudicial. Rosetta Stone’s contention that the Fourth Circuit found the survey and his testimony about it relevant and admissible misses the mark. As the Fourth Circuit expressly stated in its opinion, Dr. Van Liere’s opinions constituted evidence of confusion “**for purposes of summary judgment...** [and] 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). The Fourth Circuit’s obligation to give every inference and favorable construction to this evidence is no way translates to an obligation for this Court to disregard its ability to weigh evidence under Rule 403. The authority and discretion to strike the balance between relevance and prejudice lies in the district court, and those rulings “will not be overturned except under the most extraordinary circumstances, where that discretion has been plainly abused.” *PBM Products, LLC v. Mead Johnson & Co.*, 639 F.3d 111, 125 (4th Cir. 2011).

Dr. Van Liere concluded that the mere fact that Google displays ads results in a likelihood of confusion. He reached this determination because two out of six ads he tested yielded “confusion” of greater than 10%—including as to Rosetta Stone’s “sponsorship” of Amazon.com, one of its indisputably authorized resellers, and Coupon Cactus, which was at the time of the search result, an authorized affiliate. (See Dkt. No. 123 (Declaration of Cheryl A. Galvin in Support of Google’s Motion for Partial Summary Judgment, ), Ex. 3 at 166:19-24 (testimony that Coupon Cactus was an affiliate in 2008).) Dr. Van Liere’s confusion opinions would both confuse the issues and mislead the jury. Fed. R. Evid. 403.

The Amazon ads and the Coupon Cactus ads counted as confusing were entirely permissible as a matter of law; they are neither infringing nor confusing. E.g., *Prestonettes, Inc. v. Coty*, 264 U.S. 359 (1924); *Shell Oil Co. v. Commercial Petroleum, Inc.*, 928 F.2d 104, 107 (4th Cir. 1991). Dr. Van Liere’s opinion raises a serious counter-factual problem of counting these respondents as confused and a logical problem with adding up the “confusion” rates for all ads and applying it to Google’s “practice,” when clearly respondents drew distinctions among and between specific ads. Moreover, it introduces the legal problems of basing the survey on a theory of consumer confusion that is unrecognized in this Circuit – initial interest confusion based on a search result – and finding actionable “sponsorship” confusion in the absence of any affirmative representations of sponsorship. (See, e.g., Dkt. No. 251, Google MIL, at 15 (noting that it is an undisputed fact that Coupon Cactus directed consumers to genuine Rosetta Stone products, and explaining that Coupon Cactus never made any assertion of sponsorship by Rosetta Stone)); *id.* (citing *Toyota Motor Sales*, 610 F.3d at 1179 (explaining that nominative fair use covers use of a mark where the user directs consumers to genuine goods, and does not “affirmatively suggest sponsorship or endorsement”). Although this Court is capable of separating out the confusing and irrelevant aspects of the survey when

considering a motion for summary judgment, it should exercise its discretion to keep such confusing and ill-founded conclusions from the jury, particularly when they are wrapped in the cloak of expert authority. See, e.g., *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 260 (4th Cir. 1999) (“[G]iven the potential persuasiveness of expert testimony, proffered evidence that has a greater potential to mislead than to enlighten should be excluded.”).

**D. Anecdotal and Tertiary Evidence Regarding Purported Confusion Should Be Excluded.**

Rosetta Stone contends that the Fourth Circuit deemed its anecdotal evidence of purported “confusion” relevant and admissible. (Dkt. No. 261, RS Opp. at 12.) Specifically, Rosetta Stone posits that statements like the following are not unduly prejudicial or hearsay:

- Rosetta Stone “is aware of confusion caused by Google sponsored links through reports it has received from Rosetta Stone kiosk employees.” (See Dkt. No. 188, Oblak Decl., Ex. 4 at 1-6; Ex. 9 at ¶¶ 9-11.)
- Rosetta Stone’s kiosk employees have reported that customers have (a) requested that Rosetta Stone kiosks “match the prices set forth in a web printout from a pirate/counterfeit site” and (b) attempted to return counterfeit software. (See *id.*, Ex. 4 at 3.)
- Customers contact its call center with questions about pricing information “gathered through the internet” and attempt to return software purchased from Amazon.com to Rosetta Stone under a six-month guarantee only available directly from Rosetta Stone. *Id.*

None of this evidence satisfies Federal Rules of Evidence 401 through 403. Rather than explain how any of this evidence is probative or not hearsay, Rosetta Stone assumes that the Fourth Circuit’s summary judgment determination constituted a ruling, *sub silentio*, on evidentiary issues. But as explained above, the Fourth Circuit’s own language demonstrates that it was making every effort to construe this anecdotal evidence in a manner most favorable to Rosetta Stone. (See Dkt.

No. 261, RS Opp. at 12 (“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 . . .”) (emphasis added) (quoting Rosetta Stone, 676 F.3d at 158).) It did not evaluate exclusion of this evidence under an abuse of discretion standard because that issue was not before it. Nor did the Fourth Circuit suggest that it would be an abuse of discretion for this Court to exclude such evidence under Rule 403, or any other evidentiary rule. Given the absence of a ruling on the admissibility of this evidence or any argument substantively supporting admission, this evidence, not factually tethered to the claims at issue, should be excluded. See CDX Liquidating Tr. v. Venrock Associates, 411 B.R. 591, 606 (N.D. Ill. 2009) (excluding evidence of contracts unrelated to the matter under litigation as irrelevant); New York v. Microsoft Corp., 224 F. Supp. 2d 76, 104 (D.D.C. 2002), aff’d, 373 F.3d 1199 (D.C. Cir. 2004) (typically, courts conclude “rather swiftly” that evidence unrelated to the matter at hand is not fit for consideration or discussion by the court).

Rosetta Stone should also not be permitted to introduce the materials kept by Jason Calhoun. In particular, Google moved to exclude both the Calhoun “spreadsheet” that allegedly details the dates on which Rosetta Stone informed Google of purportedly pirated/counterfeit Sponsored Lin, as well as all data on customer complaints of allegedly pirated/counterfeit software. (Dkt. No. 106, Declaration of Jason Calhoun (hereinafter “Calhoun Declaration), at 2-5.) Rosetta Stone has not rebutted Google’s showing of why the Parature or Quickbase data showing consumer complaints of counterfeit goods is prejudicial and of almost no probative value, given that it is not tied to Google except in passing. This evidence should be excluded.

Similarly, Mr. Calhoun’s spreadsheet of dates when Rosetta Stone informed Google of purportedly counterfeit advertisements is substantially more prejudicial than probative. Specifically,

it is likely to lead a jury to believe that Rosetta Stone merely notifying Google of allegedly counterfeit activity somehow shows Google's bad intent, actual knowledge of counterfeit products, or approval of any advertisers' actions. The mere fact that Google was notified of activity Rosetta Stone contends related to counterfeit products, absent definitive proof of counterfeiting, is not proof of any intent or improper acts by Google. Rosetta Stone has cited no authority that "support[s] a conclusion that a listing must be removed—rather than investigated—upon notice that it likely is for a counterfeit product." *Tre Milano LLC v. Amazon.com, Inc.*, No. B234753, 2012 WL 3594380, at 22-23 (Ca. Ct. App. Aug. 22, 2012) (relying on federal authority). Because the spreadsheet establishes no meaningful connection between Google and counterfeit sales, its admission would create a false impression of such a connection in the minds of the jurors. It is therefore unduly prejudicial to Google. Evidence about such unrelated matters or third parties is irrelevant and is properly excluded. *Garraghty v. Jordan*, 830 F.2d 1295, 1298 (4th Cir. 1987).

Moreover, Rosetta Stone does not dispute that it has adduced no evidence that the products that are the subject of the spreadsheet or other attempted consumer returns listed in the Parature and Quickbase databases were actually infringing or counterfeit. As Mr. Calhoun conceded, whether a product is counterfeit can only be determined by physical inspection by a knowledgeable person. (See Dkt. No. 116, Caruso Summary Judgment Declaration, Ex. 53 (March 8, 2010 Deposition of Jason Calhoun), at 124:2-125:7.) Without proof that these complaints concerned products that were actually counterfeit—as opposed to excuses by consumers who changed their minds about wanting very expensive language software or who received legitimate but defective products—these complaints are irrelevant. Again, the Court's failure to exclude this evidence from its consideration

of the summary judgment record is not determinative of whether it should here be precluded as confusing and misleading evidence inadmissible at trial.<sup>2</sup>

### **III. PREJUDICE FROM UNRELATED EVIDENCE SUBSTANTIALLY OUTWEIGHS ANY SUPPOSED RELEVANCE**

#### **A. Testimony From Other Litigations Should Be Excluded.**

##### **1. Larry Page's Testimony From A Different Lawsuit Should Be Excluded.**

Rosetta Stone has offered no legitimate reason for admitting the testimony by Google's co-founder Larry Page. Mr. Page's testimony, as explained in the opening brief, has no bearing on this case: the deposition took place in another case taken more than five years ago, some two years before the nominative fair use policy that Rosetta Stone seeks to tie his testimony to was in effect. The four arguments Rosetta Stone makes in its opposition cannot overcome the prejudice and irrelevance of this testimony. First, two years before the nominative use trademark policy came into effect, Mr. Page expressed no opinion about whether it is "'okay' for an advertiser to buy its competitors' trademarks as keywords in connection with Google's advertising program." (RS Opp. at 16.) Rosetta Stone has failed to explain how this dated and non-definitive testimony would not

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<sup>2</sup> Steve Dubow, who purchased a counterfeit version of Rosetta Stone software, unequivocally stated in his deposition that he did not click a sponsored link when he made his search. Instead, he purchased the software through an "organic link" – one of the unpaid search results generated by Google. (Dkt. No. 188, Oblak Decl., Ex. 33, 79:11-81:11 ("...I scrolled down. It was on the first page.... It was not on the right side.")) Rosetta Stone's arguments about the usefulness of his testimony are misplaced: the mere fact that Rosetta Stone complained of bossdisk.com (the site Mr. Dubow visited) does not in any way demonstrate that he visited the site through a sponsored link. (See Dkt. No. 261, RS Opp. at 15.) Obviously, sites that are linked to through ads may also appear in natural search results. And contrary to Rosetta Stone's argument, it is not the responsibility of the defendant to disprove Mr. Dubow's sworn testimony that he used an organic link. (See *id.*) Offering evidence of that an organic link caused confusion would be substantially confusing and misleading to the jury about the scope of Rosetta Stone's lawsuit, which is expressly limited to paid advertising. (Dkt. No. 86, Am. Compl. ¶ 6) ("This lawsuit seeks to stop only this [paid advertising] aspect of Google's search engine function and not its ability to provide 'organic search results.'"); accord (Dkt. No. 1, Complaint ¶ 6.) Consequently, this Court should exclude Mr. Dubow's testimony.



confuse the jury or prejudice Google by interjecting doubt about what Google's trademark policy is where Mr. page was not asked any questions about what ultimately became Google's trademark policy in 2009. Similarly, Mr. Page's views on whether "Oogle" is confusing are not probative as to whether actual consumers are actually or likely to be confused by Google's current trademark policy, and the same is true of his comments about trademark confusion in 2007. *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76, 104 (D.D.C. 2002), *aff'd*, 373 F.3d 1199 (D.C. Cir. 2004) (typically, courts conclude "rather swiftly" that evidence unrelated to the matter at hand is not fit for consideration or discussion by the court). Finally, Mr. Page's views on whether "it is appropriate for trademark holders to want to differentiate themselves from their competitors" has no bearing whatever on this case. He is neither a lawyer nor an expert witness, and this testimony would be introduced solely to prejudice Google.

## **2. Prashant Fuloria and Rose Hagan's Testimony From Other Actions Should Be Excluded.**

The depositions of Prashant Fuloria and Rose Hagan from previous litigations likewise have little to no bearing on the issues in this case. As explained in Google's opening brief, this deposition testimony would be confusing, would mislead the jury, and is unduly prejudicial. (See Dkt. No. 251, Google MIL, at 22-23.) Neither deposition transcript makes a single reference to the 2009 trademark policy as it was implemented. Instead, Rosetta Stone glosses over the difference (RS Opp. at 16) between Google's rejected consideration in 2004 of allowing any third party to use a trademark at a time when Google had no practical means of preventing "bait and switch" use of a trademark and the policy it adopted in 2009, which employs automated checks to match landing pages to nominative uses of a trademark by resellers and information sites. (See Dkt. No. 117, Declaration of Bill Lloyd in Support of Google's Motion for Summary Judgment, Exs. 1-4 (outlining the 2004 and 2009 trademark policies and relevant changes).) The impropriety of permitting such a misleading use of

the testimony from a prior case is also notable here, given Rosetta Stone's opportunity and failure to identify Ms. Hagan and Mr. Fuloria in its disclosures during the initial discovery period when Google might have had the opportunity to obtain deposition testimony of these former employees, whose attendance it cannot compel at trial. (See Dkt. No. 141, Rosetta Stone Rule 26(a)(3) Exhibit and Witness List); see also Dkt. No. 251, Google MIL, at 22-23 (explaining why admission of these depositions would be improper).) Because of the delay, prejudice and confusion that would result from introducing these depositions, they should be excluded.

**B. Third Parties' Trademark Complaints Should Be Excluded.**

Third party complaints against Google are of limited probative value. While this Court determined that third party complaints should not be stricken for purposes of summary judgment, their value at trial is far outweighed by the dangers of prejudice. Rosetta Stone contends that these complaints show Google's willfulness and intent. But before the jury these complaints will be used to replace proof with inference; the jury will be lead to assume that because others have complained to Google about their marks, it is somehow more likely that Google infringed or diluted Rosetta Stone's mark. To refute that contention effectively, Google would have to introduce evidence to show that each of the complaints made to it by every trademark owner for every ad was without merit and/or acted upon. This is precisely the type of trial-within-a-trial, time-wasting exercise that Rule 403 seeks to prevent. Accordingly, third party complaints are routinely excluded. *Vukadinovich v. Zentz*, 995 F.2d 750, 755-56 (7th Cir. 1993) (affirming exclusion of evidence of prior complaints and lawsuits arising from "dissimilar events"); *Palmer v. Bd. of Regents of Univ. Sys. of Ga.*, 208 F.3d 969, 973 (11th Cir. 2000) (affirming exclusion of evidence involving "different decision-makers" and "different departments"); *Westmont Tractor Co. v. Touche Ross & Co.*, 1988 WL 126273, at \*2 (9th Cir. Nov. 10, 1988) (district court properly excluded evidence of collateral misconduct which would have invited rebuttal and confused the issues); *Lifshitz v. Walter Drake &*

Sons, Inc., 806 F.2d 1426, 1431-32 (9th Cir. 1986) (in action alleging unfair competition and trademark infringement, district court properly excluded certain evidence because it would confuse and mislead jury by raising questions not in issue). Rosetta Stone has offered no persuasive reason to depart from that practice here.

Under Rule 403:

[The] applicable analysis begins with the recognition that the Federal Rules of Evidence do not make relevance the sole criterion of admissibility; rather, even relevant evidence must be excluded if its probative value is substantially outweighed by the prejudicial effect that its admission may cause. In other words, although relevant evidence is, as a general proposition, admissible, if the prejudicial effect that would result from the introduction of a relevant piece of evidence substantially exceeds the gains that would ensue, it should be excluded.

Rambus, Inc. v. Infineon Technologies AG, 222 F.R.D. 101, 109 (E.D. Va. 2004) (citing Westfield Ins. Co. v. Harris, 134 F.3d 608, 614 (4th Cir. 1998)). As Google explained in its opening brief, evidence of third party complaints about ads not at issue and trademarks not at issue and products not at issue is useful only as part of Rosetta Stone's "where there's smoke, there's fire" strategy; it is therefore unduly prejudicial. Adams v. Cooper Indus. Inc., 2006 WL 3759619, at \*3 (E.D. Ky. Dec. 19, 2006) (excluding testimony and evidence because potential prejudice outweighed probative value); Hott v. VDO Yazaki Corp., 1996 WL 650966, at \*2 (W.D. Va. Nov. 6, 1996) (excluding evidence under Rule 403 because "[t]he jurors might easily be tempted to succumb to the notion that where there is smoke, there is fire.") (internal quotation omitted). Given the relative prejudice and minimal probative value of these complaints, they should be excluded.

#### **IV. EVIDENCE OF FACTS NOT AT ISSUE IN THIS LAWSUIT IS UNDULY PREJUDICIAL AND IRRELEVANT**

##### **A. Evidence of Rosetta Stone "Torrent" in Google Suggest Should Be Excluded.**

Nowhere in its Opposition does Rosetta Stone argue that Google's display of search results in response to search queries that include the word "torrent" or its inclusion of the word "torrent" as

part of its automated search query suggestions makes a likelihood of confusion based on Google's display of paid advertising any more likely. Indeed, Rosetta Stone's Amended Complaint expressly disclaims that natural search results are the subject of this lawsuit. (Dkt. No. 86, Am. Compl. ¶ 6 (“This lawsuit seeks to stop only this [paid advertising] aspect of Google's search engine function and not its ability to provide ‘organic search results.’”). Having staked that position out at the outset of the case, (Dkt. No. 1, Complaint, ¶ 6), Rosetta Stone should not now be allowed to argue about the operation or relevance of natural or “organic” search results. In addition, allowing Rosetta Stone to argue that Google encourages or turns a blind eye towards counterfeiting because it does not censor a particular search term would create precisely the type of undue prejudice foreclosed by Rule 403 as well as invite yet another side show about the complexities of policy making for Google's natural search results. *Lifshitz*, 806 F.2d at 1431-32 (in action alleging unfair competition and trademark infringement, district court properly excluded certain evidence because it would confuse and mislead jury by raising questions not in issue).

**B. Google's Trademark Policies And Practices for Foreign Jurisdictions Should Be Excluded.**

Google's policies on trademarks in foreign jurisdictions are immaterial in this case. Rosetta Stone cites not a single case in support of its argument that these non-pertinent policies should be admitted. (Dkt. No. 261, RS Opp. at 24-25.) This is unsurprising, given the clarity of the law on excluding foreign trademark practices. *Fuji Photo Film Co. v. Shinohara Shoji Kabushiki Kaisha*, 754 F.2d 591, 599-600 (5th Cir. 1985) (finding it “error to admit evidence of the parties' foreign trademark practices”); 5 *McCarthy*, supra, § 29:2 (noting that “the foreign activities of a party are not relevant evidence in a trademark dispute concerning U.S. rights”). To the extent that Rosetta Stone wants to make the argument that Google has the technological capacity to prevent any third parties from bidding on third-party trademarks, it is free to do so without reference to Google's

international policies. Rosetta Stone makes no compelling argument that such a cumulative point could justify the prejudice and confusion that would result from trying to explain all the trademark policies and laws in the rest of the world and the risk that the jury would improperly fault Google for not applying in the United States the practices it uses in certain other countries that have different laws. Facts relating to Google's international trademark policies are a classic example of what should be excluded under Rule 403.

### CONCLUSION

For the foregoing reasons, Google respectfully requests that the Court grant its Motion in Limine in its entirety.

Dated: August 29, 2012

Respectfully Submitted,

GOOGLE INC.

By counsel

/s/

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 29th day of August, 2012, 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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