

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

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

**ROSETTA STONE’S OBJECTIONS TO THE APRIL 23, 2010  
ORDER OF MAGISTRATE JUDGE BUCHANAN  
DENYING ROSETTA STONE’S MOTION FOR SANCTIONS**

Pursuant to Federal Rule of Civil Procedure 72(a), Rosetta Stone Ltd. (“Rosetta Stone”) hereby files its Objections to the April 23, 2010 Order of Magistrate Judge Buchanan Denying Rosetta Stone’s Motion for Sanctions, Docket Number 199 (the “April 23 Order”).

**PRELIMINARY STATEMENT**

On April 23, 2010, Rosetta Stone requested that the Court impose sanctions against Google based on its failure to produce to Rosetta Stone documents called for by the Court’s February 4, 2010 Order (the “February 4 Order”) compelling Google to produce documents. In its filings supporting its motion for sanctions, Rosetta Stone demonstrated that Google affirmatively used in its opposition to Rosetta Stone’s motion for partial summary judgment documents responsive to the February 4 Order, which were not previously produced to Rosetta Stone. In opposing Rosetta Stone’s motion for sanctions, Google conceded its failure to comply with the February 4 Order and undertook an investigation to determine how the failure occurred.

In the course of that investigation, Google identified 1,000 additional pages of documents responsive to the February 4 Order that had not been produced to Rosetta Stone.

In denying Rosetta Stone's motion for sanctions, Judge Buchanan stated her belief that Google's late production of documents would not prejudice Rosetta Stone because Rosetta Stone would have the ability to use the documents at trial. However, less than a week later, this Court granted summary judgment in Google's favor without Rosetta Stone ever having had an opportunity to utilize the late-produced documents. Because Magistrate Judge Buchanan's ruling was based on her incorrect belief that Rosetta Stone would have an opportunity to utilize the late-produced documents to demonstrate Google's liability, her ruling is clearly erroneous and contrary to law and should be reversed.

### **ARGUMENT**

Pursuant to Federal Rule of Civil Procedure 37 and Local Rule 37(D), sanctions may be imposed where a party fails to comply with a discovery order entered by the Court. *See* Fed. R. Civ. P. 37(b)(2); E.D. VA. R. 37(D). In this Circuit, a four-part test is used to determine what sanctions to impose under Rule 37: "(1) whether the non-complying party acted in bad faith, (2) the amount of prejudice that noncompliance caused the adversary, (3) the need for deterrence of the particular sort of noncompliance, and (4) whether less drastic sanctions would have been effective." *Anderson v. Foundation for Advancement, Education, and Employment of American Indians*, 155 F.3d 500, 504 (4th Cir. 1998) (affirming entry of default judgment as sanction for discovery abuse).

The facts giving rise to Rosetta Stone's motion for sanctions are set forth in the Memorandum of Law in Support of Rosetta Stone's Motion for Sanctions. (Dkt. No. 174.) Briefly stated, on April 9, 2010, in support of its opposition to Rosetta Stone's motion for

summary judgment, Google submitted three pages of documents that had not been produced to Rosetta Stone, even though they were called for by the February 4 Order. On April 14, 2010, Google produced to Rosetta Stone 129 pages of documents – all of which were responsive to the February 4 Order – relating to key issues in this case. On April 16, 2010, Rosetta Stone filed its motion for sanctions, in which it sought (i) an evidentiary finding arising from Google’s late production; (ii) a certification that Google had complied with the February 4 Order; and (iii) its costs arising from Google’s violation of the February 4 Order.

In its opposition to Rosetta Stone’s motion for sanctions, Google did not deny that it had failed to produce documents responsive to the Court’s Order. (Dkt. 192.) To the contrary, Google undertook an investigation and identified more than 1,000 additional pages that should have been produced – but were not – due to a purported miscommunication between Google and its outside vendor. (*Id.*) These documents were produced to Rosetta Stone at 1:47 a.m. and 2:23 p.m. on April 22, 2010 – the day before the hearing on the parties’ motions for summary judgment. These late-produced documents – like the 129 pages of documents produced on April 14 – are highly relevant to key issues in this case, including likelihood of confusion and Google’s knowledge and intent when it implemented the trademark policies at issue. *See PETA v. Doughney*, 263 F.3d 359, 364 (4th Cir. 2001).

In accordance with the Court’s scheduling practices, the motion for sanctions was scheduled for hearing at the same time as the motions for summary judgment.<sup>1</sup> At the hearing,

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<sup>1</sup> When Rosetta Stone filed its motion for sanctions, it stated in its Notice that the motion for sanctions was related to the pending motions for summary judgment and it provided courtesy copies of the sanctions motion and supporting documents to both Magistrate Judge Buchanan and this Court, noting in the transmittal letter that the sanctions motion and summary judgment motions were related. (Dkt. 176.) Nevertheless, the sanctions motion was referred to Magistrate Judge Buchanan. (*See* 4/19/2010 Docket Entry.)

Rosetta Stone advised Magistrate Judge Buchanan of Google's April 22 production and of the importance of the documents included therein. Magistrate Judge Buchanan ultimately concluded that the late production was inadvertent and that Rosetta Stone was not prejudiced by it. In so ruling, Magistrate Judge Buchanan did not review the more than 1,000 pages of documents produced by Google the day before the hearing. Thus, Judge Buchanan's ruling was not based on an analysis of the content of the documents produced by Google on April 22 but on her conclusion that Rosetta Stone could still use the documents in connection with its trial preparation efforts.

By granting summary judgment in Google's favor, this Court has deprived Rosetta Stone of the opportunity to use these late-produced documents in establishing its claims against Google. Because the prejudice to Rosetta Stone is manifest, the April 23 Order is clearly erroneous and contrary to law and should be reversed.

**CONCLUSION**

For the foregoing reasons, Rosetta Stone respectfully requests that the Court grant its motion for sanctions and enter an order (i) setting aside the April 23 Order; and (ii) granting the relief requested in Rosetta Stone's motion for sanctions.

Respectfully submitted,

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May 4, 2010  
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**CERTIFICATE OF SERVICE**

I hereby certify that on May 4, 2010, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system which will then send a notification of such filing (NEF) to the following:

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May 4, 2010

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