

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

CAMPMOR, INC.,  <i>Plaintiff,</i>  - <i>vs.</i> -  BRULANT, LLC,  <i>Defendant.</i>	CIVIL ACTION NO.  09-CV-5465 (WHW)
BRULANT, LLC,  <i>Counterclaim Plaintiff,</i>  - <i>vs.</i> -	
CAMPMOR, INC.,  <i>Counterclaim Defendant.</i>	

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PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S  
MOTION IN LIMINE TO BAR CERTAIN EVIDENCE/TESTIMONY AT TRIAL

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## PRELIMINARY STATEMENT

Plaintiff Campmor, Inc. (“Campmor”) submits this memorandum of law in opposition to defendant Brulant, LLC’s<sup>1</sup> motion for an order barring seven broad categories of damning, but eminently admissible, evidence against it in this case. (These categories are addressed *seriatim* in this Preliminary Statement but set out in the margin below<sup>2</sup> for the Court’s convenience.) In this motion, along with four additional motions in limine, Rosetta seeks, on the eve of trial, to relitigate its motions for dismissal under Fed. R. Civ. P. 12(b)(6) and for summary judgment, because when the overwhelming evidence of how its recklessness, incompetence and misrepresentations all but destroyed Campmor’s online business reaches the jury, the results will not be good for Rosetta. The Court, however, should have little difficulty seeing through Rosetta’s cynical and voluminous “evidentiary” motions and, for the reasons set forth below and as further developed herein, deny them all.

**Artificial Delineation of Damages Evidence** First, defendant asks the Court to limit Campmor’s damages claim to services provided by Rosetta in connection with the “upgrade” of Campmor’s website from WebSphere 5.61 to WebSphere 6.0 and search engine optimization (“SEO”) work from March 2009 through May 2009. Rosetta’s breaches of contract and

<sup>1</sup> As the Court recalls, Brulant, LLC is a wholly-owned subsidiary of Rosetta, LLC and is so described in the caption of this action. As the Court is also aware, Rosetta, LLC purchased Brulant, Inc. (the entity with which Campmor initially had a contract) in 2008 and all services performed in connection with Campmor’s website after Rosetta’s purchase of Brulant, Inc. were performed and payment was rendered by Campmor in Rosetta’s name. For the sake of convenience, these entities are collectively referred to herein as “Rosetta.”

<sup>2</sup> Defendant’s motion asks the Court to (i) limit Campmor’s damages claim to services provided by Rosetta in connection with the “upgrade” of Campmor’s website from WebSphere 5.61 to WebSphere 6.0 and search engine optimization work from March 2009 through May 2009; (ii) bar Campmor from using the term “best practices” at trial; (iii) preclude Campmor from “seeking to impose further obligations...based on extra-contractual alleged statements and representations”; (iv) preclude Campmor’s managers from offering opinion testimony at trial; (v) bar certain fact witnesses identified by Campmor from offering what defendants call “expert testimony”; (vi) preclude the jury from considering emails from Campmor customers (and corresponding transmittal emails from Campmor to Rosetta) identifying problems encountered with Campmor’s website after the launch of the 6.0 Website; and (vii) preclude Campmor from introducing or referencing internal Rosetta emails discussing in detail the myriad, material breaches and unequivocal and complete failures by Rosetta during the course of its contracts with Campmor.

Campmor's resulting damages, however, extend beyond these two aspects of the engagement, even if such effects could "scientifically" be segregated from the whole of Rosetta's work. Rosetta nonetheless bases its application on a set of narrow Requests for Admission, which were both defective, requiring no response from Campmor, and which in any event would not act to bar the evidence it fears. Its additional reliance on a small portion wrenched out of Mr. Jarashow's deposition testimony is belied by other portions of the transcript, as well as other evidence, and mistakes – as most of defendant's arguments do – opportunities for cross-examination of the witness as grounds for court-ordered management of testimony.

**Fleeing from Defendant's own "Best Practices" Pitch** Arguably the most cynical feature of defendants' motion is their attempt to bar Campmor from using the term "best practices" at trial. "Best practices," of course, was a term used by Rosetta throughout both its website and the documents it presented to Campmor to sell Campmor, and sell it again, on Rosetta's services. "Best practices" are even referred to in the contract with Campmor to upgrade Campmor's website to WebSphere 6.0 – the very same contract that even Rosetta maintains should be the sole focus of this litigation.<sup>3</sup> In what can most charitably be described as a triumph of irony, because defendant's own management team admitted during depositions that the term is essentially meaningless [*see*, Coleman Cert. ¶ 4, Ex. B], Rosetta now seeks to preclude Campmor from making any reference to the term at trial. But both Rosetta's use and definition of the term are relevant to Campmor's breach of contract and negligent misrepresentation claims. Furthermore, the Court has already acknowledged that the standard does have meaning in connection with prior motion practice concerning Brian Cooper, Campmor's SEO expert witness, who will testify as to its application in that field.

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<sup>3</sup> A copy of the SOW for the 6.0 upgrade is attached as Exhibit E to the Certification of Ronald D. Coleman, dated January 14, 2013 ("Coleman Cert.")

**Barring Documentation of Defendant’s Misrepresentations** Rosetta asserts that Campmor intends to utilize Rosetta’s status updates, PowerPoint presentations, written representations, and other materials to suggest to the jury that Rosetta had extra-contractual obligations to Campmor. The claim is baseless. These exhibits do, however, constitute proof of Rosetta’s egregious breaches of contract and material misrepresentations (either negligent or deliberate) of fact – and are therefore both relevant and admissible.

**Labeling Facts as “Expertise”** Rosetta seeks to prevent Campmor’s managers from offering “opinion” testimony—a tack at which it already failed on summary judgment. As the Court has already ruled, Campmor’s witnesses do not need any special expertise to testify about how Rosetta’s incompetence resulted in its losses without coming onto technical or specialized knowledge that would fall under the purview of Fed. R. Evid. 702. Similarly, despite Rosetta’s claims to the contrary, the testimony of Red Baritone and Net Concepts – the technical experts who picked up the pieces left behind by Rosetta, and were able to see empirically what it did wrong – also does not fall within the scope of Rule 702.

**Running from their Results** Rosetta also seeks exclusion of Campmor’s Exhibit 42, a compendium of customer complaint emails and, in most instances, corresponding transmittal emails from Campmor to Rosetta. Both highly relevant and entirely admissible, because they are proof of what was conveyed to Campmor by its customers as their inability to use the Campmor website after Rosetta “fixed” it. Because it cannot argue the admissibility or relevance of these documents, Rosetta makes a disjointed argument that Fed. R. Evid. 1006 somehow precludes their admission into evidence (even though Rosetta concedes the emails could be conveniently examined by the jury at trial) and (ii) expressly and even tries to make hay out of whether these emails should have been assigned individual exhibit numbers – in the process, misrepresenting

Magistrate Judge Arleo's eminently sensible determination that all these emails could be included in a single exhibit as long as all documents in that exhibit were properly identified.

**Running from the Facts** Finally, Rosetta's request for an order precluding internal Rosetta emails from trial completely exposes the rationale behind all of Rosetta's motions in limine (the vast majority of which directly or essentially seek to re-litigate issues already decided by this Court): the only chance Rosetta has at defending against Campmor's claims is to exclude all evidence from reaching the jury, particularly Rosetta's internal documents. As discussed below, there is simply no basis for Rosetta's application to exclude that evidence.

For these reasons, and as set out more fully below, Rosetta's motion in limine must be denied *in toto*. In addition, based on the clear bad faith demonstrated by Rosetta in making the motion, it is respectfully submitted that Campmor should be awarded costs and attorneys' fees in responding to the same.

### **STATEMENT OF FACTS**

Rosetta's instant motion in limine contains seven distinct requests for relief. Rather than include a separate statement of facts, in the interest of clarity Campmor will include the relevant facts in its response to each of Rosetta's specific requests.

## LEGAL ARGUMENT

### STANDARD OF REVIEW

Motions in limine are meant to deal with discrete evidentiary issues related to trial, and are not another excuse to file dispositive motions disguised as motions in limine. *Dunn ex rel. Albery v. State Farm Mutual Auto. Ins. Co.*, 264 F.R.D. 266, 274 (E.D. Mich. 2009). Unlike a summary judgment motion, which is designed to eliminate a trial in cases where there are no genuine issues of fact, a motion *in limine* is designed to narrow the evidentiary issues for trial and to eliminate unnecessary trial interruption. *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1069 (3d Cir. 1990). “[A] motion *in limine* should not be used to resolve factual disputes or weigh evidence.” *C & E Services, Inc. v. Ashland, Inc.*, 539 F.Supp.2d 316, 323 (D.D.C. 2008) (internal citation omitted). A court may “exclude evidence *in limine* only when evidence is clearly inadmissible on all potential grounds [internal citation omitted].” *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F.Supp. 1398, 1400 (N.D. Ill. 1993). “Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context.” *Id.*

#### **I. ROSETTA’S MOTION IS IMPROPER.**

“The purpose of a motion in limine is to allow the trial court to rule in advance on the admissibility and relevance of certain forecasted evidence.” *United States v. Chan*, 184 F.Supp.2d 337, 340 (S.D.N.Y. 2002). Any attempt to use a motion in limine to bar claims based on the argument that those claims lack evidentiary support must fail as a matter of law. *See, C & E Services, supra*, at 323. In particular, where, as here, a party’s motion in limine endeavors “to strike in shotgun fashion at whole topics and sources of prospective evidence, out of context and before any specific objection against its proper backdrop is raised .... [the motion] would

effectively serve and a form of advance trial of substantive portions of the case” and should be denied. *TVT Records v. Island Def Jam Music Group*, 250 F.Supp.2d 341, 344-45 (S.D.N.Y. 2003).

Rosetta’s instant motion impermissibly seeks, **by its own terms**, to (i) limit Campmor’s claims through a motion in limine and (ii) eliminate broad categories of documentary evidence and testimony, neither of which is a proper purpose of a motion in limine. It asks this Court to Campmor to make its case by slaloming around arbitrarily-selected parts of a multi-year relationship evidenced by innumerable representations, documents, emails and observations by precluding nothing less than the most damaging representations, documents, emails and observations.

**II. THERE IS NO LEGAL GROUND TO LIMIT CAMPMOR’S EVIDENCE TO THE 6.0 UPGRADE AND SEO WORK DURING THE THREE MONTHS AFTER LAUNCH OF THE 6.0 WEBSITE.**

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Simply put, there is no basis for Rosetta’s application to limit Campmor’s evidence in support of its claims to those that could artificially be attributed to the “upgrade” of Campmor’s website from WebSphere 5.61 to WebSphere 6.0 and search engine optimization work from March 2009 through May 2009. At the outset, Rosetta relies on an expansive reading of the implications of the Request for Admissions served by Rosetta on March 30, 2010 (“Request”) and not responded to by Campmor. But in fact, Rosetta’s submission indicates that the Request was defective because it failed to include the exhibits to which it referred and expressly relied on for meaning. *See, Coleman Cert. ¶ 5, Ex. C.* As a matter of law, therefore, the Request was of no effect and Campmor had no obligation to respond. *See, Outdoor Prod., Inc. v. The Deck Connection & More, Inc.*, 728 N.E.2d 44, 47 (Ohio Com. Pl. 1999).

Even assuming if the Request had properly been served, the admissions are far narrower than the broad categories of disputed facts that Rosetta claims. Rosetta's statement that the Request "sought answers in connection with Brulant's work performed for Campmor from 2006 through 2008" [Rosetta Memorandum of Law in Support dated December 5, 2012 ("Rosetta Memo of Law"), p. 5] is grossly misleading. The relevant portions of the Request did no more than ask Campmor to admit that certain agreements were entered into between 2006 and 2008 which. Again, because the proffered agreements were not attached to the Request, Campmor could not and did not deny the admissions. But assuming that Rosetta was referring to agreements known to Campmor, Campmor would not have denied the requests anyway, because Campmor did, in fact, enter into the agreements generally described. This hardly amounts to a limitation of Campmor's claims or evidence in this action. Rosetta's preposterous attempt to shoehorn non-existent "admissions" into its defective Request concerning the undisputed question of whether Campmor signed various documents, is not a valid basis for Rosetta's motion in limine.

Likewise, Rosetta's claim that Dan Jarashow, Campmor's CEO, admitted that Campmor had no complaints about Rosetta's performance prior to the 6.0 upgrade and contemporaneous SEO work [Rosetta Memo of Law, p. 6] is both false and irrelevant. Even in the testimony cited by Rosetta, Mr. Jarashow did identify an issue, specifically that he was having problems with Rosetta's cost overruns. Further belying Rosetta's claim is Mr. Jarashow's testimony regarding issues with Rosetta's performance in 2007. *See*, Coleman Cert., Ex. A at 35; 41-47. Moreover, the fact that Rosetta was able to cover up its incompetence with false representations about the track Campmor was on under its guidance is one of the key issues in this case. The fact that Campmor did not complain in 2007 is hardly proof that, when it finally realized it could no

longer trust Rosetta and had a third party look at the state of affairs, Campmor did nothing wrong in 2007. Nor has Rosetta proffered any cogent legal ground to prevent Campmor from submitting proof that it did. Rosetta's motion seeking all evidence and testimony regarding Rosetta's services during this period be barred should be denied.

**III. CAMPMOR'S EVIDENCE OF THE MEANING OF 'BEST PRACTICES' AND ROSETTA'S FAILURE TO FOLLOW THOSE PRACTICES IS BOTH RELEVANT AND ADMISSIBLE.**

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**A. Expert Testimony is not Necessary to Place "Best Practices"-Related Evidence Before the Jury.**

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Rosetta seeks, in effect, an order forbidding any mention of the term "best practices" by Campmor at trial because such evidence will help Campmor's case. It claims authority for its request, however, in a remarkable twist of logic: When the Court determined on summary judgment that Campmor adduced insufficient evidence of fraud in the inducement, it noted Campmor's partial reliance on Rosetta's repeated appeal to how its services represented "best practices," stating this Rosetta's invocations of the term essentially amounted to puffery and did not in and of itself provide grounds for allowing the fraud claim to go to trial. From there, however, Rosetta leaps to the far-fetched conclusion, almost mirror-image of what the Court actually held, that the Court "substantially determined, as a matter of law, that Brulant did not disregard best practices."

The Court made no such determination, "substantially" or otherwise. That question was not even before the Court. And certainly nothing in the summary judgment opinion has the slightest bearing on whether an expert is required as a filter of testimony concerning "best practices." The July 12, 2011 Opinion, in fact, strongly suggests the exact opposite, stating as it does that best practices are not a bright-line, technical or quantifiable quality, but, rather, "generally-accepted, informally standardized techniques, methods or processes that have proven

themselves over time to accomplish given tasks.” *Campmor, Inc. v. Brulant, LLC*, 2011 WL 2745922 (D.N.J) at \*10. This is certainly not a judicial determination that Rosetta met that standard. And is complete unrelated to the question of whether expert testimony is required for the jury to hear evidence allowing it to determine whether Rosetta met that standard. Indeed, while it may be an amorphous, it is one that Rosetta included in its own contract with Campmor [Coleman Cert., Ex. E, p. 2] in providing the services it sold to Campmor.<sup>4</sup> Rosetta fails to find authority for the proposition that expert testimony is required to establish what it meant when it promised, and whether it provided, “best practices” in connection with building Campmor’s 6.0 site in the Court’s opinion, and in the inapposite medical malpractice cases it cites as well. A jury does not need an expert to explain exactly how a retail website is built in order to evaluate if one was built “according to proven methods to successfully accomplish the desired result,” as the Court defined the term “best practices.” See, *Campmor, Inc. supra*, at \*5 (“In 2011, the average juror can be expected to be familiar with the internet and websites...An issue that prevents a customer from buying an item is a devastating problem for a retail website; Jarashow does not need to have a degree in computer science to explain this, and jurors do not need one to understand it.”).

Indeed, the Court made just this point, and strenuously, when Rosetta attempted the same lame argument focusing on the supposed need for expert testimony concerning “web design” instead of “best practices” in web design. Rejecting Rosetta’s reasoning wholesale, the Court wrote as follows (*Campmor, Inc.*, 2011 WL 2745922 at \*4):

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<sup>4</sup> The correct SOW for the 6.0 upgrade that was executed by both parties is the document attached to the Coleman Certification as Exhibit E. The copy annexed by Rosetta as Exhibit D to the Declaration of Dennis Drasco, dated December 5 2012 was neither agreed to nor signed by Campmor.

Brulant argues that summary judgment is warranted on the breach of contract claim because Campmor does not have an expert in web design (or some other expert competent to testify about the technical aspects of building a website). . . . Brulant alleges that Campmor has “no admissible evidence that there was anything wrong with the fundamentals of the website created and designed by Brulant.”

Brulant's argument loses the forest for the trees. Absent a state or federal mandate requiring expert testimony to maintain a claim, the Federal Rules of Evidence are quite clear; Rule 702 states that if testimony from a qualified expert will assist the trier of fact the court “may” allow such testimony.” Brulant has not cited a single case where expert testimony was required on a breach of contract claim. The Court finds that such testimony is not necessary.

Brulant argues that Jarashow and other Campmor executives are not experts in web design, and are unqualified to testify about their own contract. The Court disagrees. The issue, quite simply, is whether Brulant delivered what it promised in the contract.

Here “best practices,” a term the Court has ruled is not one of art or a matter of expertise, is Rosetta’s own description of “what it promised in the contract.” The jury does not need any specialized or expert insight as to the technology behind the website to determine if Rosetta met that standard. Nor is there anything in the relevant documents, the rules of evidence or the prior proceedings here that could form a basis for allowing Rosetta to flee from its own puffery.

Indeed, it would be the height of injustice if a party could, as Rosetta did on summary judgment, evade being held to a strict interpretation of a phrase such as “best practices” by claiming that it means nothing at all, and then use the shield of “mere puffery” as a sword, claiming no jury should be allowed to hear how the phrase was used in the course of the relationship. *See, Sumitomo Machinery Corp. of America, Inc. v. Allied Signal, Inc.*, 81 F.3d 328, 335 (3rd Cir. 1996) (where [as here] the meaning of contract provisions are in dispute, it is the role of the fact finder to resolve the intent of the parties). In fact, Rosetta knows that its breaches of that standard were so egregious that the jury will readily find Rosetta failed to meet

it without any expert testimony, and there is no legal basis whatsoever to prevent them from having that opportunity.

**B. Campmor's Expert Will Testify as to Best Practices in Search Engine Optimization.**

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It must be noted that despite Rosetta's unqualified assertion that best practices have not been "defined nor have they been confirmed or explained in any way by a liability expert pursuant to Fed. R. Evid. 702" [Rosetta Memo of Law, p. 8], there is in fact a definition in the expert report from Campmor's SEO expert, Brian Cooper. Throughout his August 17, 2011 Supplemental Report (particularly, but not exclusively, in Point VII, pp. 17-30), Mr. Cooper discusses in detail what SEO "best practices" are and how Rosetta completely failed to meet that standard for each of the SEO elements analyzed therein. *See, Coleman Cert., ¶ 6, Ex. D.* Thus the claim cannot be made that best practices are not defined by an expert where, as regarding SEO here, expertise may be appropriate to enhance the jury's understanding of the issues.

**IV. ROSETTA HAS NOT DEMONSTRATED A LEGAL BASIS FOR EXCLUDING EVIDENCE OUTSIDE THE FOUR CORNERS OF THE CONTRACT.**

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Brulant's attempt to keep from the jury patently admissible and relevant communications and exhibits other than the contractual documents themselves is without merit, and is particularly brazen in light not only of its own gargantuan exhibit list but the fact that this Court has denied this exact application by Rosetta – **twice**. In ruling on both Rosetta's motion to dismiss and its motion for summary judgment, the Court ruled that (i) the parol evidence rule does not bar such evidence where a claim for negligent misrepresentation exists unless the alleged promise/representation was directly contradicted by the terms of the contract at issue (here the Master Services Agreement ("MSA")); and (ii) Rosetta failed to demonstrate that the MSA contains any provisions directly contradicting the misrepresentations alleged by Campmor.

*Campmor, Inc. v. Brulant, LLC*, 2011 WL 2745922 (D.N.J.) at \*8. Campmor's claim for negligent misrepresentation remains to be tried – and therefore any extra-contractual evidence is both relevant and admissible. Rosetta's improper attempt to re-litigate this issue for a third time should at the very least result in the same outcome as the first two.

For all this, even if the Court were to again consider Rosetta's argument, its practical effect would be of no moment, because not even Rosetta can argue that this case should be tried on the evidence of a half-dozen or so contractual documents. It would be strange indeed to hear it do so, considering that it designated no fewer than 494 documents as exhibits compared to Campmor's 80. Besides the sole exception of the introductory PowerPoint presentation from Rosetta to Campmor, all the documents (status updates, charts, similar data, oral statements, etc.) Rosetta seeks to keep out of evidence are relevant to Rosetta's performance of its contractual obligations.

**V. ROSETTA HAS NOT DEMONSTRATED A LEGAL BASIS FOR EXCLUDING EVIDENCE MANAGERS' AND EMPLOYEES' TESTIMONY CONCERNING KEY FACTS AT TRIAL .**

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Rosetta's motion in limine concerning whether or not Campmor officers and employees can testify about Rosetta's failure to deliver on its contractual obligations (as well as its misrepresentations) is another rather bold, and for all that desperate, attempt to re-litigate an issue already determined by this Court. As quoted above, in denying Rosetta's prior request for what amounts to exactly this relief, the Court came to the commonsense conclusion that "representatives of Campmor do not need to know how to build a website themselves in order to know that they did not receive what they expected." *Campmor, Inc.*, 2011 WL 2745922 at \*4.

As the Court noted, it is axiomatic that Campmor's officers and employees are competent to testify regarding facts within their knowledge regarding Rosetta's work as well as the result of that work. Moreover, under the Federal Rules of Evidence, they are also permitted to provide

opinion testimony that is (a) rationally based on their perception, (b) helpful in understanding the witness's testimony or to determine a fact in issue and (c) not based on scientific, technical or other specialized knowledge within the scope of Fed. R. Evid. 702. *See*, Fed. R. Evid. 701. Rosetta has made no showing that there is any "scientific, technical or other specialized knowledge" at risk of being proffered by these witnesses. The risk to Rosetta of what this relevant testimony will reveal is real, but that is why it should come in, not why it should be excluded.

**V. ROSETTA HAS NOT DEMONSTRATED A LEGAL BASIS FOR EXCLUDING THE TESTIMONY OF RED BARITONE AND NET CONCEPTS EMPLOYEES TESTIMONY AT TRIAL.**

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Similarly, Rosetta's application to preclude or limit the testimony of employees of Red Baritone and Net Concepts, the two firms that Campmor hired to do the job that Rosetta could not, must be denied for the same reasons as those set forth in the previous two sections. Neither Red Baritone nor Net Concepts need to be qualified as an expert to discuss and explain Rosetta's breaches of contract. They too are permitted to provide both fact testimony based on their first-hand observations of the website operation they inherited as well as opinion testimony rationally based on their perception, that will help the fact-finder understanding their testimony or to aid in determining a fact in issue that is, as this Court has ruled the subject web design is, not based on scientific, technical or other specialized knowledge.

Rosetta's specious argument that Campmor was required to designate and disclose these entities as expert witnesses to permit them to testify to facts relating to Campmor's claims has already been rejected by this Court. Their re-argument of the point is meritless.

**VI. CAMPMOR'S TRIAL EXHIBIT 42 (CUSTOMER EMAILS AND CORRESPONDING CAMPMOR EMAILS TO ROSETTA) IS RELEVANT AND ADMISSIBLE AT TRIAL.**

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Rosetta fears Campmor's "consumer complaint" emails greatly, as well it should, for they take Rosetta's breaches out of the esoteric and technical realms that, per the above, it would like the Court and the jury to believe are the subject of this case and brings home the painful truth: Rosetta sold Campmor a lot of things, but one thing it didn't sell Campmor was the one thing it thought it was buying, and the one thing it had before it got involved with Rosetta: A website that sold camping equipment to the customers, credit cards in hand, who wanted to buy it from Campmor. They couldn't.

None of the three purported bases for the relief sought by Rosetta supports its argument. Rosetta both pretends not to understand the relevance of these emails and, for good measure, muddles matters entirely with discussion of Fed. R. Evid. 1006. Rosetta's incoherent position is that Campmor is offering these emails as a "summary" of all the emails received by Campmor during the relevant time period. But Campmor's Exhibit 42 is not a summary. It is a collection of emails – emails from Campmor customers complaining about the problems with Campmor's website after Rosetta's launch of the 6.0 site, along with corresponding transmittal emails from Campmor to Rosetta, demonstrating that Rosetta received these emails and accepted them as authentic at all times. These emails are relevant under Fed. R. Evid. 401 as evidence tending to make Campmor's claims of breaches more or less likely. There is neither a relevance nor a Fed. R. Evid. 1006 issue pertaining to this exhibit.

Rosetta's spurious attempt to twist the words of Magistrate Judge Arleo to suggest that each and every email must be listed as a separate trial exhibit – and that Campmor should be deprived of its substantive right to offer this evidence because it subdivided one exhibit number a matter of economy and convenience for all concerned – is directly and conclusively refuted by

the transcript of the September 28, 2012 appearance, at which time Judge Arleo expressly stated, in reaction to Campmor's original arrangement of the exhibit, that all emails "could be offered as one exhibit" but that each email must be identified by Bates number in order to address any evidentiary issues with a particular email [Coleman Cert., ¶ 8, Ex. F, pp. 11-12]. A copy of the list of Bates numbers for Exhibit 42 that was provided to Rosetta's counsel is attached to the Coleman Cert. as Ex. P.

If there were still any confusion on Rosetta's part, this should have been dispelled when Judge Arleo again stated "you [Campmor] can put them all under [Exhibit] 42, but I want everything listed . . ." [Coleman Cert., Ex. F, p. 13]. Indeed, further in the transcript, during colloquy concerning Campmor Exhibit 18, which consists of four charts, each of which was specifically identified by Bates number under Exhibit 18 in Campmor's list, Rosetta's counsel complained that each was not a separate exhibit. Judge Arleo's response was, "But he listed the four charts [by Bates number]. So I think that's ok." Rosetta's counsel then accepted this determination and stated "That's okay? Okay. That's fine with us." Coleman Cert. Ex. F, at 13. Apparently Rosetta changed its mind in this regard and it is no longer "fine". However, that does not change the fact that Campmor complied with Judge Arleo's direction.

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**VII. ROSETTA HAS NOT DEMONSTRATED A LEGAL BASIS FOR EXCLUDING ROSETTA'S INTERNAL EMAILS FROM EVIDENCE.**

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Once again, Rosetta attempts to take a second bite at the apple as to an issue already addressed by the Court. This time it is regarding the admissibility of certain Rosetta internal emails certain to be devastating to Rosetta's defense. As the Court will recall, Rosetta, in its motion for summary judgment, argued that the very emails at issue in Rosetta's instant motion in limine did not constitute evidence of a breach of contract because they were – yes – not "supported by expert testimony"; that they were merely "colorful language"; that they consisted

of Rosetta staff just idly “repeating to their colleagues what the client (Campmor) was complaining about” – indeed, that the emails were in fact evidence of nothing so much as Rosetta’s efforts “to identify, troubleshoot and remedy issues.” In its July 12, 2011 Opinion, the Court called these arguments “**incredibly disingenuous.**” *Campmor, Inc.*, 2011 WL 2745922 at \*6 (emphasis added).

Disingenuous is, evidently, as disingenuous does. By all indications, Rosetta believes it cannot do any worse by offering up slight variations of these laughable arguments as grounds for preclusion. Now the basis for Rosetta’s position is that the statements in the emails fail to qualify as admissions against interest, and are thus inadmissible hearsay, because none of the “alleged declarants were assigned to the team responsible for the upgrade of the 6.0 site” [Rosetta Memo of Law, p. 19]. Rosetta then repeats the comical suggestion that “these emails primarily demonstrate [Rosetta’s] consistent efforts to address and satisfy Campmor’s expectations.” [*Id.* at 20-21] and, for good measure, throws up the suggestion – the ultimate in disingenuousness – that these emails “are not relevant to trial issues.”

Some of these stories, of course, are stories that Rosetta is at liberty to tell the jury, if can do so within the bounds of the Federal Rules of Evidence and the strictures of legal ethics. This is notably the case concerning its attempt to spin admissions of failure, incompetence and recklessness into robust corporate acceptance of responsibility – which, if Rosetta truly believes, would be a reason that it should be offering these emails as its own evidence, not scrambling desperately to keep them from the jury.

Tellingly, Rosetta offers no support for its ludicrous argument that Campmor cannot establish that these emails are admissible as admissions against interest on the ground that they concern a matter within each author’s scope of employment “because the authors of the subject

emails were not involved in the launch and implementation process.” [Rosetta Memo of Law, p. 20]. Besides raising the obvious question of why these Rosetta employees would be wasting time emailing each other about the chain of Rosetta failures in the “launch and implementation” of Campmor’s website, the standard Rosetta suggests is not the law. The only requirement to meet the “scope of employment prong” for an admission is “that the subject matter of the admission match the subject matter of the employee’s job description.” *Aliotta v. National R.R. Passenger Corp.*, 315 F.3d 756, 762 (7th Cir. 2003). “To qualify an admission, an employee need only be performing the duties of his employment when he comes in contact with the particular facts at issue.” *Id.*, citing *Polec v. Northwest Airlines*, 86 F.3d 498, 536 (6th Cir. 1996).

In fact, each author of the respective emails at was directly involved in Rosetta’s efforts to correct the problems it caused with Campmor’s website and therefore was acting within the scope of his employment when the emails were written.<sup>5</sup> Specifically, but not exclusively:

- Scott Young<sup>6</sup> is identified in his email signature block as a managing partner at Rosetta -- clearly someone in decision-making authority, which is evident in his April 29, 2009 email directing Dave Fazekas to go to the Campmor site and work on the “major issues that can be seen...” This alone demonstrates his emails fall within the scope of his employment. However, it is also worth noting that Scott Young signed nearly SOW with Campmor on behalf of Rosetta, including the SOW for the 6.0 upgrade (*see*, Coleman Cert., Ex. J). Certainly any discussion of Rosetta’s performance under those SOWs (which his emails do) falls within the scope of Mr. Young’s employment.
- Dave Fazekas’ responsive April 29, 2009 email clearly identifies himself as someone directly involved in Rosetta’s efforts to fix the problems it caused to Campmor’s website. Therefore any evaluation or discussion of Rosetta’s

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<sup>5</sup> For the Court’s convenience, the emails at issue are attached to the Coleman Cert. as Exhibit G.

<sup>6</sup> Rosetta’s claim that “during that time, Scott Young was a junior account sales manager for Brulant” [Rosetta Memo of Law, p. 19] is belied by his own deposition testimony identifying himself as a “partner” at Brulant and as a managing partner once Rosetta purchased Brulant. Mr. Scott further detailed his responsibilities with Rosetta as including “to generate business for the organization and support the clients that I generate business for.” (emphasis added). The relevant pages of Mr. Young’s deposition transcript are attached to the Coleman Cert. as Exhibit H.

work on Campmor's website (which is the subject matter of each of his emails) therefore falls within the scope of his employment.

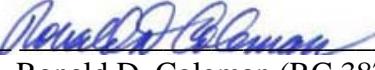
- Joe McCrone was a managing partner at Rosetta that had oversight responsibility for the Campmor project at or around the time of the launch of the 6.0 site. See, Coleman Cert., ¶ Ex. I. Any discussion of that project (which is the subject of his emails) therefore falls within the scope of Mr. McCrone's employment.
- Chris Boggs is identified as Rosetta's Director of Search Engine Optimization on his email signature block. Clearly any discussion of SEO, including SEO for Campmor (which is the subject matter of each of his emails), falls within the scope of Mr. Boggs' employment.

In the unlikely event that Campmor failed to establish the admissibility of these emails by laying a proper foundation at trial, naturally an objection could be made, and the opportunity for a cure extended, as the Court finds appropriate. But exclusion of these documents, under these circumstances, is not the subject for a motion in limine. Rosetta's motion regarding these emails, as most of its motions in limine has, to the contrary, merely been a waste of time and money for all concerned.

## CONCLUSION

Based on the foregoing, Campmor respectfully requests that Rosetta's motion in limine be denied in its entirety, along with such further relief as to this Court seems just.

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