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November 23, 2015

VIA FEDEX AND ELECTRONIC MAIL

Naomi Jane Gray, Esq.
Harvey Siskind LLP
Four Embarcadero Center, 39th Floor
San Francisco, CA 94111

Re: Splunk, Inc., and Rocana, Inc.

Dear Ms. Gray:

This firm represents Rocana, Inc. ("Rocana"). As you are aware, Splunk, Inc. ("Splunk") has made a demand on Rocana via your letter dated November 9, 2015. Splunk has alleged, among other things, that Rocana has supposedly engaged in "acts of false advertising, unfair competition, trade libel, and defamation" on: (i) a blog on Rocana's website entitled "Rocana vs. Splunk: IT Operations Shutdown," dated September 22, 2015; and (ii) a white paper entitled "Improving Event Data Management and Legacy Systems," available on the Resources page of Rocana's website.

Please consider each substantive allegation made by Splunk to be categorically rejected. This appears to be part of an overall pattern where Splunk has attempted to intimidate competitors that have made comparisons with Splunk's product and third-party research analysts that have independently raised issues regarding Splunk. It is not uncommon, in our experience, that people who do not have the best product look to find ways to stop competition. It is evident that Splunk has tried to silence people before with intimidation and that Splunk has lost when it has tried to do so. Public policy encourages people to speak freely about commercial things, and it is the essence of Rocana's corporate culture to engage in an open and transparent dialogue. That is what the marketplace is about.

If Splunk pursues any legal action against Rocana for opportunistic or malicious reasons, Rocana will not back down and will pursue all rights and remedies against Splunk and any affiliated parties. This may include an anti-SLAPP motion in California to protect Rocana's free-speech rights. You should know that Rocana and its founders, who are experienced industry veterans in the realm of real-time operational intelligence, have worked very hard to create a useful product. The start-up company that they have founded, as well as the investors who stand ready to validate it, cannot be stopped by idle threats, premised on falsehoods.

To summarize:

A. Rocana stands firmly behind all statements made in the above-referenced blog and white paper posted on its website. Rocana will continue to exercise its protected free speech rights to discuss the capabilities of its specialized product offerings, which

offer a direct alternative to Splunk. Rocana will not delete or destroy these postings, as Splunk has demanded.

B. Splunk is incorrect on the facts, and incorrect on the law. These statements made by Rocana are totally true and also constitutionally protected opinions that are not legally actionable.

C. If Splunk is predicating its claims against Rocana on these ideas, your client is misguided. If Splunk continues to persist in making threats, Rocana will take prompt and appropriate action.

This is a matter where the public has an interest in being informed to allow people to engage in an open dialogue regarding the merits of the respective products of Splunk and Rocana. In the interest of maintaining transparency, copies of your November 9th letter and this letter will be made publicly available by Rocana.

This letter proceeds in three parts. Part I provides Rocana's response to Splunk's allegations and explains how each of the statements made by Rocana are factually correct or legally protected opinions. Part II shows how Splunk is incorrect on the law, and how Splunk has engaged in a similar pattern to try to silence other parties with intimidation. Part III provides Rocana's response to the six matters demanded by Splunk in your letter.

I. Splunk's Allegations against Rocana

Your letter consists of approximately five pages where Splunk alleges, erroneously, that Rocana has made false statements about Splunk's products and services. Rocana rejects each of these allegations. Part A discusses the allegations regarding the blog posting in pages 2 through 4 of your letter, and Part B discusses the white paper allegations made in pages 5 through 7 of your letter.

A. Blog

1. David Spark was engaged as a guest author of the blog posting. Mr. Spark was specifically disclosed as a guest author at the top of the blog posting on Rocana's website, which is conspicuous and obvious to any reader. He did not receive any consideration to make statements favorable to Rocana nor was his blog posting false or misleading in any way.

   Your letter strains to assert that Mr. Spark and other authors quoted in his blog posting may be affiliated with Rocana. Then your letter claims, without any factual substantiation, that Mr. Spark and other third-party analysts quoted in Mr. Spark's blog posting "may have received … consideration to make false or misleading statements favorable to Rocana." This is categorically false. To be clear:

   a. Mr. Spark has received compensation from Rocana to conduct research and serve as a guest author of the blog. However, Mr. Spark's opinions are

exclusively his own, and he has never received any compensation to make statements favorable to Rocana.

b. It is open and obvious that Mr. Spark is a "Guest Author" on Rocana's website. Moreover, it is also clear that Rocana provides the content for its blog postings on its own website and allows for the submission of public comments, encouraging an open and transparent dialogue. This is how Splunk's blog works as well. As such, any suggestion made by Splunk that the relationship between Mr. Spark and Rocana is somehow not apparent to a reader of Rocana's proprietary blog is simply nonsensical.

c. Rocana has been a long-time client of Monash Research for access to industry knowledge and experience. This affiliation is independent and separate from any opinions expressed by Curt Monash that were cited in Mr. Spark's blog posting.

d. Rocana has recently engaged Jason Bloomberg's company, Intellyx. However, Splunk's suggestion that Mr. Bloomberg was somehow paid to provide a favorable opinion is a falsehood.

2. Rocana's view is that Splunk cannot deliver "total operational awareness." This is a protected opinion, supported by experiences of Splunk's users and expert industry analysts.

   In response, Splunk claims that its customers include 80 of the top 100 revenue-generating companies in the United States and also claims that its product "can be scaled to serve the needs of large businesses and organizations." This response says nothing about Splunk's ability to deliver "total operational awareness," and Rocana does not agree that Splunk's product is capable of doing so.

   As used in the industry, "total operational awareness" is a specific use of software that requires collecting data from every system into one product and making that data readily accessible to users in a timely manner. Rocana is aware of certain issues preventing Splunk from delivering "total operational awareness" to Splunk's users. This includes, without limitation, specific issues with respect to the operation of Splunk's software based on increases in data and the inability for Splunk's users to store all data on one installation, requiring multiple, discrete installations. As such, while the statements made by Rocana are nonactionable statements of opinion, the underlying operational issues experienced by Splunk's users are a matter of demonstrable, actual evidence.

3. It is true that Splunk does not provide "reliability guarantees." In fact, your letter does not dispute this at all, but instead suggests that certain features offered by Splunk, such as "multiple protections against data loss," somehow equate to a reliability guarantee. This is not what a reliability guarantee is – a guarantee is an enforceable assurance that the product works, not merely a recitation of features that the product offers.

Naomi Jane Gray, Esq.
Harvey Siskind LLP

November 23, 2015

4. Splunk is wrong when it claims that Rocana does not guarantee data collection reliability. Rocana provides specific reliability guarantees in the very blog posting that your letter references: "Rocana's robust data bus and high fidelity store architecture can guarantee delivery of events anywhere on the network, plus record any metric at any interval." This language is crystal-clear, yet is disregarded by Splunk.

5. Issues regarding Splunk's processing of larger amounts of data and the budgets of Splunk's customers are backed by extensive third-party analysts and reports. Splunk's standard pricing model charges customers based on increases in customer data collection. This is not contested by Splunk. It is Rocana's view, and the view of independent third-party analysts, that this model results in specific issues for Splunk's customers as data collection increases. This is supported by a published master's thesis entitled "Big Data Archiving with Splunk and Hadoop," written with the support of Splunk employees, which provides that "some of Splunk's customers have retention policies that require that data be stored longer than Splunk can offer."[1] In addition, there is extensive commentary that Splunk's volume-based licensing model has negative effects on Splunk's customers, which Splunk should be readily aware of.

6. It is accurate and verifiable that Splunk's software was designed for functionality first, not for scalability. Splunk claims that statements quoted from a well-respected research analyst are somehow false and misleading where such analyst states that Spunk's software is an "older system" that was "designed for functionality first and scalability second." However, it is admitted and acknowledged by Splunk's former CEO, Godfrey Sullivan, that Splunk's system was designed for functionality: "[Massive amounts of data storage] is very different than what we typically do at Splunk Enterprise, which is kind of like a real-time or near-time time-based indexing to see trends that [are] happening right now in IT operations or security use cases or the like. So Hadoop is more like a database for storing massive amounts of data that you want to come back later and analyze it. And that's not typically what people do with the Splunk Enterprise."[2]

7. Splunk has misportrayed Rocana's statements regarding real-time data collection and analysis, which are generalized statements that say nothing about Splunk. In particular, Splunk claims that the following statement is somehow demonstrably false: "For network data analysis to effectively help the business, IT needs to be alerted about unexpected events as they happen. This requires a system that can collect and analyze data in real time." This says nothing about Splunk whatsoever. In any case, these statements regarding the importance of real-time data operations are statements of opinion, not fact.

8. Rocana believes that it performs better than Splunk, such as with respect to Rocana's machine learning integration and ability to perform intelligent anomaly detection. These are not only Rocana's opinions, but the opinions of third-party analysts who are experts

[1] See http://www.nada.kth.se/utbildning/grukth/exjobb/rapportlistor/2013/rapporter13/ergenekon_emre_berge_OCH_eriksson_petter_13006.pdf.

[2] See http://seekingalpha.com/article/2245783-splunks-splk-ceo-godfrey-sullivan-on-q1-2015-results-earnings-call-transcript?part=single.

in the fields of data management and business intelligence. Beyond indexing the data and making it searchable, Rocana applies machine data and automatically shows the user what is happening with dynamic, real-time functionality, which it believes that Splunk's product does not offer. Rocana is confident that its product offerings provide various advantages over Splunk's products and encourages an open dialogue regarding the merits of their respective products.

9. It is accurate and verifiable that "Splunk is a proprietary system that doesn't publish their file formats, enable direct access to files, or offer open APIs [Application Program Interfaces]." In other words, the underlying platform utilized by Splunk is not completely open, and Splunk's customers do not have access to write directly their own data collection to integrate into their own systems, or read the data directly off the disk, or have the underlying source code. In addition, Splunk does not offer an "open" API, as Splunk requires a license to the API that is entirely under Splunk's control. Specifically, the file formats generated and used by Splunk are not published to its customers, and Splunk's customers do not have access to the internal processes and functions of the API, nor does Splunk provide customers with details on the mechanisms to replicate the processes outside of Splunk's proprietary system.

10. Splunk's standard pricing model is based on daily indexed data volume, while Rocana does not charge for data collection. It is Rocana's position that this structure acts as a "tax" for Splunk's users as their daily data volumes increase, which is accurate given Splunk's price structure. While it may be true that Splunk's users can transfer certain raw data out of Splunk at no charge, the reality is that the data is essentially unusable, as Splunk users build dependencies on Splunk's proprietary system to manipulate the data. Users can export the raw data, but they cannot uninstall Splunk and are essentially beholden to the Splunk system to generate any meaningful output from the data. And, as the daily data volume increases, the cost to purchase an upgraded license increases, based on Splunk's volume-based pricing model.

B. <u>White Paper</u>

1. Rocana is correct that Splunk's customers have looked for alternatives due to cost structure alone. This is well documented and admitted by Splunk, as evidenced by such things as Splunk's quarterly earnings calls and pricing changes.

2. Splunk's license agreement often results in Splunk's users being required to purchase upgrades in the event that users exceed their daily data volumes. The terms of Splunk's license agreement speak for themselves. Suffice it to say that noncompliances of license terms (such as exceeding data restrictions) result in the disabling of Splunk's features. Even if Splunk's customers are made aware that they need to "increase their licenses," as your letter admits, it still stands to reason that the users are required to purchase a license upgrade to be able to have meaningful use of previously existing data.

3. It is openly known that Splunk promotes Splunk experts called “Splunk Ninjas” for their advanced skillset to manage and use Splunk. This has been openly discussed in Splunk conferences. The complexity of Splunk’s software is further evidenced by the fact that Splunk has been adding features to address ease of use.

4. Rocana stands behind its opinion that Splunk is a “one-way street,” as there is no way to access data other than through Splunk-provided tools. In addition, Rocana’s characterization of Splunk as a “roach motel” is a term of art in the industry, referring to a service that is difficult to use because it is designed to make it easier to input rather than extract data.

5. It is accurate that data access through Splunk is query-based. This is a product distinction between Splunk and Rocana, as Splunk’s system requires a user to populate a pre-built dashboard and submit questions to access the data, and also requires for data to be written to disk before Splunk’s users can ask questions of it, as opposed to Rocana’s dynamic machine learning application, which is adaptive and identifies anomalies with respect to patterns of data other than those that have been previously identified.

6. Splunk is deeply misguided by claiming that the following statement is somehow false or misleading: "Rocana provides a modern alternative that is better [than Splunk] in several regards: simpler and greater scalability, open data access and formats, out-of-the-box functionality for augmented IT ops, open integration and rich analytics, significantly lower TCO [total cost of ownership]." This is the quintessence of an opinion.

II. Rocana’s Statements Are Constitutionally Protected Opinions and Splunk’s Claims Have No Basis under Applicable Law

Rocana is confident that each and every statement made in the blog posting and white paper is completely truthful. Splunk is incorrect on the facts, and it is also incorrect on the law, as any factual information that is encompassed in Rocana’s statements is provided a safe-harbor as a constitutionally protected opinion based on the public policy of allowing free speech.

Splunk makes various threats against Rocana, but the only law that Splunk has stated in your letter concerns regulations concerning advertisers and third-party endorsers. Even assuming that these regulations were to apply to Rocana, such regulations do not authorize private lawsuits against a competitor, as they are exclusively in the domain of the Federal Trade Commission (“FTC”). Separately, Splunk claims, in a conclusory manner without any reference to applicable law, that Rocana has supposedly engaged in false advertising, unfair competition, trade libel, and defamation. This is not the case under California law, and it is notable that your letter provides approximately five pages of allegations, but not a word regarding the applicable law. Just a sampling of relevant cases should expose this to your client, as follows:

A. First, blogs and postings made on a party’s own website are given substantial protection under California law as free speech. California courts have repeatedly held that postings on a business competitor’s website – and specifically, a business competitor’s blog – are

constitutionally protected opinions, and the truth of such statements is not even considered by the court as a matter of law. See Amaretto Ranch Breedables, LLC v. Ozimals, Inc., No. CV 10-5696 CRB, 2013 WL 3460707, at *3 (N.D. Cal. July 9, 2013) ("The statements made in Ozimals' Blog Entry do not constitute actionable defamation because the statements are constitutionally protected opinions. Therefore, Ozimals is entitled to judgment as a matter of law on Amaretto's defamation claim."). In particular, the Amaretto court cited that a competitor's blog was a public forum for debate and that a reader would understand that the competitor "wrote it from its own perspective to paint itself in a better light, and would not understand it to be 'statements of fact rather than the predictable opinion of ... one side about the other's motives.'" Id. at *4 (quoting Info. Control v. Genesis One Computer Corp., 611 F.2d 781, 784 (9th Cir. 1980)). On similar grounds, the Amaretto court dismissed claims for trade libel and unfair competition on the basis that the statements made comprise constitutionally protected opinions.

B. California courts have held that "statements made on personal website[s], through Internet discussion groups, and as part of heated debate are less likely to be viewed as statements of fact." Nicosia v. De Rooy, 72 F.Supp.2d 1093, 1101 (N.D. Cal. 1999). See also Summit Bank v. Rogers, 206 Cal. App. 4th 669, 696-97 (2012) ("Not only commentators, but courts as well have recognized that online blogs and message boards are places where readers expect to see strongly worded opinions rather than objective facts."). This is exactly the case here, as both documents referenced by Splunk are only available on Rocana's website. Moreover, Rocana's blog invites the viewpoints and comments from the general public. In fact, such dialogue has occurred with respect to the blog in question, as an anonymous poster made comments in support of Splunk on September 25, 2015.

C. You have also suggested that "Rocana must be able to substantiate each of these claims based upon factual evidence in existence prior to the making of the claims." Again, this is not the case under California law. First, as the Summit Bank court held, Splunk, and not Rocana, has the burden of presenting a *prima facie* case that the statements at issue are "reasonably capable of a defamatory meaning or are substantially false." Id. at 700. Splunk cannot meet this standard. Moreover, the Summit Bank court held that "the law does not require … the literal truth of the allegedly defamatory conduct," as it is sufficient that the statement is substantially true, irrespective of slight inaccuracy in the details.

D. In addition, even assuming that the statements made by Rocana are not constitutionally protected opinions (which they are) and are statements of facts subject to the determination of a factfinder (which they are not), Splunk, as a publicly traded company, is a limited public figure for the purposes of a defamation claim and is required to "prove by clear and convincing evidence that an allegedly defamatory statement was made with knowledge of falsity or reckless disregard for truth." Ampex Corp. v. Cargle, 128 Cal. App. 4th 1569, 1577 (2005) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964)). Similar to the above, Splunk has provided no evidence to support this high burden to assert even a *prima facie* case against Rocana.

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November 23, 2015

Given the applicable facts and law, Rocana believes that your client's demand letter is a malicious attempt to interfere with its business and an endeavor to bully my client from exercising its legally protected rights. We have learned that this appears to be part of an overall pattern where Splunk has taken the tack of threatening and pursuing claims against a competitor in a very similar manner to what is happening here. Specifically, we are aware that Splunk pursued multiple cases against Sumo Logic, Inc. ("Sumo Logic") before the National Advertising Division ("NAD") of the Better Business Bureau. In the first action filed by Splunk in 2012, Splunk alleged that Sumo Logic made false and misleading claims on its website regarding comparisons made to Splunk's product. Sumo Logic continued to dispute Splunk's claims, and in the interest of resolving the dispute, agreed to make certain changes to its website, including: (i) a comparison chart on Sumo Logic's website entitled "Machine Data Analytics Showdown: Sumo Logic vs. Splunk"; (ii) a blog on the website entitled "differentiators"; and (iii) a post on the website entitled "Sumo Logic vs. Splunk: Top 6 reasons to think beyond Splunk." Subsequently, in 2014, Splunk initiated another action with the NAD, claiming that Sumo Logic had not complied with making such changes. The NAD ruled against Splunk, determining that Sumo Logic had complied with the agreed-upon changes to its website.

On similar grounds, Rocana is aware that a third-party expert who voiced issues regarding Splunk's software in a blog has been accused as allegedly receiving compensation from a competitor. This involves a blog posting by Chris Riley on January 20, 2015, entitled "Log Analysis, or Log Cloud," where multiple anonymous posters claimed that Mr. Riley was being compensated by Logentries to write the blog posting, a claim that Mr. Riley has vigorously denied.[3]

While we make no assessment on the merits of the above cases or others, this pattern seems to be telling. Just like these cases, Splunk is threatening a competitor in a manner that seeks to curb product comparisons with Splunk's product and interfere with the public's legitimate interest in an open dialogue regarding the capabilities of Rocana's and Splunk's products. This will not happen, as my client will do what it takes to protect itself against any untoward action by your client. Based on the foregoing, we hereby request that Splunk takes all necessary steps to prevent and preserve any and all documents and information relevant to this matter or any other matters involving similar circumstances, such as the matters involving Sumo Logic and Mr. Riley, including, without limitation, e-mails and electronically stored information. Compliance with this preservation obligation includes providing anti-spoliation instructions to all individuals and organizations that are responsible for any of the items referred to in this letter. If Splunk's strategy is to squash free speech about best solutions and competition, it will not succeed.

III. Response to Splunk's Demand

Splunk "demands" that Rocana addresses six matters set forth on page 7 of your letter of November 9. In series, here are my client's responses:

[3] See http://devops.com/2015/01/20/log-analysis-or-log-clog/.

Naomi Jane Gray, Esq.
Harvey Siskind LLP

November 23, 2015

1. My client can confirm that it has ceased and desisted any alleged false and misleading claims. In fact, no such false and misleading claims have ever occurred.

2. My client has a legally protected right to compete against Splunk and plans to continue to do so in the future. There is no obligation for my client to certify or warrant anything to your client.

3. The demand to remove the "Rocana vs. Splunk: IT Operations Shutdown" blog post from Rocana's website and any other location is rejected.

4. The demand to withdraw the "Improving Event Data Management and Legacy Systems" white paper and destroy all copies is rejected.

5. There have been no violations of Splunk's rights by Rocana's employees.

6. This letter constitutes my client's written response to your letter dated November 9.

My respectful belief is that it would be a sensible move for Splunk to end this poorly advised endeavor. If Splunk takes any action beyond the bounds of what is permitted under applicable law, then Rocana is prepared to take promptly whatever lawful action is necessary to protect its interests and free speech rights. This may entail, without limitation, an anti-SLAPP motion to strike any complaint as a strategic lawsuit against public participation, and the recovery of all of Rocana's attorneys' fees and costs. See Ampex Corp., 128 Cal. App. 4th at 1575–80 (granting anti-SLAPP motion and awarding attorneys' fees and costs to defendant alleged to have posted messages critical of a publicly traded company and its chairman on a message board). My client respectfully suggests that Splunk should put its efforts into making a better product, not trying to stop people from talking about what works best.

My client reserves all rights and claims against Splunk, and any parties that in any manner assist or abet Splunk. Thank you.

Sincerely,

David J. Shlansky

cc: Mr. Omer Trajman, Chief Executive Officer, Rocana, Inc.
Travis Tatko, Esq., Shlansky Law Group, LLP (California counsel)
Colin Hagan, Esq., Shlansky Law Group, LLP (California counsel)

Naomi Jane Gray 11 23 15