

EXHIBIT 33

Capital Reporting Company
Dubow, Steve F. 03-08-2010

IN THE DISTRICT COURT
FOR THE DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

COPY

-----:
ROSETTA STONE, LTD., :

Plaintiff, :

vs. :

GOOGLE, INC., :

Defendant. :

C.A. No.:

1:09-cv-00736 (GBL/TCB)

-----:
Lakewood, Colorado

Monday, March 8, 2010

Videotaped Deposition of:

STEVE F. DUBOW...

called for oral examination by counsel for Plaintiff,
pursuant to notice, at the Sheraton Denver West
Hotel, 360 Union Blvd., Lakewood, Colorado, before
Barbara J. Castillo, RMR/CRR, of Capital Reporting
Company, a Notary Public in and for the State of
Colorado, beginning at 10:52 a.m., when were present
on behalf of the respective parties:

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1 behalf of Google.

2 STEVE F. DUBOW, called as a witness, and
3 having been first duly sworn, was examined and
4 testified as follows:

5 EXAMINATION

6 BY MR. ETTINGER:

7 Q Good morning.

8 A Good morning.

9 Q Please state your full name.

10 A Steve Floyd DuBow.

11 Q Have you ever been deposed before, sir?

12 A Yes, sir.

13 Q On how many occasions?

14 A At least twice from my memory.

15 Q Well, the ground rules that applied to those
16 depositions will apply here, and I'd like to go over
17 them briefly with you just to make sure we're on the
18 same page. Okay?

19 A Uh-huh.

20 Q Everything that we say in this room today
21 will be recorded verbatim by the court reporter and the
22 videographer. So we need to be careful not to speak

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1 course, we'll accommodate you. All right?

2 A Thank you.

3 Q Sir, where do you reside?

4 A I reside in Conifer, Colorado.

5 Q What is your address?

6 A 26500 Long View Drive, 80433.

7 Q And how long have you lived there?

8 A About a year and a half now.

9 Q And are you married?

10 A Yes.

11 Q What is your wife's name?

12 A Sandra.

13 Q And I'm not trying to be intrusive, but would
14 you mind stating your age.

15 A My age is 65.

16 Q What is the highest level of education that
17 you completed?

18 A Bachelor in mathematics.

19 Q And from what university did you receive that
20 degree?

21 A From Cal State Northridge.

22 Q Did you do any follow-on graduate work?

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1 A I did. I went to USC graduate school, did
2 not complete my master's there. I started a software
3 company in 1973, and that was the end of my college
4 work.

5 MR. STERN: Mr. DuBow, I'm terribly sorry.
6 This is Claude Stern. The acoustics of this room are
7 horrendous, and the court reporter is nodding. You're
8 doing fine, but if I could ask you to speak up just a
9 little bit.

10 THE DEPONENT: I'll do my best.

11 MR. STERN: We have -- we have literally
12 airplanes outside and --

13 THE DEPONENT: Air-conditioning.

14 MR. STERN: -- air-conditioning going on. I'm
15 terribly sorry for the conditions, but if you can speak
16 up just a little bit, that would be great.

17 THE DEPONENT: Okay.

18 MR. STERN: Thank you.

19 THE DEPONENT: I'll do my best.

20 Q (BY MR. ETTINGER) And are you currently
21 employed?

22 A Yes.

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1 Q Okay. Through what business?

2 A I'm in the software development business.

3 Q What is the name of the business?

4 A It's called Comm-Pro Associates, C-o-m-m,
5 hyphen, P-r-o Associates.

6 Q And how long have you been employed by Comm-
7 Pro?

8 A We started that company in 1973, as I said.

9 Q And what is the business of Comm-Pro?

10 A We write communications software for IBM
11 computers.

12 Q And who are your principal customers?

13 A Our customers are generally banks, insurance.
14 companies, cross platform -- or I should say cross
15 industry.

16 Q And what is the functionality of the software
17 that you sell?

18 A Our current iteration of software is --
19 provides an interface between users on a network and
20 IBM applications that run on a mainframe.

21 Q Okay. And you understand that this case that
22 you're testifying in today involves a civil lawsuit

1 between Rosetta Stone and Google, correct?

2 A Yes.

3 Q And you've agreed to provide testimony in
4 this matter; is that right?

5 A Correct.

6 Q You're not under any subpoena to appear here
7 today, are you, sir?

8 A No.

9 Q Are you being compensated for your appearance
10 today?

11 A Not at all.

12 Q Did anyone promise you anything in return for
13 your testimony?

14 A No.

15 Q Have you ever taken or studied a foreign
16 language in your life?

17 A Yes. I took Spanish in high school.

18 Q Did you achieve fluency in that foreign
19 language?

20 A Not really.

21 Q During your adult life, have you had the
22 desire to learn a foreign language?

1 bar?

2 A Well, I guess my wife did the -- the typing,
3 and then I helped her scroll through the links that
4 were presented.

5 Q And did you direct your wife what terms to
6 enter into the search bar?

7 A Yes.

8 Q All right. And were those terms Rosetta
9 Stone?

10 A Yes.

11 Q Did you use any other terms other than
12 Rosetta Stone at the time you searched on Google to
13 look for the purchase of software?

14 A No.

15 Q Do you know what the term "sponsored link"
16 means?

17 A I do now. I heard it for the first time
18 this morning. I wasn't exactly sure. I've seen those
19 on the right-hand side of the -- of the Google Web
20 page, but I wasn't exactly sure what it was.

21 Q Okay. At the time that you entered the terms
22 or your wife entered the terms "Rosetta Stone" in the

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1 Google search engine --

2 A Uh-huh.

3 Q -- in October 2009, do you recall whether any
4 advertisements appeared on the first page?

5 A I -- what -- what do you mean by
6 advertisements?

7 Q Links that appear to you to be companies
8 selling goods in response to your query.

9 A Yes. Yeah. There were quite a few under
10 that description, yes.

11 Q What do you recall seeing on the search page
12 results when you entered Rosetta Stone in the Google
13 search engine?

14 A I saw a number of sites and -- advertising
15 Rosetta Stone software for a number of different
16 discounted prices. What attracted us to this
17 particular site was that they presumed to be a Rosetta
18 Stone reseller reselling OEM or original equipment
19 manufactured product.

20 Q Did you click on one or more of the -- of the
21 links that appeared to offer Rosetta Stone products for
22 sale?

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1 A We probably clicked on a few before deciding
2 on this one. I don't remember. It was six months ago.

3 Q Ultimately you selected one particular link -
4 -

5 A Yes.

6 Q -- to purchase your software; is that
7 correct?

8 A Correct.

9 Q And what attracted you to that link?

10 A I think the fact, again, re- -- my memory is
11 not a hundred percent here, but I think the fact that
12 they -- they presumed to be a reseller. And it looked
13 like a legitimate Rosetta Stone site.

14 Q What do you mean by reseller?

15 A That they were a -- a sanctioned reseller of
16 Rosetta Stone product.

17 Q Was that important to you?

18 A Absolutely.

19 Q Why is that?

20 A Well, because there's -- there's a lot of
21 bootlegged software product out there. This one looked
22 to be legitimate.

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1 Q Did the ad text, the actual text of the ad
2 itself, appearing on the link use the term "Rosetta
3 Stone"?

4 MR. STERN: Objection, foundation.

5 A Yes.

6 MR. STERN: Objection, foundation.

7 Q (BY MR. ETTINGER) It's okay. You may answer
8 now.

9 A Yes, it did.

10 Q When you clicked on the -- the link or your
11 wife clicked on the link --

12 A Uh-huh.

13 Q -- did you see the page that came up?

14 A Yeah, oh, absolutely.

15 Q Sir, do you recall the name of the -- the
16 company that advertised on the link that you -- you and
17 your wife clicked on?

18 A Yes. It was a company called Bossdisk.

19 Q Could you spell that, please.

20 A B-o, double, s-d-i-s-k.

21 (Exhibit Number 1 was marked.)

22 Q (BY MR. ETTINGER) Sir, I'm going to hand you

1 what's been marked as DuBow Exhibit 1. It is a two-
2 page document that I'll represent to you is a landing
3 page from a Google search to Gain Soft Mall, not
4 Bossdisk, but I want to ask you if this -- if you can
5 take a look at this exhibit and ask you whether or not
6 it bears any resemblance to the one that you saw when
7 you clicked on the Bossdisk site.

8 A It's virtually identical. The price here is
9 \$142. I guess it's gone up. Mine was 139. And I
10 don't remember the version number being presented on
11 the level of Rosetta Stone.

12 Q The page that was presented to you and your
13 wife, did it have the Rosetta Stone boxes appear on the
14 Web itself?

15 A To the best of my recollection, it looked
16 almost exactly like this.

17 Q All right. Sir, if you'd look to the second
18 page, do you see at the bottom of the second page
19 there's some links like to -- conditions of use,
20 contact us.

21 A Uh-huh.

22 Q Do you recall whether you and your wife

1 believe that it was offering genuine Rosetta Stone
2 products?

3 A I -- again, I think -- I remember choosing
4 the site because they said they were a Rosetta Stone
5 reseller.

6 Q How many times do you believe you searched
7 the Internet before getting to the point that you were
8 ready to buy Rosetta Stone software?

9 MR. STERN: Objection, vague.

10 Q (BY MR. ETTINGER) Let me re-ask the
11 question. How many times did you search the Internet
12 for language learning software before you determined
13 that you were ready to buy a product?

14 MR. STERN: Same objection.

15 Q (BY MR. ETTINGER) You can answer.

16 A Okay. I would say a couple of times. I had
17 also read articles in magazines, advertisements.

18 Q When you and your wife sat down at the
19 computer on the day that you were purchasing the
20 software, how long did the whole session take between
21 the time you started until the time that you actually
22 placed an order?

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1 A Probably less than a half hour, I'd say.

2 Q Did you, in fact, place an order with the
3 company Bossdisk?

4 A Yes, I did.

5 Q And what did you do?

6 A I ordered Latin American Spanish, Levels 1,
7 2, and 3, which I received.

8 Q And what was the purchase price?

9 A It was \$139.

10 Q At the time that you placed the order with
11 Bossdisk -- Bossdisk, did you know how much other
12 companies were, charging for the Rosetta Stone software
13 Levels 1, 2, and 3?

14 A Oh, yes.

15 Q And how did you know this?

16 A Well, I -- going into Borders or looking at
17 Amazon.com, I knew the price for the latest version was
18 much higher than what I paid.

19 Q Did the lower price -- purchase price offered
20 through Bossdisk lead you to conclude that the software
21 that was being offered was not genuine Rosetta Stone
22 software?

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1 A Not at all.

2 Q And why is that?

3 A I thought it was back level software, in
4 other words, an earlier version. I don't necessarily
5 have to have the latest and greatest. I thought it
6 would work sufficiently good for me.

7 Q Have you ever heard of the term "counterfeit
8 software"?

9 A Absolutely.

10 Q And had what does that mean to you?

11 A It means not produced by the original
12 manufacturer.

13 Q At the time you placed your order with
14 Bossdisk, did you intend to purchase counterfeit
15 software?

16 A Oh, no, never, no.

17 Q At the time you placed your order with
18 Bossdisk, did you believe that you were purchasing
19 counterfeit software?

20 A No, I didn't.

21 Q How did you pay for the order?

22 A I used PayPal.

1 gainsoftmail.com." Do you see that?

2 A Yes.

3 Q There's nothing in here that indicates this
4 is a Bossdisk Website, right?

5 A True.

6 Q Okay. But what you meant to say is that --
7 what you intended is that even though this may not be
8 the precise image that you saw, it's similar in general
9 appearance to whatever you looked at, right?

10 A That's true.

11 Q Now, can you tell me where on the page -- if
12 you remember, where on the page that you ultimately
13 clicked on to buy -- I'm not talking about this -- I'm
14 not talking about the Exhibit 1.

15 A Oh.

16 Q I'm talking about the search result page.

17 A Search result.

18 Q Where on the page that you -- the Bossdisk
19 search result was actually located.

20 A I had -- I remember having to scroll down.
21 Didn't have to change pages, but I scrolled down. It
22 was on the first page.

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1 Q So that -- that link, the Bossdisk link was
2 somewhere on the first page, correct?

3 A Yes.

4 Q Other than that granularity, can you say
5 whether it was in the middle of the page or at the
6 bottom of the page?

7 A I don't remember. I -- I -- one thing I --
8 I -- I believe is that -- and I've seen this before.
9 The same link will appear on multiple pages, but I
10 believe this was probably in the lower part of the
11 first page.

12 Q The lower part of the first page.

13 A Yeah.

14 Q Okay. And -- and that's the link that you
15 clicked on to ultimately buy the product?

16 A Right.

17 Q And do you know if -- when -- what you -- if
18 what you clicked on -- I'm sorry. Just some more
19 foundation. So what we're clear about is that what you
20 clicked on was not on the right side of the page?

21 A It was not on the right side.

22 Q And it wasn't the Number 1 on the top of the

1 page?

2 A It was not Number 1.

3 Q Okay. Can you tell me whether or not that
4 link for -- that led you to the Boss --

5 A Disk.

6 Q -- Bossdisk site whether it was located
7 behind the field that said, "Sponsored link"?

8 MR. ETTINGER: Objection.

9 A I don't -- I just can't remember that.

10 Q (BY MR. STERN) Okay.

11 A I don't think so. I don't know.

12 Q So the best -- the best you can recall is
13 that it was somewhere on the first page?

14 A Yes.

15 Q Now, when you clicked on the site, you saw
16 some sort of discounted prices similar to --

17 A Very similar.

18 Q -- Exhibit 1?

19 A Yeah.

20 Q And if I understand your testimony, you
21 didn't think it was counterfeit. You thought it was --
22 I think you used the phrase "back"?

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1 A Back levels.

2 Q Back levels. Which is prior versions?

3 A Prior versions.

4 Q Okay. And -- because you had no intention of
5 buying counterfeit product, right?

6 A I'd never buy -- I wouldn't want somebody
7 counterfeiting my software.

8 Q But did you -- you thought -- and just so I
9 understand what you mean by back level, you thought
10 that what you were buying were earlier versions of what
11 is today a current program?

12 A That's correct.

13 Q And you wanted to buy Levels 1, 2, and 3 of
14 Latin American Spanish?

15 A Correct.

16 Q You understand that when you -- when you buy
17 Rosetta Stone product, Rosetta Stone sells product at
18 various educational levels, correct?

19 A Yes.

20 Q And that with each level there is 50 hours of
21 training, correct?

22 A Okay. Yes.

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1 hardware over the Internet. Have you ever sold
2 computers?

3 A I've sold things on Craigslist, but not
4 computers.

5 Q Good enough. So you haven't -- have you ever
6 sold any computers or peripherals or software on
7 Craigslist?

8 A No.

9 Q Have you ever seen people offering software
10 products like, you know, Microsoft Word or Microsoft
11 PowerPoint or Office for sale?

12 MR. ETTINGER: Object.

13 A I've seen -- I've seen ads for that and for
14 Adobe Postscript, things like that.

15 Q (BY MR. STERN) Okay. Have you -- are you
16 aware of the fact that for some software publishers if
17 you buy their product, you can resell their product as
18 long as you delete it off your system?

19 A I've -- I've heard that, but I -- and I
20 wasn't aware that's a general rule.

21 MR. STERN: Just a second.

22 (Pause in proceedings.)

1 Q (BY MR. STERN) You used a phrase -- I want
2 to make sure I'm sure about this. You used the phrase
3 when you looked on the Bossdisk site that you presumed
4 them to be a reseller selling OEM product. When you say
5 presumed, do you mean that you assumed or did they
6 actually say they were --

7 A I -- my recollection is that they said they
8 were a Rosetta Stone reseller.

9 Q Okay. When you typed in the words -- I think
10 Mr. Ettinger asked you whether or not what -- what your
11 search query was that led you to the page that you
12 scrolled down and found near the bottom of this link
13 that you ultimately clicked on to buy your product.

14 MR. ETTINGER: Objection.

15 A Uh-huh.

16 Q (BY MR. STERN) I think you said what your
17 query was was Rosetta Stone, right?

18 A That's correct. That's right.

19 Q Do you remember exactly how you typed it? Was
20 it all caps? Was it initial caps?

21 A Initial caps.

22 Q So it was capital R --

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1 A Uh-huh.

2 Q -- Rosetta, capital S, Stone?

3 A Yes.

4 Q And it was separated by a space?

5 A Yes, correct.

6 Q Okay. You -- I know -- and this is going to
7 be tough again, but you -- when you did that, you got a
8 whole bunch of search results, right?

9 A Yes.

10 Q And it was more than one page. It was one of
11 those search results where it stopped at a certain
12 portion of the page?

13 A That's my recollection, yeah.

14 Q And I think you testified that you searched
15 and you saw discounts on many of the pages, correct?

16 A I don't know how many pages I actually went
17 through. I don't remember, but certainly on the first
18 page there were more than one discounted version, if my
19 recollection serves me right.

20 Q Okay... So that's actually important
21 information. So are you saying that as you sit here
22 today you can't recall actually going beyond the first

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1 Q All right. That Website -- I'm going to give
2 it just another second, see if it comes up. Rather than
3 wait, I'm going to go down to the right-hand side again
4 to the sponsored link where it says, "Buy Rosetta
5 Stone," the fourth one down.

6 A Uh-huh.

7 Q Do you see that?

8 A Yes.

9 Q Rosetta Stone up to 43 percent off.

10 A Okay.

11 Q All right. I'm going to go above that one.

12 A Okay.

13 Q The third one down, "Rosetta software on
14 sale."

15 MR. STERN: Which was that one?

16 MR. ETTINGER: I apologize. Let me go back.

17 MR. STERN: It's still loading.

18 Q (BY MR. ETTINGER) This is -- this is the
19 earlier site that we -- that we clicked on?

20 A Right. Right.

21 Q Do you see that site?

22 A I do.

1 Q Can you see the pictures that are coming up
2 now?

3 A Very professional.

4 Q Do these compare to the ones that appear on
5 the Rosettastone.com site that you visited?

6 MR. STERN: Objection, foundation, vague.

7 A I don't -- I don't remember the moving --
8 the slide show above it. I don't remember that, but it
9 may have been there.

10 Q (BY MR. ETTINGER) From looking at this
11 Website now that it's loaded --

12 A Uh-huh.

13 Q -- can you tell whether or not this is an
14 authorized reseller of Rosetta Stone product?

15 MR. STERN: Foundation.

16 A It -- it looks like it, but I can't tell.

17 Q (BY MR. ETTINGER) You don't know one way or
18 another whether this is a -- another site where people
19 are selling software to individuals that have no
20 activation key?

21 A I -- no way to know for me.

22 Q I want to go to one more of the sites. The

1 third one down, "Rosetta software on sale." Do you see
2 that on the right-hand side?

3 A I do.

4 Q All right. It says, "Learn foreign language
5 with Rosetta award winning software," then there's a
6 space and a comma and it says, "Ship free." Do you see
7 that?

8 A Very difficult to read, but I -- I believe
9 that's what it says, yes.

10 Q All right. And the URL for that is
11 www.onlyrosetta.com. Do you see that?

12 A I see that, yes.

13 Q All right. I'm going to click on that link.
14 Do you see what's coming up?

15 A I do.

16 Q Do you see the familiar yellow boxes, yes?

17 A Oh, yes.

18 MR. STERN: Objection, foundation.

19 Q (BY MR. ETTINGER) You said earlier in your
20 testimony that you've associated the color yellow with
21 Rosetta Stone, correct?

22 A Yes.

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<p>1 STATE OF COLORADO) 2) as REPORTER'S CERTIFICATE 3 COUNTY OF DENVER) 4 I, Barbara J. Castillo, do hereby certify that 5 I am a Registered Merit Reporter, Certified Realtime 6 Reporter and Notary Public within and for the State of 7 that previous to the commencement of the examination, 8 the deponent was duly sworn to testify to the truth. 9 I further certify that this deposition was taken 10 in shorthand by me at the time and place herein set 11 forth, that it was thereafter reduced to typewritten 12 form, and that the foregoing constitutes a true and 13 correct transcript. 14 I further certify that I am not related to, 15 employed by, nor of counsel for any of the parties or 16 attorneys herein, nor otherwise interested in the 17 result of the within action. 18 In witness whereof, I have affixed my signature 19 and seal this 10th day of March, 2010. 20 My commission expires January 5, 2013. 21 22</p> <p>Barbara J. Castillo, CRR 216 - 16th Street, Suite 650 Denver, Colorado 80202</p>	<p>1 A C K N O W L E D G E M E N T O F D E P O N E N T 2 3 I, STEVE F. DUBOW, do hereby acknowledge I have 4 read and examined the foregoing pages of testimony, and 5 the same is a true, correct and complete transcription 6 of the testimony given by me, and any changes or 7 corrections, if any, appear in the attached errata 8 sheet signed by me. 9 10 11 12 13 14 15 16 17 03/17/10 <i>Steve F. Dubow</i> 18 Date STEVE F. DUBOW 19 20 21 22</p>
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<p>1 Capital Reporting Company 2 1821 Jefferson Place, NW 3 3rd Floor 4 Washington, DC 20036 5 (202) 857-3376 6 ERRATA SHEET 7 Case Name: Rosetta Stone vs. Google 8 Witness Name: STEVE F. DUBOW 9 Deposition Date: March 8, 2010 10 Page No. Line No. Change/Reason for Change 11 12 13 14 15 16 17 18 19 20 21 22 Date Signature</p>	<p>1 Mitchell S. Ettinger, Esq. 2 Skadden, Arps, Slate, Meagher & Flom, LLP 3 1440 New York Avenue, N.W. 4 Washington, D.C. 20005 5 (202) 371-7444 6 7 IN RE: Rosetta Stone vs. Google 8 Dear Mr. Ettinger: 9 Enclosed please find your copy of the deposition 10 of STEVE F. DUBOW, along with the errata sheet and 11 original signature page. As agreed, you will be 12 responsible for contacting the witness regarding 13 signature. Within 30 days of March 10, 2010, please 14 forward errata sheet and original signed signature page 15 to counsel for Plaintiff, Claude M. Stern. If you have 16 any questions, please do not hesitate to call. Thank 17 you. 18 19 Yours, 20 Barbara J. Castillo, CRR 21 22 cc: Claude M. Stern</p>

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