

Exhibit R-1

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA

3
4 GOOGLE INC., a Delaware)
5 corporation,)
6 Plaintiff(s),)
7 vs.) Case No.
8 AMERICAN BLIND & WALLPAPER) C 03-5340-JF (RS)
9 FACTORY, INC., a Delaware)
10 corporation d/b/a)
11 decoratedtoday.com, Inc., and)
12 DOES 1 through 100,)
13 inclusive,)
14 Defendant(s).)

15 AMERICAN BLIND & WALLPAPER)
16 FACTORY, INC., a Delaware)
17 corporation d/b/a)
18 decoratedtoday.com, Inc., and)
19 DOES 1 through 100, inclusive)
20 Counter-Plaintiff,)
21 vs.)
22 GOOGLE INC., a Delaware)
23 corporation,)
24 Counter-Defendant.)

20 DEPOSITION OF DR. ITAMAR SIMONSON

21 Held at Howrey
22 525 Market Street, Suite 3600
23 San Francisco, California
24 Friday, December 15, 2006, 9:51 a.m.

25 REPORTED BY: James Beasley, CSR No. 12807

Page 2

1 APPEARANCES

2

3 For the Plaintiff and Counter-Defendant:

4

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22

23

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Page 3

1 INDEX OF EXAMINATIONS

2

3 EXAMINATIONS page

4 MR. PHILLIP 4

5

6

7

8 INDEX OF EXHIBITS

9 NO. DESCRIPTION page

10 1 Expert report of Dr. Itamar Simonson with Exhibits A, B, and C attached, 44 pages 13

11

12 2 Google Inc.'s Responses and Objections to American Blinds & Wallpaper Factory, Inc.'s Subpoena Duces Tecum of Dr. Itamar Simonson, eight pages 16

13

14

15 3 Multiple documents, 62 pages 28

16 4 Google Search: american blinds, dated 2/4/2004; two pages 161

17

18 5 Google Search: american blinds, dated 1/21/2004; two pages 161

19

20 6 Google Search: american blinds, dated 2/11/2004; two pages 161

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Page 4

1 BE IT REMEMBERED, that on Friday, December

2 15, 2006, commencing at the hour of 9:51 a.m.

3 thereof, at the Law Offices of Howrey, 525 Market

4 Street, Suite 3600, San Francisco, California,

5 before me, James Beasley, a Certified Shorthand

6 Reporter, in and for the County of Sacramento,

7 State of California, there personally appeared

8 DR. ITAMAR SIMONSON,

9 called, as an expert witness, by the Defendant(s),

10 who, being first duly sworn by the Certified

11 Shorthand Reporter was thereupon examined and

12 interrogated as is hereinafter set forth:

13 EXAMINATION

14 BY MR. PHILLIP:

15 Q. Good morning, Dr. Simonson. Would you

16 please state your full name for the record.

17 A. Itamar Simonson.

18 Q. And do you understand that you're

19 appearing here today as an expert witness?

20 A. Yes.

21 Q. And in the case Google versus American

22 Blinds & Wallpaper Factory?

23 A. Yes.

24 Q. When were you first retained for this

25 case?

Page 5

1 A. I think maybe October of 2006.

2 Q. Okay.

3 A. I'm not sure if it was earlier than that,

4 maybe September.

5 Q. Okay. Who contacted you?

6 A. Mr. Page.

7 Q. Okay. And have you had any dealings with

8 anyone else at Mr. Page's law firm concerning this

9 matter?

10 A. I think there was -- I spoke at least once

11 on the -- perhaps once on the phone. His name

12 escapes me.

13 Q. Do you understand him to be an attorney?

14 A. Yes. He's a young attorney.

15 Q. Someone who worked for Mr. Page?

16 A. Yes.

17 Q. Have you had contact with anyone else at

18 the Kecker firm concerning this case besides

19 Mr. Page and the attorney that --

20 A. I don't think so.

21 Q. Have you had contact with anyone at Google

22 concerning this case?

23 A. No.

24 Q. Have you ever had contact with anyone at

25 Google?

Page 6

1 A. Yes.

2 Q. Okay. Can you tell me who?

3 A. Not in litigation context.

4 Q. Okay. In what context?

5 A. Well, just this term as I was teaching

6 marketing to businesses the students had a project

7 whereby they proposed research ideas -- I'm sorry,

8 business ideas for Google targeting small

9 businesses.

10 So they prepared student presentations.

11 People from Google came to class and evaluated

12 those presentations. The students prepared some

13 written reports. It was kind of a course project.

14 Q. Is this an undergraduate course?

15 A. It's an MBA class.

16 Q. Okay. Did any of the presentations relate

17 to Google's keyword advertising program?

18 A. I don't think so. And these were new

19 business ideas, targeting small businesses. I

20 guess that would not necessarily exclude something

21 related to this case, even though blinds typically

22 target consumers.

23 But I can't think of any proposal that had

24 any relevance to search words.

25 Q. How about --

Page 7

1 A. Nothing that I can think of.

2 Q. How about the manner in which the search

3 results are displayed?

4 A. Nothing like that.

5 Q. How about trademark legal issues?

6 A. None.

7 Q. And who from Google attended the course

8 presentations?

9 A. I'm not sure I remember their names.

10 Q. Do you remember what department they were

11 in?

12 A. They were from various areas. One had to

13 be with AdSense.

14 Q. Say that again.

15 A. AdSense, A-d-s-e-n-s-e.

16 Q. Okay.

17 A. And I think as you might know, nowadays

18 Google is also involved in advertising not through

19 the search engines, but through other means. One

20 person -- I think just as I recall, moved two weeks

21 earlier from eBay and I don't remember what he was

22 doing. Yeah, I don't remember their positions.

23 They were three people from Google.

24 Q. Have you had contact with Google in any

25 other manner besides this coursework?

Page 8

1 MR. PAGE: I'll object as vague and

2 ambiguous.

3 THE WITNESS: No. I mean, obviously

4 Google is a significant company in Silicon Valley,

5 so I've met and talked with people from Google, but

6 nothing that is relevant.

7 BY MR. PHILLIP:

8 Q. Have you met or talked to the founders?

9 A. I did, actually. I had lunch with them

10 many years ago -- well, I guess they already had,

11 as I recall, the lunch. The food was quite

12 impressive, even then. But it was quite a few

13 years back when they were -- way before the IPO.

14 MR. PAGE: Speaking of trademarks.

15 BY MR. PHILLIP:

16 Q. So this was a lunch with both founders,

17 Larry Page and the other gentleman?

18 A. Sergey Brin. Must have been something

19 around maybe 2000 or so. Maybe even 1999. I don't

20 remember.

21 Q. So lunch with the founders, six, seven

22 years ago. Have you had any contact with them

23 since then?

24 A. No.

25 Q. Do you know anyone in the legal department

Page 9

1 at Google?

2 A. Well, I had an involvement in the Geico

3 case. And in that case I do remember another

4 Michael who was present during trial in Alexandria,

5 Virginia. So I shook his hand and we might have

6 talked a couple of times while the trial was going

7 on, but that was about it.

8 MR. PAGE: It's Michael Quan.

9 MR. PHILLIP: He's an in-house attorney at

10 Google?

11 THE WITNESS: I believe so.

12 BY MR. PHILLIP:

13 Q. How about Rose Hagan, have you ever met

14 Rose Hagan?

15 A. No.

16 Q. Do you know Mark Lemley?

17 A. No.

18 Q. Do you have any financial interest in

19 Google?

20 A. No, unfortunately, don't even own the

21 stock.

22 Q. That makes me feel much better that a

23 Stanford professor didn't know to buy Google stock.

24 A. In fact, I remember -- it's not directly

25 relevant to this, one of the smartest colleagues I

<p style="text-align: right; margin-bottom: 0;">Page 10</p> <p>1 have, after the IPO when it was around one hundred, 2 he said given the competition, it was Microsoft and 3 Yahoo, I would short that stock. 4 Q. You were smart not to listen. 5 A. That's true, I was smart on that. 6 Q. Other than the Geico case and this case, 7 have you ever been retained as an expert witness in 8 any matter for Google? 9 A. No. 10 Q. Obviously you've been deposed many times 11 as an expert witness? 12 A. Yes. 13 Q. So I will dispense with the usual 14 pleasantries if that's okay with you. 15 A. Sure. 16 Q. But if there is a question that I ask that 17 you don't understand, please tell me and I'll do my 18 best to restate it. 19 A. Certainly. 20 Q. Have you worked with the Kecker firm before 21 this case? 22 A. Other than the Geico case you mean? 23 Q. Yes. 24 A. I don't think so. 25 Q. Okay.</p>	<p style="text-align: right; margin-bottom: 0;">Page 12</p> <p>1 the cross-examination of the survey expert, in her 2 wisdom, she could see that the survey had some very 3 serious issues and I think that led to her ruling 4 and the trial was suspended. 5 Q. Okay. So you had -- you had prepared a 6 report criticizing that survey in that case, 7 correct? 8 A. I did. 9 Q. And that was the survey that was performed 10 by Gary Ford? 11 A. Correct. 12 Q. But you didn't -- you didn't actually 13 testify with respect to your opinions in that 14 critique, right? 15 A. That's correct. Other than in deposition. 16 Q. Was the report submitted to the judge 17 during any motions? 18 A. Mr. Page would know more. I would think 19 so, but I don't know. 20 MR. PAGE: I have no idea. I believe it 21 was marked as an exhibit, but I don't think it was 22 ever entered other than in the form of a cross. 23 BY MR. PHILLIP: 24 Q. Okay. Did you perform your own study in 25 the Geico case?</p>
<p style="text-align: right; margin-bottom: 0;">Page 11</p> <p>1 A. Many years ago I had very limited 2 involvement in a case involving Gallo Winery and 3 Trironleaf (phonetic); that was the label, I think. 4 But I worked more with an attorney by the name of 5 Edwards, whom you don't know, who was a private -- 6 I think he had his own private practice and he was 7 at the time located in Palo Alto. I think now he's 8 somewhere else. 9 BY MR. PHILLIP: 10 Q. Okay. Fred Firth was on the other side, 11 right? 12 A. I think so, yes. 13 Q. Okay. So Mr. Page contacted you about 14 this case. Who contacted you to work on the Geico 15 case? 16 A. Mr. Page. 17 Q. Okay. And you mentioned that you were 18 present at the trial in that case? 19 A. Yes. 20 Q. And you testified? 21 A. Actually, I did not. 22 Q. Oh. 23 A. I did not, because just as I was about to 24 take the witness stand the Court apparently had the 25 right incite, if I may say so, that just based on</p>	<p style="text-align: right; margin-bottom: 0;">Page 13</p> <p>1 A. I did not. 2 Q. Have you ever performed a study for 3 Google? 4 A. Nope. 5 Q. Other than the critique of Gary Ford in 6 the Geico case and your critique of Al Ossip in 7 this case, have you worked with Mr. Page in any 8 other matters? 9 A. No. 10 MR. PHILLIPS: Let's take care of some 11 housekeeping matters here. Mark that as Exhibit 1. 12 (Exhibit 1 was marked for 13 identification.) 14 BY MR. PHILLIP: 15 Q. We've marked as Exhibit 1 the expert 16 report of Dr. Itamar Simonson that was produced by 17 Google in this case. And if you would just confirm 18 for me, sir, that this is a complete and accurate 19 copy of your expert report? 20 A. It is. 21 Q. And that's your signature on page 28? 22 A. Yes. 23 Q. And there are three exhibits attached, 24 Exhibits A, B, and C. Are those all of the 25 exhibits?</p>

Page 14

1 A. Yes.

2 Q. Now, do you understand what a rebuttal

3 expert report is?

4 A. It's a report that rebuts someone else's

5 opinion or report.

6 Q. Okay. And have you done rebuttal expert

7 reports in the past?

8 A. Yes.

9 Q. And do you understand that the purpose of

10 a rebuttal report is to address the opinions in

11 someone else's report that's previously been

12 served?

13 A. Generally, yes.

14 Q. Is it your practice not to go -- to offer

15 new opinions that are unrelated to the opinions in

16 the -- in the report that you're rebutting?

17 A. Well, I'm -- in general I'm trying to

18 respond. In some cases my response would build on

19 my general knowledge of issues. For example, how

20 consumers make buying decisions. That might not

21 have been directly addressed by the original

22 report, but they are relevant and therefore they're

23 included in my report.

24 Q. Have you ever done that and had a court

25 not consider it because it was not considered

Page 15

1 rebuttal?

2 A. Not that I'm aware of.

3 Q. Okay. Have you ever been told by counsel

4 who's retained you that you need to limit your

5 opinions to matters that directly relate to what's

6 in the report that you're critiquing?

7 A. I don't have a specific recollection of

8 someone telling me that. That's my general

9 understanding.

10 Q. Okay. Now, does this report that we

11 marked as Exhibit 1 contain all of your opinions

12 with respect to the AI Ossip survey that was

13 commissioned by American Blinds?

14 A. Yes.

15 Q. So all of your critiques that you have of

16 Mr. Ossip's survey are set forth in this report?

17 A. Yes.

18 Q. And do you currently have any plans to

19 offer any opinions that are not in this report at

20 the trial in this case?

21 A. Not at this point. If there is new

22 evidence, then I might.

23 Q. Okay. Have you had any discussions with

24 Mr. Page about the possibility of doing any further

25 work?

Page 16

1 A. Not at this point.

2 Q. You don't have any plans to do further

3 work?

4 A. That's correct.

5 Q. Okay. You're aware that a subpoena was

6 served for you to bring documents?

7 A. Yes.

8 Q. Okay. Or to produce documents, I should

9 say.

10 A. Yes.

11 Q. Did you get a chance to look over that

12 subpoena?

13 A. Yes.

14 Q. Okay. Have you looked over the response

15 to the subpoena?

16 A. We talked about that. I haven't looked at

17 that.

18 Q. Okay. Well, I have the response here,

19 which replicates the request in the subpoena and

20 has the official response so we'll use that as the

21 guide.

22 A. Sure.

23 MR. PHILLIP: Let's go ahead and mark that

24 as Exhibit 2.

25 (Exhibit 2 was marked for

Page 17

1 identification.)

2 THE WITNESS: I remember the name of the

3 person you asked me about that I spoke to,

4 Mr. Hamm.

5 BY MR. PHILLIP:

6 Q. Klaus Hamm?

7 A. Yes.

8 Q. Okay. Exhibit 2 refreshed your

9 recollection, didn't it?

10 A. It certainly did.

11 Q. There's a reason for that rule.

12 A. Actually, it was Exhibit 1.

13 Q. Oh, Exhibit 1. He's on there also. Okay.

14 So have you brought any documents with you here

15 today?

16 A. I did not.

17 Q. So you've already given you file to

18 Mr. Page?

19 A. No, there was nothing to give.

20 Q. Okay. What was in your file?

21 A. Just the documents that I received, those

22 that are listed in Exhibit C to my report.

23 Q. Okay. So that's the -- that's certain

24 documents that have been produced by Mr. Ossip at

25 Bates No. ABWF 055057 through 59238, that's listed

Page 18

1 in Item 1 on Exhibit C, do you see that?
 2 A. Yes.
 3 Q. And the deposition transcript of Jeffrey
 4 Alderman?
 5 A. Correct.
 6 Q. Were you provided with that?
 7 A. Yes.
 8 Q. Did you read it?
 9 A. I did.
 10 Q. The whole thing?
 11 A. I did. Some sections more carefully than
 12 others.
 13 Q. Were there particular sections that
 14 Google's counsel pointed you to?
 15 A. Nothing.
 16 Q. How did you know what sections to review?
 17 A. I just read a number of transcripts over
 18 the years, so I try to find which topics are of
 19 most interest.
 20 Q. And who is Mr. Alderman?
 21 A. Mr. Alderman -- he is a fairly high-level
 22 position. I forget the title. I mean, he
 23 obviously works for ABWF, but I forget his exact
 24 title.
 25 Q. Okay. Do you recall any of his testimony

Page 19

1 that you thought was pertinent?
 2 A. I refer to some of that in my report, as I
 3 recall. But I believe he talked a great deal about
 4 how they bid on keywords and the work with
 5 affiliates. That's what comes to mind right now.
 6 Q. Okay.
 7 A. And he might have been the one or maybe it
 8 was Mr. Layne who talked about the name
 9 transformations.
 10 Q. Okay. Anything else that you recall about
 11 Mr. Alderman's deposition that you thought was
 12 pertinent to your critique?
 13 A. I think it's one of those depositions the
 14 issue came up of them bidding on competitors
 15 name's, such as USA Wallpaper. I don't remember.
 16 I'm sure there were other things.
 17 Q. Okay. Now, you also listed the deposition
 18 of Michael Layne. Do you see that?
 19 A. I do.
 20 Q. And is that a deposition that you
 21 reviewed?
 22 A. Yes.
 23 Q. And who is Michael Layne?
 24 A. I believe he was in charge of their
 25 Internet website.

Page 20

1 Q. Okay. And can you recall any specific
 2 testimony from that deposition that you relied on
 3 in your report or that you found pertinent?
 4 A. I think as I said, I think he mentioned
 5 how they changed names and the various web sites
 6 that they were using over the years. So that
 7 was -- that was relevant.
 8 Q. Okay. And when you say changed names,
 9 what are you referring to?
 10 A. Well, the different names of the
 11 company --
 12 Q. Uh-huh.
 13 A. -- different web sites that they were
 14 using.
 15 Q. Uh-huh.
 16 A. I think that's what I was referring to.
 17 Q. Can you recall any of those names or web
 18 sites?
 19 A. Well, decoratetoday looms large. I don't
 20 remember. American Wallpaper. American Brands. I
 21 don't remember all the names.
 22 Q. Okay. Was there anything else about
 23 Michael Layne's deposition that you thought was
 24 important to your report, other than the fact that
 25 the -- that American Blinds and Wallpaper Factory

Page 21

1 has various names?
 2 A. No. I think that was particularly
 3 important. There might have been others at the
 4 time when I was preparing the report. I can't
 5 think of any.
 6 Q. Were you given any exhibits to these
 7 deposition transcripts?
 8 A. I don't think so.
 9 Q. Okay. Then number four is the rough
 10 deposition transcript of Mr. Ossip, correct?
 11 A. Right.
 12 Q. And did you review that?
 13 A. Yes.
 14 Q. And then number five is the post-trial
 15 order in Geico versus Google. Do you see that?
 16 A. Yes.
 17 Q. Did you review that?
 18 A. I did.
 19 Q. Was that given to you or was that
 20 something you already had?
 21 A. Well, I probably had it. I didn't look
 22 for it. I probably had it somewhere, so now I have
 23 another copy. And I read it previously, so this
 24 time I just skimmed it.
 25 Q. Okay. And what was -- what was the

Page 22

1 relevance of the post-trial order in Geico versus
 2 Google to your report?
 3 A. Well, you know, for one thing, one of the
 4 concerns of the Court in that case was the
 5 inadequate control that was used by Dr. Ford and in
 6 that light, I find it a little surprising that
 7 Mr. Ossip's response to the criticism of the Nike
 8 control in the Geico case was to not have control
 9 at all.
 10 Q. Okay. Anything else that you were relying
 11 upon in this post-trial order or is that the main
 12 point?
 13 A. No, I thought that the control -- or in
 14 that case, the various needed controls --
 15 Q. Uh-huh.
 16 A. -- were definitely an important point that
 17 had direct relevance to the present survey.
 18 Q. Okay. And we'll talk about that. So
 19 these are the documents that you reviewed on
 20 exhibit that are set forth in Exhibit C, correct?
 21 A. Right, other than web sites.
 22 Q. Okay.
 23 A. Which were not listed.
 24 Q. Okay. What web sites did you review and
 25 rely upon that aren't listed here?

Page 23

1 A. Well, I went to the Google website and
 2 tried different words.
 3 Q. Uh-huh.
 4 A. I don't think I'll remember all of them,
 5 but I tried different words and looked at the
 6 resulting or the triggered sponsored links.
 7 Q. Uh-huh.
 8 A. I went to the ABWF website, which is at
 9 this point primarily decoratetoday, or at least
 10 appears to be. And I looked at some competitors of
 11 ABWF.
 12 Q. Any other sites?
 13 A. I can't think of any. I probably visited
 14 different sites that sell blinds.
 15 Q. Okay. Did you make printouts of any of
 16 those searches?
 17 A. I did not.
 18 Q. Did you capture them as electronic files?
 19 A. I did not.
 20 Q. Were any of these sites that you visited
 21 given to you by Mr. Page?
 22 A. No.
 23 Q. You found them all on your own?
 24 A. Yes.
 25 MR. PAGE: Well, Google helped.

Page 24

1 BY MR. PHILLIP:
 2 Q. Did you review the sites that were
 3 included as sponsored links in the AI Ossip study?
 4 A. I might have.
 5 Q. Are you -- you're not sure?
 6 A. I'm not sure.
 7 Q. So you may not have?
 8 A. I probably did. I'm not sure that I
 9 visited every single one of them.
 10 Q. Okay. Can you recall visiting any one of
 11 them?
 12 A. I do recall visited -- visiting some of
 13 them. I don't know if it was just blinds or budget
 14 blinds or all of the above. I just don't remember
 15 specifically.
 16 Q. Okay. Did you rely on anything else
 17 besides what's listed in Exhibit C and your various
 18 Internet searching in preparing your report?
 19 A. I do recall flipping through my yellow
 20 pages.
 21 Q. Okay. And what are your yellow pages?
 22 A. Just -- I think this particular one was
 23 the AT&T one, SBC, whatever it is.
 24 Q. Are you saying you flipped through the
 25 phone book?

Page 25

1 A. Yes, the yellow pages portion of the phone
 2 book, yes.
 3 Q. Right. Okay. And what was the purpose of
 4 doing that?
 5 A. Just to see how people advertise blinds.
 6 Q. And what did you find?
 7 A. One thing that I recall is that in most
 8 cases people were emphasizing the type of blinds
 9 that they were offering.
 10 Q. Uh-huh.
 11 A. Whereas my impression was that brand names
 12 were not emphasized.
 13 Q. Okay. So this is based on your scanning
 14 of the advertisements in the yellow pages, right?
 15 A. That portion of it, yes.
 16 Q. And was there a specific category called
 17 blinds or was it something else like home
 18 furnishings or window coverings, do you remember?
 19 A. I don't think it was blinds, but I don't
 20 remember where exactly it was.
 21 Q. Okay. And you didn't keep a copy of this?
 22 A. I did not. I mean, I do have obviously
 23 the directory still.
 24 Q. Okay. This is a yellow pages book in your
 25 office?

Page 26

1 A. Actually, in my study at home.
 2 Q. Okay. So it was your impression based on
 3 just looking at advertisements in the yellow pages,
 4 that advertisers emphasized the type of blinds more
 5 so than the actual brand name of the blinds?
 6 A. That was my impression. It doesn't mean
 7 that you don't see brand names at all. For
 8 example, I believe I had encountered the name
 9 HunterDouglas before.
 10 Q. Yes.
 11 A. But if you ask me as a marketing
 12 researcher or consumer researcher, I look at that,
 13 the impression I get is that the type of blinds,
 14 miniblinds, appears to be emphasized much more so
 15 than brands.
 16 Q. Uh-huh. Okay. But each of these
 17 advertisements had a company name to call, correct?
 18 A. Usually the seller's name.
 19 Q. Right. Was American Blinds listed in the
 20 yellow pages?
 21 A. I don't recall that name.
 22 Q. Did you look for it?
 23 A. I don't remember specifically looking for
 24 it, but given my involvement in this case, I think
 25 that's probably a name that would have captured my

Page 27

1 attention.
 2 Q. Okay. Anything else that you can recall
 3 looking at that's -- that you haven't already told
 4 me about in preparing your report?
 5 A. I can't think of anything else at this
 6 point.
 7 Q. Okay. Now, you mentioned that there
 8 wasn't much in your file or something to that
 9 effect. Do you have a file for this case?
 10 A. The documents that I received.
 11 Q. Okay.
 12 A. Which are listed in Exhibit C. And I
 13 guess it's not listed here, but I did receive
 14 copies of all the questionnaires, completed
 15 questionnaires.
 16 MR. PAGE: Those are in -- that's in the
 17 Bates range in number one.
 18 MR. PHILLIP: Okay. That's part of
 19 Ossip's report, you got the completed
 20 questionnaires?
 21 THE WITNESS: Subsequently I received a
 22 book with all the questionnaires.
 23 BY MR. PHILLIP:
 24 Q. Anything else, did you receive anything
 25 else?

Page 28

1 A. I don't recall anything else.
 2 Q. How did you -- -- strike that.
 3 I assume you've had telephone
 4 conversations with Mr. Page?
 5 A. Yes.
 6 Q. And you've had some e-mail conversations,
 7 e-mail communications?
 8 A. A few. Yeah, not too many. I'm not even
 9 sure I would quote, unquote dignify them as
 10 conversations. But there might have been a few
 11 e-mails.
 12 Q. Okay. And did you save your e-mails?
 13 A. I do have e-mails. Yeah, they are
 14 available.
 15 MR. PAGE: We've produced them all.
 16 BY MR. PHILLIP:
 17 Q. To your knowledge, they've all been
 18 produced, Dr. Simonson?
 19 A. You know, I haven't gone over what's been
 20 produced, so I couldn't tell you.
 21 MR. PHILLIP: Let's mark this Exhibit 3.
 22 (Exhibit 3 was marked for
 23 identification.)
 24 BY MR. PHILLIP:
 25 Q. Taking a look at Exhibit 3, Dr. Simonson,

Page 29

1 this is a group of documents that appear to all
 2 involve you in one way or another.
 3 A. Uh-huh.
 4 Q. So starting with the first document, which
 5 is marked GGL 6045, can you identify that for me?
 6 A. That's a protective order.
 7 Q. Okay. Good. And that's your signature?
 8 A. It is.
 9 Q. Okay. Good. So this was given to you by
 10 the Kecker firm, it looks like it's dated November
 11 14th, 2006. Do you see that?
 12 A. Right.
 13 Q. Was that -- does that refresh your
 14 recollection at all as to when you were first
 15 contacted in this case?
 16 MR. PAGE: Objection. Assumes facts.
 17 THE WITNESS: You know, I still believe
 18 that I was first contacted -- or just might have
 19 had one brief conversation with Mr. Page before
 20 that.
 21 BY MR. PHILLIP:
 22 Q. Okay.
 23 A. But I just don't remember the exact date.
 24 MR. PAGE: For the record, the reason it
 25 was November 14th is that your colleague, for

Page 30

1 reasons that escape us, chose to designate all of
 2 Mr. Ossip's survey materials attorneys' eyes only,
 3 thereby signing up Dr. Simonson under the
 4 protective order.
 5 This was immediately after you produced
 6 that material. Rather than argue about the
 7 designation, we simply had him sign the protective
 8 order. We're still curious about that one.
 9 MR. PHILLIP: That was cooperative of you.
 10 Q. Well, let me ask you this. When you had
 11 been contacted -- when you were first contacted
 12 about this case, were you told or did you know that
 13 a study had been done by Mr. Ossip?
 14 A. I have a vague recollection. Even though
 15 it wasn't all that long ago, I don't think that I
 16 knew who the expert would be. But I vaguely recall
 17 that Mr. Page indicated that a survey would be
 18 forthcoming.
 19 Q. Okay. So do you believe that he contacted
 20 you before -- before he received American Blinds'
 21 expert survey report?
 22 A. It is possible that he did.
 23 Q. Okay. And what did he -- what did he
 24 discuss with you at that time?
 25 A. He -- again, I'm constructing it or

Page 31

1 reconstructing it without perfect recollection.
 2 But I think he said a survey would be forthcoming
 3 and I probably said what I typically say is, of
 4 course, if the survey does not have major flaws,
 5 then I will tell you that and perhaps you'll find
 6 another expert to work on the rebuttal.
 7 Q. Okay. But he didn't tell you who was
 8 doing the survey?
 9 A. You know, I don't remember that he
 10 mentioned the name of Ossip.
 11 Q. Okay. Look at the second document in
 12 Exhibit 3, which has Bates GGL 6048 and GGL 6049.
 13 Do you see that?
 14 A. Yes.
 15 Q. And what is this?
 16 A. That appears to be the signature page that
 17 I faxed --
 18 Q. Okay.
 19 A. -- for my report.
 20 Q. Okay. Then the next document is GGL 6119
 21 through GGL 6146. And can you identify that for
 22 us?
 23 A. That appears to be a rough draft of my
 24 report, which I e-mailed to Mr. Page on December
 25 3rd.

Page 32

1 Q. Okay. Is this the -- is this the very
 2 first draft that you sent to Mr. Page?
 3 A. I believe so. I believe I only -- there
 4 was only one draft. I could be wrong, but I think
 5 there was only one draft.
 6 Q. Well, this is dated December 3rd, 2006,
 7 correct?
 8 A. Right.
 9 Q. So this is a week and a half ago, right?
 10 A. Yes.
 11 Q. Sitting here today, can you recall sending
 12 Mr. Page any other draft besides this draft?
 13 A. No.
 14 Q. And did you ever -- did Mr. Page ever come
 15 to your office to review any of your drafts?
 16 A. No.
 17 Q. Okay. So is this the -- is this the --
 18 did you discuss this draft with Mr. Page on the
 19 telephone?
 20 A. Very, very superficially and very briefly.
 21 I believe he was traveling and I just informed him
 22 that I've completed a rough draft.
 23 Q. Okay. Did you ever send Mr. Page an
 24 outline of your report?
 25 A. I did not.

Page 33

1 Q. Did you ever send him, you know, talking
 2 points?
 3 A. Nothing like that.
 4 Q. Okay. Did he ever send you an outline or
 5 talking points?
 6 A. He did not. No. That's not the way I
 7 work. I do it all on my own.
 8 Q. Good. Now, look at the next document, GGL
 9 6147. Can you identify this for me, please?
 10 A. It appears to be an e-mail that he sent
 11 regarding a conversation -- a phone conversation
 12 that we were going to have and he just checked -- I
 13 believe he was out of town, if I recall correctly,
 14 and he wanted to know if that time, 3:00 p.m. on
 15 Sunday, was working, and I said yes and gave him my
 16 home number.
 17 Q. Okay. And did you have a telephone
 18 conversation from your home on that Sunday?
 19 A. Yes.
 20 Q. And what did you and Mr. Page discuss?
 21 A. That was the very brief superficial
 22 conversation, probably four or five minutes that we
 23 had.
 24 Q. Okay. And what was the purpose of the
 25 conversation?

Page 34

1 A. Just to tell him a little bit about my
 2 report.
 3 Q. Okay. Had you -- he didn't have the
 4 report yet, though, did he?
 5 A. I don't think so. No, he did not have the
 6 report yet.
 7 Q. So you talked to him on the phone before
 8 you sent him the report?
 9 A. That's correct.
 10 Q. Was there anything in particular that you
 11 wanted to talk to him about in the report before
 12 sending it to him?
 13 A. No, just told him what the report was
 14 about.
 15 Q. Uh-huh.
 16 A. Probably -- I mean, I don't have a
 17 specific recollection, even though it wasn't all
 18 that long ago, but I just told him my main
 19 conclusions with respect to the Ossip survey.
 20 Q. Okay. Did you work on the report any
 21 further before sending it to him, based on that
 22 telephone call?
 23 A. I don't think making any changes
 24 subsequently --
 25 Q. Okay.

Page 35

1 A. -- before sending that draft.
 2 Q. Right. So then turn to the next document,
 3 which is 6148 through 6175. And can you identify
 4 that for us, please?
 5 A. That appears to be my report. I guess it
 6 still says draft. Actually, that was something
 7 that he sent to me with his comments on the draft
 8 that I had sent him.
 9 Q. Okay. So these are Mr. Page's recommended
 10 changes to your report?
 11 A. Correct.
 12 Q. And did you accept his changes?
 13 A. I -- in some cases he suggested using
 14 different words and I accepted in some cases,
 15 didn't accept in other cases.
 16 Q. Turn to page 6153 and 6154. And I'm going
 17 to read the sentence that starts with: To the
 18 extent that one relies.
 19 Do you see that at the bottom of the page?
 20 A. Which page? 6153?
 21 Q. 6153, yes.
 22 A. Yes, I see that.
 23 Q. "To the extent that one relies on this
 24 survey, the only conclusion that can be drawn is
 25 that the use of trademarks as keywords does not

Page 36

1 confuse or cause consumers to be misled by
 2 sponsored links."
 3 Did I read that correctly?
 4 A. Yes.
 5 Q. And Mr. Page had substituted the phrase:
 6 "The use of trademarks as keywords does," for the
 7 phrase, "entering the search term at issue does."
 8 Do you see that?
 9 A. Yes.
 10 Q. Was that a change that you accepted?
 11 A. Yeah. Actually, I think as I was
 12 preparing for the deposition rereading my report, I
 13 noticed there was a little typo there on my part.
 14 But yes, I think that in -- I did accept most of
 15 it. Maybe not word for word. I just don't
 16 remember.
 17 Q. You had it reading that the only
 18 conclusion that could be drawn is that entering the
 19 search term at issue does not confuse or cause
 20 consumers to be misled by sponsored links, correct?
 21 A. Yes.
 22 Q. And what was the search term at issue in
 23 your view?
 24 A. In this case it was american blinds, but I
 25 thought that the conclusion could very well be

Page 37

1 stated more generically, so I thought that was a
 2 reasonable way of putting it.
 3 Q. Well, why -- would you agree with me that
 4 your language is limited to the effect of entering
 5 the search term at issue and Mr. Page's language is
 6 the use of any trademark as a keyword. Do you
 7 agree with me that that's the difference there?
 8 A. Yes, that is the difference.
 9 Q. And don't you think that that is a
 10 significant difference?
 11 A. I think it is -- I think it is a
 12 significant difference. The point, though, is that
 13 there was, in the survey and previously, there was
 14 this Geico case, there is nothing there that would
 15 apply in this case to say American Blinds and not
 16 to American Wallpaper or not to some other
 17 trademark combination that I could think of.
 18 So in that respect, I thought that one --
 19 to the extent that you rely on this particular
 20 survey, there was nothing there that would be
 21 inconsistent with this more general conclusion. Of
 22 course, as I said, I have some major concerns about
 23 the survey.
 24 Q. Right. But I'm troubled by the fact that
 25 you went from drawing a conclusion about entering a

Page 38

1 particular search term to drawing conclusions about
 2 the use of any trademarks as keywords. That seems
 3 to be a much bigger bite of the apple, if you will,
 4 and what was it that enabled you to make that jump
 5 and accept that change from Mr. Page?
 6 A. Because if you look at the explanations
 7 that respondents provided when they asked, for
 8 example, where would you go and why and then the
 9 follow-up question was, do you think that this
 10 particular sponsored link or that sponsored link
 11 would take you to a particular source, and you look
 12 how many referred to entering that search term and
 13 the triggered sponsored links as a result of
 14 entering the search term.
 15 And I think that component is quite
 16 generic. In other words, to the extent that you
 17 see many people say, well, I entered the search
 18 term and therefore I come to the conclusion that
 19 every sponsored link on that page must be the
 20 company that I asked for.
 21 If that's what I found, I think similarly
 22 the conclusion would be more generic. It would go
 23 beyond american blinds. For example, if someone
 24 enters Pepsi-Cola and they said -- and you see
 25 sponsored links and you find 20, 50 percent of the

Page 39

1 people said, well, I entered Pepsi-Cola, so
 2 therefore all sponsored links must be from or by
 3 Pepsi-Cola, I think that would allow me to derive
 4 conclusions that go beyond Pepsi-Cola.
 5 Q. So --
 6 A. And similarly here, the fact that so
 7 few -- in fact, if you just look at the first
 8 question about, where would you go first, I believe
 9 no one referred to the search term. I think that's
 10 a generic phenomenon that allows you to derive
 11 conclusions that go beyond the particular search
 12 term.
 13 Q. So if there was a survey that showed
 14 confusion as to the sponsored links after entering
 15 a particular trademark, from that, in your opinion,
 16 one could reliably conclude that there would be
 17 confusion without regard to what the trademark is?
 18 A. Well, that is talking about generic
 19 issues. That's all a generic question.
 20 Q. I mean, doesn't it work both ways?
 21 MR. PAGE: Can you let him finish his
 22 answer.
 23 MR. PHILLIP: Sure.
 24 Q. Using your logic, doesn't it work both
 25 ways?

Page 40

1 A. Yeah, I think in many cases it would be.
 2 In other words, here the question is generic. To
 3 what extent people say, I entered term X, therefore
 4 all sponsored links must be by term X, assuming
 5 term X is a trademark --
 6 Q. Right.
 7 A. -- that is a generic question. There is
 8 really -- I cannot think of a difference between
 9 american blinds versus american airlines. I just
 10 cannot think -- maybe there are some weird, you
 11 know, unexpected differences, but in general, I
 12 think this question of the connection of the link
 13 between the search term and presumptions about
 14 sponsored links, that's a generic question. And --
 15 generic phenomena.
 16 And to the extent that you find no such
 17 link for trademark X, let's assume it is a
 18 trademark -- I guess it is a trademark, but let's
 19 assume it is a commonly used brand name, then we
 20 could generalize it to other brand names.
 21 Q. So if that phenomenon existed with someone
 22 who believes a certain name is a trademark, whether
 23 it is or not, but if someone believes that it's a
 24 trademark, and they're confused, then it shouldn't
 25 matter whether that name that they entered is a

Page 41

1 trademark or not, should it?
 2 A. If they perceive -- if there is evidence,
 3 for example, of secondary meaning for that term.
 4 In other words, the people, when they see
 5 the term American Blinds, they associate it with a
 6 single source, even if they don't know the full
 7 name, ABWF or whatever it is, but they associate
 8 American Blinds with a single source -- so it has
 9 secondary meaning and you have a substantial
 10 number, I guess.
 11 The threshold for secondary meaning is
 12 fairly high. Let's say you find 40 percent of the
 13 people say American Blinds is one company, they're
 14 located wherever they're located, et cetera, or my
 15 neighbors have that. I think that's quite possible
 16 even if they don't know the legal name of the
 17 company.
 18 Q. Right. Or even if they believe that it is
 19 an actual company or a brand name, regardless of
 20 whether it is, in fact.
 21 In other words, regardless of whether
 22 there is actually secondary meaning out in the
 23 marketplace, but if they believe that it is when
 24 they enter that search term, and they're confused
 25 about the sponsored links, thinking that it's

Page 42

1 connected in some way, then that would be evidence
 2 of confusion, wouldn't it?
 3 A. No.
 4 MR. PAGE: Let me object. I think it
 5 calls for a legal conclusion and is an incomplete
 6 hypothetical.
 7 THE WITNESS: I'm a little confused. So
 8 you say there is no secondary meaning, or you say
 9 regardless?
 10 BY MR. PHILLIP:
 11 Q. Regardless.
 12 A. Regardless of whether there is a secondary
 13 meaning, how should I interpret that presumption
 14 that they think American Blinds represents many
 15 different companies, that there are many different
 16 companies that sell American Blinds, what should I
 17 assume?
 18 Q. No. That it is a company or it is a brand
 19 of blinds, either one.
 20 A. Okay. I think there is a difference, A,
 21 whether it's a company or a brand. Let's assume
 22 they think it's a brand of window blinds and they
 23 associate it with a particular company. So I'm not
 24 an attorney, but it strikes me that probably there
 25 is secondary meaning then, in which case, yeah, I

Page 43

1 agree with you that if they believe -- if there is
 2 evidence of secondary meaning, and as I said,
 3 40 percent of the people believe when they enter
 4 the term american blinds that it is a brand of
 5 window blinds, that's okay. They don't need to
 6 know the legal name of the corporation.
 7 Q. Okay.
 8 MR. PAGE: When you get to a good spot, I
 9 could use a break.
 10 MR. PHILLIP: Okay. Now is fine.
 11 (Recess taken.)
 12 BY MR. PHILLIP:
 13 Q. Okay. Dr. Simonson, this document that we
 14 just looked at that had Mr. Page's edits to your
 15 report, this is the last document in Exhibit 3 and
 16 other than the few nonsubstantive documents that
 17 may also exist that Mr. Page referenced during the
 18 break, can you recall any other documents from your
 19 file?
 20 A. I don't.
 21 Q. Okay. Now, I noticed that there's no
 22 handwritten notes anywhere.
 23 A. That's correct.
 24 Q. Did you prepare handwritten notes?
 25 A. No.

Page 44

1 Q. So other than working at your computer, do
 2 you have any other written records of your work?
 3 A. Nothing.
 4 Q. Okay. Did you mark up the Ossip report?
 5 A. I did not.
 6 Q. All right. How much time do you estimate
 7 you've spent on your report?
 8 A. I don't remember.
 9 Q. Have you issued a bill?
 10 A. I did.
 11 Q. And do you recall how much the bill was?
 12 A. I don't.
 13 Q. Do you have an estimate?
 14 A. I hate to estimate something that probably
 15 exists and I probably will be wrong on that.
 16 Q. Okay.
 17 MR. PAGE: Actually, we just received it.
 18 On a break I can probably get that number for you.
 19 MR. PHILLIP: Okay. Thank you.
 20 Q. Was this bill the final bill that you
 21 issued, at least for the report?
 22 A. For the report, yeah, given that I
 23 submitted the final version on December 6, it might
 24 not be the absolutely -- it was definitely the bulk
 25 of it, but maybe there are a few more hours.

Page 45

1 Q. Okay. Does the bill indicate the number
 2 of hours spent?
 3 A. Yes.
 4 Q. And your hourly rate of \$650 per hour?
 5 A. Correct.
 6 Q. Do you have a retainer agreement with the
 7 Keker firm or Google?
 8 A. I don't remember if I do.
 9 Q. Okay. If you look at request number six
 10 in Exhibit 2. And this asks for documents in any
 11 governmental investigation or in any
 12 administrative, congressional or judicial
 13 proceeding involving the use of unit search
 14 engines. Do you see that?
 15 A. I do.
 16 Q. Do you have any documents of that nature?
 17 A. Just the Geico report.
 18 Q. Okay. Have you done any kind of academic
 19 work in the field of Internet search engines?
 20 A. No.
 21 Q. Have you done any academic work in the
 22 field of the Internet, generally?
 23 A. Yes.
 24 Q. Can you describe that for me?
 25 A. You mean published work?

Page 46

1 Q. Yes.

2 A. I've done some work on online auctions.

3 And in various studies, I tried to study consumer

4 behavior or decision-making in general at a global

5 level, so as not limited to one category or

6 another. So it may involve searches on the

7 Internet and other types of purchases, say

8 purchases from catalogs.

9 Q. Right.

10 A. So I've done a fair amount of work on how

11 people choose among options. The Internet allows

12 you to arrange a set of options on a web page

13 however you wish to present it, which gives you a

14 lot of degrees of freedom in terms of influencing

15 consumer preferences.

16 Q. Have you published any articles that have

17 as a section in them consumer purchasing behavior,

18 on the Internet?

19 A. I don't know if there was a separate

20 section. I did mention that. I did mention what I

21 just told you in various articles, I believe.

22 Q. Okay.

23 A. Because I've done a lot of work on

24 so-called context effects, that means the effect of

25 the choice set, which options you choose to present

Page 47

1 to your consumers, how that affects the decisions

2 they make.

3 Those kinds of effects are particularly

4 useful in an Internet context, as I said. So

5 that's why I mentioned that as an important arena

6 that's obviously becoming more and more important,

7 which means that these kind of effects are much

8 more important.

9 Q. Uh-huh. Other than the critique that you

10 did in the Geico case and the critique that you did

11 in this case, have you -- have you done any work in

12 litigation involving purchasing behavior over the

13 Internet?

14 A. Involving, it's kind of a broad word. If

15 that's the word, I would definitely say yes.

16 Q. Okay. Have you done any studies for

17 purposes of litigation where you used -- where you

18 had respondents use the Internet as part of the

19 study?

20 A. What I've done more often is just present

21 a hardcopy of a web page.

22 Q. Okay. You've used web pages as stimuli in

23 studies?

24 A. Yes.

25 Q. Okay. Can you say approximately how many

Page 48

1 times you've done that?

2 A. Probably less than 10, maybe 5.

3 Q. Okay. And were these likelihood of

4 confusion studies?

5 A. I'm not sure if all of them were

6 likelihood of confusion studies, but probably a

7 fair number were or probably most were.

8 Q. And when you use a website printout as

9 stimuli in a study for litigation purposes, did the

10 question require the consumer to assume that it

11 encountered that page as it was searching on the

12 Internet?

13 A. Yes.

14 Q. Did any of the studies also instruct the

15 respondent to assume that they entered a certain

16 search term in order to trigger that stimuli?

17 A. No.

18 Q. Okay. But you've never, in those

19 situations, had a survey where the respondent was

20 actually sitting at a computer and shown the

21 website stimuli?

22 A. That is probably not the case. In other

23 words, I think -- I vaguely recall that there were

24 cases where the respondents put -- I mean, there

25 was some sort of CD that included something that

Page 49

1 looked like -- that was a website but was just

2 captured or stored on a CD so that we have full

3 experimental control.

4 Q. Uh-huh. Like what Mr. Ossip did?

5 A. I think that -- again, I need to think

6 about specific, but I believe that these were

7 actual pages, not manufactured pages.

8 Q. Okay. But it was similar to the extent

9 that it was a static page as opposed to one that

10 would, you know, that had active links on it?

11 A. That is correct.

12 Q. Okay. So other than these experiences

13 that you've had where you've used website pages as

14 stimuli in litigation surveys and the research that

15 you've done which can relate to choices consumers

16 have, including on the Internet, can you think of

17 any other work that you've done that would relate

18 to consumer purchase behavior on the Internet?

19 A. Well, I -- nowadays, when I work with my

20 doctoral students, more often than not they use the

21 Internet to run the study. In other words, when we

22 ask people to make choices, let's say I'm showing

23 them an array of posters or an array of chocolates

24 and I've asked them to rank order them or to rate

25 them or whether they would rather get \$3 or one of

Page 50

1 those posters, we use the Internet for that
 2 purpose.
 3 And I run those kinds of studies very
 4 often, or more precisely, my doctoral students do.
 5 Q. Right. Have you ever done any research --
 6 any empirical research on people's experiences with
 7 search engines, such as Google?
 8 A. No.
 9 Q. And have you ever reviewed other
 10 research -- have you ever reviewed or commented on
 11 other person's research in that field?
 12 A. No, I can't think of anything.
 13 Q. Okay. So you haven't done peer review,
 14 for example, in that field?
 15 A. Not that I recall.
 16 Q. Okay. And you haven't had any doctoral
 17 students that have done research on people's
 18 experiences with Internet search engines?
 19 A. No. And I should say, I don't know if
 20 it's still the case, but at some point if you
 21 looked on my web page --
 22 Q. Uh-huh.
 23 A. -- my Stanford web page and it states
 24 there your research interest, I probably was one of
 25 the only people around the world who said consumer

Page 51

1 behavior on the Internet was one of the things I
 2 put there.
 3 So it's definitely an area that I'm
 4 interested in, so you would think that if there has
 5 been a lot of academic research in that area, I
 6 probably would have reviewed it by now, especially
 7 given that I have the good fortune or misfortune of
 8 being asked to review many articles for referee
 9 journals.
 10 Q. So the fact that you can't recall having
 11 done any of those reviews, are you saying that that
 12 means there is just not much academic research out
 13 there in this area?
 14 A. You know, on the issue of information
 15 search on the Internet, there has been a lot -- I
 16 should say a great deal of research. The use of
 17 search engines, I can't think of any. It doesn't
 18 mean that there hasn't been any, but I just cannot
 19 think of any.
 20 Q. Has Mr. Page ever indicated to you that
 21 Google retained someone else to do a study in this
 22 case?
 23 A. No.
 24 Q. Has he ever inferred that to you?
 25 A. No.

Page 52

1 Q. He's never inferred that Google piloted a
 2 study but opted not to run it in full?
 3 A. No.
 4 MR. PAGE: Object as vague and ambiguous.
 5 I think you mean imply.
 6 MR. PHILLIP: Okay.
 7 THE WITNESS: No.
 8 BY MR. PHILLIP:
 9 Q. And you're not aware of any such study
 10 being do?
 11 A. That's correct.
 12 Q. Okay. Have you ever asked Mr. Page why
 13 Google did not do its own study in this case?
 14 A. No.
 15 Q. You've not discussed that at all?
 16 A. No, we did not. I could speculate. As I
 17 said, we haven't talked about it. If there was a
 18 valued survey submitted showing that there is
 19 confusion that is at issue here, then perhaps a
 20 survey would have been conducted. However, given
 21 that -- I think the survey, as I detail in my
 22 report, had major flaws, there was no need to do
 23 it.
 24 Q. Well, in your experience, haven't you been
 25 involved in cases where -- where defendants have

Page 53

1 come forth with surveys showing no likelihood of
 2 confusion?
 3 A. Yes.
 4 Q. Have you --
 5 A. It happens. Again, I'm not an attorney.
 6 My understanding is that the plaintiff needs to --
 7 I guess as you guys call it, have the burden of
 8 proof. And I think if there was a legitimate
 9 survey here, I think perhaps Google would have
 10 considered running a survey. As far as I can tell,
 11 there wasn't such a survey here, so there was no
 12 need for the defendant to.
 13 Q. So is that your speculation, in other
 14 words, you think that Google made a strategic
 15 choice not to do a survey and wait and see what
 16 American Blinds came forth with?
 17 A. That's beyond speculation. I have no idea
 18 on that.
 19 Q. Have you ever reviewed the survey report
 20 that Dr. Jacobe prepared in the Geico case?
 21 A. I might have skimmed it. I never
 22 evaluated it very carefully.
 23 Q. I --
 24 A. And I have only a vague recollection of
 25 what he did.

Page 54

1 Q. I noticed it wasn't in your Exhibit C. Was
 2 it something that you looked at in the context of
 3 preparing this report?
 4 A. No.
 5 Q. When was the last time you looked at it?
 6 A. It's possible -- it's likely that in the
 7 context of the Geico case --
 8 Q. Uh-huh.
 9 A. -- I took a look at that at some point.
 10 Q. Do you know Dr. Jacobe?
 11 A. I do.
 12 Q. And you've had communication with him
 13 before?
 14 A. Yes.
 15 Q. Did you ever discuss his report in the
 16 Geico case with him?
 17 A. You know, I don't think that I did.
 18 Q. Okay. You don't recall ever asking him
 19 why he used a certain control or why he did
 20 something a certain way?
 21 A. Nope.
 22 Q. Okay. Did you assist him at all in
 23 designing his survey?
 24 A. Nope.
 25 Q. Did he consult you at all when he was

Page 55

1 designing his survey?
 2 A. He did not.
 3 Q. Other than Dr. Jacobe's report in the
 4 Geico case, Dr. Gary Ford's report in the Geico
 5 case and Al Ossip's report in this case, have you
 6 seen any other studies addressing the issue of
 7 consumer perception when using search engines?
 8 A. I can't think of any.
 9 Q. Now, I know as a full time professor, you
 10 are often very busy and sometimes don't have time
 11 to do surveys, correct?
 12 A. That's correct.
 13 Q. And would you say that when you get
 14 involved in litigation, that more often than not
 15 you do critiques than actually run studies?
 16 A. I don't think that's true.
 17 Q. Okay.
 18 A. I'd say probably on half the cases I do
 19 surveys and in some cases I do both. In some cases
 20 I run more than one survey. Other cases I may just
 21 do an evaluation of the other side's report or
 22 reports.
 23 Q. Okay. So in some cases where you've
 24 critiqued someone else's survey you've also run
 25 your own study to demonstrate that the -- that the

Page 56

1 things that you were critiquing had an impact on
 2 the results?
 3 A. Not necessarily, just I may -- might have
 4 done my own survey. In some cases both surveys are
 5 done simultaneously as opposed to sequentially.
 6 Q. Uh-huh.
 7 A. So just to give you an example, in a case
 8 involving Starbucks and another chain, something to
 9 do with Tea Leaf. I forget their name. I think
 10 they have a store here on Market Street, Coffee
 11 Bean and Tea Leaf or something like that where
 12 there was an issue of the term ice blended, whether
 13 it was generic or the fact that Starbucks was using
 14 the term ice blended created confusion with that
 15 other chain.
 16 So I was doing surveys and then they were
 17 doing a survey. And then reports were exchanged
 18 and then I evaluated the other side's survey.
 19 Q. Okay. So that's a situation where the two
 20 parties produced their surveys simultaneously and
 21 then each party then followed up with a critique of
 22 the other party's surveys?
 23 A. Correct.
 24 Q. Okay. Have you ever had a situation where
 25 you -- where one party produced a survey and then

Page 57

1 you, on behalf of another party, reviewed it,
 2 critiqued it, and then ran your own survey?
 3 A. I'm sure it happened.
 4 Q. Okay. Have you had situations where
 5 you've run a survey and someone else has critiqued
 6 it?
 7 A. Oh, yes. Definitely.
 8 Q. Have you had --
 9 A. You mean critiqued and ran a subsequent
 10 survey or just critiqued it?
 11 Q. Either.
 12 A. Yeah, I'm sure that happened.
 13 Q. Both?
 14 A. When you say ran a survey, specifically to
 15 rebut my survey or -- in other words, to correct a
 16 flaw in my survey or just a survey to assess, say,
 17 confusion or genericness or secondary meaning,
 18 whatever it is?
 19 Q. No. In other words, that you've run a
 20 survey and someone else critiqued it and ran their
 21 own survey to back up their critique?
 22 A. I don't have a specific recollection. I
 23 mean, it might have happened.
 24 Q. Okay. All right. How long have you been
 25 doing studies in trademark cases?

Page 58

1 A. In litigation, you mean?
 2 Q. Yes. Just approximately how many years?
 3 A. Maybe a dozen years, maybe 13 years.
 4 Q. Okay. And approximately how many studies
 5 do you think you've done in litigation?
 6 A. A hundred. I don't know. I'm just
 7 guessing.
 8 Q. And you've done likelihood of confusion
 9 studies, correct?
 10 A. Yes.
 11 Q. And you've done secondary meaning studies?
 12 A. Yes.
 13 Q. And you've done genericness studies?
 14 A. I did. And dilution.
 15 Q. Dilution studies?
 16 A. And just general marketing kinds of
 17 issues.
 18 Q. Right. Have you ever been asked to
 19 critique a report and reviewed the report and saw
 20 absolutely nothing in it that you could critique?
 21 A. Many times.
 22 Q. And in those cases you turned down the
 23 assignment?
 24 A. Yeah, I told the attorney after looking at
 25 the report, I see no major problems with this

Page 59

1 survey.
 2 Q. Okay. Have you ever critiqued a survey
 3 from Dr. Jacobe?
 4 A. Quite a few times.
 5 Q. Have you ever critiqued a survey from
 6 Henry Offsburg?
 7 A. Yes.
 8 Q. Have you ever critiqued a survey from
 9 Deborah Jay?
 10 A. No.
 11 Q. Have you ever been asked to critique a
 12 survey from Deborah Jay and declined?
 13 A. Yes.
 14 Q. Is that because you felt the survey was
 15 not flawed or was there some other reason?
 16 A. Well, at that time, it was just because I
 17 looked at the survey and I thought it was a good
 18 survey.
 19 Q. Okay.
 20 A. I also -- at this point I also know her
 21 personally and I would rather not critique friends.
 22 Q. Okay. Fair enough. Do you have any other
 23 people that you would put in that category?
 24 A. Yes.
 25 Q. And who is that?

Page 60

1 A. Jerry Ford.
 2 Q. How about Phil Johnson, have you critiqued
 3 Phil Johnson?
 4 A. Quite a few times.
 5 Q. And Gary Ford you've critiqued?
 6 A. Yes.
 7 Q. How about Sandra Cohgen, have you
 8 critiqued her?
 9 A. Quite a few times.
 10 Q. And Al Ossip?
 11 A. In the Cohiba case. I think that was the
 12 only other case.
 13 Q. Okay. Would you say that it's fairly
 14 typical in litigation -- more often than not it's
 15 typical for these -- you know, these people, these
 16 experts that are in this field to critique one
 17 another?
 18 A. Yes.
 19 Q. If we look at Exhibit 1, which is your
 20 report, and if you turn to Exhibit B, which is a
 21 list of cases that you've testified in or given a
 22 deposition in the past four years. Did you prepare
 23 this list?
 24 A. Yes.
 25 Q. And I assume you update it as need be?

Page 61

1 A. I tried. I don't always have the exact
 2 dates, but it's approximately in the past four
 3 years.
 4 Q. Okay. Can you tell me which of these
 5 matters was a -- can you tell me in which of these
 6 matters you offered an opinion which was a critique
 7 only, as best as you can recall?
 8 A. Number four. Number five. In number six
 9 there was a confusion survey, but I'd say that was
 10 less than half the opinion. I mean, I think there
 11 were many other issues there, such as whether the
 12 name -- the Cuban Cohiba was famous on a certain
 13 date in 1992, which had to do with various other
 14 issues that had nothing to do with Mr. Ossip's
 15 survey.
 16 Q. So are you saying you did a survey in
 17 number six?
 18 A. No, I did not.
 19 Q. You did a critique?
 20 A. No. As I said, my report, which was quite
 21 long in that case, focused -- I don't recall
 22 exactly. Most of it has to do with the question of
 23 whether the Cuban Cohiba was famous as of November
 24 or something like that of '92, which was the date
 25 on which General Cigar reregistered the mark Cohiba

<p style="text-align: right;">Page 62</p> <p>1 in the U.S.</p> <p>2 And there were many, many surveys that was</p> <p>3 done at the time such as by Cigar Aficionado and</p> <p>4 various other sources which were used to infer the</p> <p>5 level of fame at that time. Now, in addition,</p> <p>6 Mr. Ossip conducted a survey, I forget, around 2002</p> <p>7 or something like that.</p> <p>8 Did I say number eight?</p> <p>9 Q. No, you did not. That's a critique only,</p> <p>10 right?</p> <p>11 A. Right.</p> <p>12 Q. Okay.</p> <p>13 A. Number 15. I think number 16. And I</p> <p>14 think number 17. Number 19. Number 21. Might</p> <p>15 have been in 23. 25, I think. And number 27.</p> <p>16 Number 30. Number 33, there were various issues.</p> <p>17 One of them was an evaluation of a survey, but</p> <p>18 there were many other issues. That's it.</p> <p>19 Q. Okay.</p> <p>20 A. Now, there might have been other cases</p> <p>21 where I also evaluated the other side's surveys,</p> <p>22 but that was not the primary --</p> <p>23 Q. Right, in addition to doing your own</p> <p>24 survey?</p> <p>25 A. In most cases.</p>	<p style="text-align: right;">Page 64</p> <p>1 A. That was a dilution survey.</p> <p>2 Q. Okay. And number 12.</p> <p>3 A. Confusion.</p> <p>4 Q. The presence or absence of?</p> <p>5 A. It was a survey to assess the likelihood</p> <p>6 of confusion.</p> <p>7 Q. Were you representing -- were you retained</p> <p>8 by the trademark holder or the alleged infringer?</p> <p>9 A. By Visa International. I guess the</p> <p>10 alleged infringer.</p> <p>11 Q. Okay. How about in number three, were you</p> <p>12 retained by the trademark holder or the alleged</p> <p>13 infringer?</p> <p>14 A. Alleged infringer.</p> <p>15 Q. Okay. And then number 14?</p> <p>16 A. I think it was a confusion survey.</p> <p>17 Q. By which side?</p> <p>18 A. Thane International.</p> <p>19 Q. Who was the alleged infringer, correct?</p> <p>20 A. Correct.</p> <p>21 Q. And number 18?</p> <p>22 A. Number 18, that was on behalf of</p> <p>23 ZonePerfect Nutrition.</p> <p>24 Q. What kind of study?</p> <p>25 A. It was forward confusion.</p>
<p style="text-align: right;">Page 63</p> <p>1 Q. Are there any other cases here that you</p> <p>2 haven't mentioned where you offered an opinion on</p> <p>3 something but didn't actually do a survey?</p> <p>4 A. Yes.</p> <p>5 Q. And which are those?</p> <p>6 A. Number one. Number two. I think number</p> <p>7 seven. It's been a while. Number nine. I think</p> <p>8 13. Number 20. 24. 26. That's it.</p> <p>9 Q. Okay. So am I correct, then, in saying</p> <p>10 the remaining matters were all matters in which you</p> <p>11 conducted a study?</p> <p>12 A. One or more, yes.</p> <p>13 Q. Okay. In number three, what kind of study</p> <p>14 was that?</p> <p>15 A. Just a forward confusion survey.</p> <p>16 Q. Okay. In number 10, what kind of study</p> <p>17 was that?</p> <p>18 A. There were a few surveys there. There</p> <p>19 were one or two genericness surveys, maybe just</p> <p>20 one. I'm not sure. And there was forward</p> <p>21 confusion and reverse confusion.</p> <p>22 Q. Okay. And you worked -- you did studies</p> <p>23 on all those issues?</p> <p>24 A. Yes.</p> <p>25 Q. Okay. How about number 11?</p>	<p style="text-align: right;">Page 65</p> <p>1 Q. By the trademark holder?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. And number 22?</p> <p>4 A. Well, that was a patent case.</p> <p>5 Q. Okay. And number 28?</p> <p>6 A. 28, I think I did a fame survey. Did I do</p> <p>7 anything else? I don't remember. It was</p> <p>8 definitely a fame survey on behalf of Nissan. It</p> <p>9 had to do with the fame of the models with the</p> <p>10 letter Q.</p> <p>11 Q. Okay. Number 29?</p> <p>12 A. That was a confusion case on behalf of the</p> <p>13 trademark holder.</p> <p>14 Q. All right. Number 31?</p> <p>15 A. That was -- my part had to do with</p> <p>16 genericness and I conducted a survey on behalf of</p> <p>17 Classic Foods, which despite appearing first, was</p> <p>18 actually the alleged infringer.</p> <p>19 Q. Okay. And 32?</p> <p>20 A. That's -- that's ongoing. That's a</p> <p>21 confusion study which I conducted on behalf of</p> <p>22 Allergan.</p> <p>23 Q. Okay. 34?</p> <p>24 A. I conducted there at least two surveys. I</p> <p>25 believe both a confusion survey and a dilution</p>

Page 66

1 survey and that was on behalf of U-Haul.
 2 Q. Alleged infringer?
 3 A. Yes.
 4 Q. Thirty-five?
 5 A. Confusion on behalf of ICON.
 6 Q. Alleged infringer?
 7 A. Yes.
 8 Q. And last but not least, 36?
 9 A. That was another case where I did both
 10 confusion and dilution on behalf of the plaintiff,
 11 Newport Pacific.
 12 Q. Okay. In any of these cases where you
 13 performed a survey, have any of them been excluded
 14 at trial by the judge?
 15 A. No.
 16 Q. Have any of them been the subject of
 17 published opinions critiquing the survey?
 18 MR. PAGE: I'll object as vague and
 19 ambiguous.
 20 THE WITNESS: I'm not aware of any case
 21 that critiqued.
 22 BY MR. PHILLIP:
 23 Q. And just to be clear, criticized the work?
 24 A. No, I understand. I'm not aware, you
 25 know. Yeah, I'm not aware of any critique of any

Page 67

1 of these surveys.
 2 Q. Okay. Are you aware of any cases,
 3 published decisions that discussed your surveys?
 4 A. That were done in the context of
 5 litigation?
 6 Q. Yes. Any court opinions where the judge
 7 wrote, you know, Mr. Simonson's survey says or
 8 Mr. Simonson testified -- commented upon it in some
 9 way?
 10 A. Yeah, there were some cases. There was an
 11 old case involving Simon Property Group versus
 12 mySimon where I believe the Court referred
 13 extensively to my opinion. And I'm sure there were
 14 other cases. Once the case is done I just don't
 15 read it as closely.
 16 The control that I used in that case was
 17 Simonson.com. I saved that exhibit.
 18 Q. Okay. So how about in the other
 19 direction, have you -- have any surveys that you
 20 have critiqued been excluded at trial?
 21 A. I believe so, but you know, this issue of
 22 exclusion, I guess there is a difference obviously
 23 between exclusion and harshly criticized?
 24 Q. Exactly.
 25 A. And I'm not -- I'm not sure exactly which

Page 68

1 category. So let's say if I criticize a survey and
 2 then there was summary judgment --
 3 Q. Right.
 4 A. -- consistent with my critique, now, I'm
 5 not sure if the summary judgment was based
 6 completely on my critique or on the flaws of that
 7 survey or not.
 8 Q. Right.
 9 A. So it's hard for me to answer that.
 10 Q. Okay. How about any decisions that you
 11 can recall where the Court actually cited your
 12 critique in support of its criticisms of someone
 13 else's work?
 14 A. Again, it could -- I assume it happened,
 15 but I just don't keep track of that.
 16 Q. Okay. So do you consider yourself fairly
 17 well known within the legal world as someone that
 18 companies can go to if they need a confusion study
 19 done in a case?
 20 A. I haven't done that survey yet. I could
 21 tell you that I get about a call a day and I keep
 22 turning people down or referring them to others, so
 23 I guess that provides some evidence. But I haven't
 24 checked for secondary meaning. Actually, secondary
 25 meaning I would fail because there is another

Page 69

1 expert by the name of Dr. Simonson, which
 2 unfortunately, his name is Alexander Simonson and
 3 he has been harshly criticized. What are the odds
 4 that you'll have two likelihood of confusion
 5 experts with the same last name.
 6 BY MR. PHILLIP:
 7 Q. Certainly you've been known to Mr. Page at
 8 least since the Geico case, right?
 9 A. Correct.
 10 Q. So for example, if he wanted to contact
 11 you to do a study in this case, he certainly knew
 12 where you were and how to get ahold of you?
 13 A. That's correct.
 14 Q. If he had contacted you to ask you to do a
 15 study on behalf of Google in this case, would you
 16 have considered doing it?
 17 A. Well, I did all my teaching for the year
 18 during those 10 weeks of the fall. So I was fairly
 19 busy and I had a couple of other surveys going on.
 20 Q. Uh-huh.
 21 A. So I'm not sure that I would or I would
 22 tell him, call Deborah or call Jerry.
 23 Q. Right. Time permitting, is there
 24 anything -- would there be any reason why you would
 25 consider not doing a survey in this case on behalf

Page 70

1 of Google?

2 A. No.

3 Q. Okay. Are there any particular, you know,

4 challenges that you would think could not be

5 overcome in doing a survey for Google?

6 A. No. I think if there was a perceived need

7 to do so, it could have been done.

8 Q. Okay. Have you given -- have you ever

9 given thought as to how it could have been done?

10 A. No. Survey design is something I take

11 seriously and I'm sure if I -- had I accepted that

12 assignment, I would have spent some time and come

13 up with what I consider to be an appropriate

14 design.

15 Q. Okay. And based on what you know so far,

16 having reviewed a lot of people's work in this

17 area, you feel like you could have come up with an

18 acceptable design to show no likelihood of

19 confusion?

20 A. I think a survey, a proper survey could

21 have been designed. I mean, that's my assumption.

22 Again, without having thought about it carefully.

23 Obviously I thought about it carefully in the

24 context of evaluating what Mr. Ossip did.

25 Q. If Mr. Ossip were to follow your critique

Page 71

1 and run a survey that addresses each of the issues

2 that you've taken issue with, would that, in your

3 opinion, be a proper survey?

4 MR. PAGE: Object as an incomplete

5 hypothetical and circular.

6 THE WITNESS: Yeah, I think it meets a

7 survey that followed everything, all the concerns

8 that I raised, I think that -- again, you know,

9 it's hard to speak in the abstract. But generally

10 speaking, if he addressed all my concerns, then I

11 would have no concerns left.

12 BY MR. PHILLIP:

13 Q. So is all of your time spent between your

14 teaching duties at Stanford and then litigation

15 consulting?

16 A. Well, I spend a great deal of time with my

17 doctoral students on their research and other

18 academic research.

19 Q. Uh-huh. But I get -- I mean, this is

20 probably obvious, but your time is spent in either

21 academia or doing expert work?

22 A. On rare occasions I spend some time with

23 my family.

24 Q. I understand that. Can you give me a, you

25 know, rough estimate in terms of percentage of how

Page 72

1 much your income comes from expert work?

2 A. I don't know. I'd have to guess. Half.

3 I'm not sure. Perhaps a little more than half.

4 Q. Okay. You're familiar with the treatises

5 by professor McCarthy, right?

6 A. Yes.

7 Q. And it's one of the most widely used

8 treatises in the area of trademark litigation?

9 A. That's my impression.

10 Q. He's the man, as they say, right?

11 A. I think so, yes.

12 Q. Okay. And do you have a copy of his

13 treatises in your office?

14 A. I do, dated, I think '02, but yes.

15 Q. And you'll rely on it from time to time?

16 A. Yes.

17 Q. Are you aware that he states in his

18 treatises, that, and I'm quoting, it is notoriously

19 easy for one survey expert to appear to tear apart

20 the methodology of the survey conducted by somebody

21 else?

22 A. I think I recall him saying that.

23 Q. Okay. And do you agree with that?

24 A. I think so. I think there is no perfect

25 survey. Having said that, it doesn't mean that

Page 73

1 anything goes. In other words, one needs to make a

2 distinction between minor flaws and major flaws.

3 Q. Right.

4 A. If we are in a situation where the flaws

5 on their own can account for whatever the result

6 you get, then the survey didn't teach you anything.

7 So I think that's the important distinction.

8 Q. Okay. Which is ultimately the Court's --

9 A. I beg your pardon?

10 Q. Which is ultimately the Court's function,

11 correct?

12 MR. PAGE: I object. Calls for a legal

13 conclusion.

14 THE WITNESS: I'm sure that's the case.

15 BY MR. PHILLIP:

16 Q. Have you ever testified that the best way

17 to determine whether an alleged design flaw that

18 you spotted in critiquing a survey had any impact

19 on the outcome of the survey was to conduct another

20 survey?

21 A. That strikes me as something that if I

22 said it ever, it would have been overly sweeping

23 and generic because there are some flaws that are

24 flogged on their face, so obviously, for example,

25 you don't have a control. I don't think that you

Page 74

1 need to conduct a survey to establish the fact,
 2 which I think, for example, in this case, Mr. Ossip
 3 readily admits that he did not have a control.
 4 You don't need a survey to prove that. He
 5 admits it.
 6 Q. That's right. But to determine
 7 empirically whether the lack of control had any
 8 impact on the outcome of the survey, wouldn't you
 9 need to conduct another survey with a control to
 10 show if it had any impact?
 11 A. I don't think it would be necessary.
 12 Because when you submit a survey and there's some
 13 rules and there is nothing more, I'd say basic,
 14 than you know, needing to include a control. In
 15 this case it was easy to find the control.
 16 Just put the name blinds. I presume that
 17 plaintiff in this case is not objecting to Google
 18 selling the keyword blinds and allowing anyone who
 19 wants to bid on that word to do so. So he could
 20 have just used that as a control.
 21 Q. But without doing that, we don't know
 22 whether it would change the outcome?
 23 A. Well, but we do know that we cannot rely
 24 on this survey without a control. That's what we
 25 know for sure.

Page 75

1 Q. Okay. And I'll accept that, but my
 2 question is, without actually running another
 3 survey with control, you can't say with any
 4 certainty whether the results would be different?
 5 A. Well, I'd be shocked if they were not
 6 different. Maybe you say, well, instead of the
 7 noise that you would have obtained in the survey
 8 would not be 15 percent, it would be 10 percent. I
 9 can't tell you that --
 10 Q. Uh-huh.
 11 A. -- without running the survey. I can tell
 12 you that in all likelihood, it will be
 13 significantly lower than it is and furthermore,
 14 just as in academia, in any setting, without a
 15 control, you just cannot rely on that survey.
 16 Q. Uh-huh. When you do surveys, who do you
 17 use to collect -- to actually go out and perform
 18 the research and collect the data?
 19 A. Well, my -- the firm that supervises
 20 implementation is the same one that Mr. Ossip used,
 21 Target Research Group. Actually, most of the
 22 interviews are done by the people who operate those
 23 shopping mall research locations.
 24 Q. Who Target contracts with?
 25 A. Exactly.

Page 76

1 Q. So you've been satisfied with Target?
 2 A. Very much so.
 3 Q. And you don't have any criticisms of the
 4 work they did for Mr. Ossip, setting aside the
 5 design of the survey?
 6 A. That's correct. I mean, it sounded like
 7 there were some particular issues, but that can
 8 happen, where apparently some mall locations were
 9 not performing properly and there were some errors
 10 made.
 11 Q. Right.
 12 A. It doesn't happen all that often, but it
 13 has happened.
 14 Q. And Mr. Ossip acknowledged that in his
 15 report and said he was not relying on that data,
 16 right?
 17 A. That's correct.
 18 Q. And that's the right thing to do in that
 19 situation?
 20 A. Yes.
 21 Q. And just to tie up a loose end from
 22 earlier, is it right that you've never spoken with
 23 anyone at Google in connection with this
 24 assignment?
 25 A. That's correct.

Page 77

1 Q. Do you use Google regularly as your search
 2 engine of choice?
 3 A. Probably more often than any other search
 4 engine.
 5 Q. Does it come up automatically when you
 6 open up your browser?
 7 A. I have several notebooks. I think in all
 8 but one it is.
 9 Q. Okay. Are you familiar with their ad
 10 words program?
 11 A. Somewhat.
 12 Q. Have you heard of the term, negative
 13 keyword?
 14 A. Yes.
 15 Q. And what's your understanding of a
 16 negative keyword?
 17 A. I understand that's keywords for which you
 18 want your ad not to appear.
 19 Q. So when you were retained by Mr. Page,
 20 what exactly did he ask you to do?
 21 A. He just said that a survey report was
 22 forthcoming.
 23 Q. I'm going to send you a survey report and
 24 I'd like you to critique it?
 25 A. No, I want you to take a look at it.