

Exhibit R-2

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1 Q. Okay. A survey report is coming, I'm
 2 going to send it to you and I want you to take a
 3 look at it?
 4 A. Correct.
 5 Q. And I might want you to do your own
 6 report?
 7 A. Yes.
 8 Q. Okay. You understood that?
 9 A. I did.
 10 Q. Okay. But I'm not -- did Mr. Page also
 11 say, but I'm not going to have you do a survey?
 12 A. Yes, as I said, it never came up.
 13 Q. But did he say explicitly in the first
 14 call, a survey report is coming, I'm going to send
 15 it to you. I want you to take a look at it and I
 16 may have you do your own report, but I'm not going
 17 to ask you to do a survey?
 18 A. I don't recall him saying that.
 19 Q. Was that your impression?
 20 A. I don't remember. Now, are you asking is
 21 that not what was said?
 22 Q. Right.
 23 A. But my impression, I would not trust my
 24 recollection of unsaid impressions.
 25 Q. Okay. At any time did he say to you, you

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1 know, I'm going to have you do a report, but I'm
 2 not going to have you do a study?
 3 A. I don't recall that. I mean, as I said,
 4 we didn't talk about doing a survey.
 5 Q. At any time when you were reviewing the
 6 report, did you say, hey, Mike, would you like me
 7 to do a study for you?
 8 A. I don't think so, no.
 9 Q. Have you thought about doing a study,
 10 Mike?
 11 A. Did I think about that?
 12 Q. Did you say to Mike, hey, Mike, have you
 13 thought about doing a study?
 14 A. I don't think that I asked that.
 15 Q. Okay.
 16 A. As I said, if the survey did not look like
 17 it had major flaws, one thing I would say, probably
 18 I'm not the right person to critique it, to
 19 evaluate it.
 20 Q. Right.
 21 A. And/or I'd say, well, it looks like it has
 22 no major flaws. Let's do another survey. Again,
 23 it has to be a proper survey that I feel
 24 comfortable doing and let's see what happens.
 25 Q. So he sent you Mr. Ossip's survey, then,

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1 right?
 2 A. Yes.
 3 Q. Do you remember approximately when you
 4 received it?
 5 A. I don't.
 6 Q. Was it shortly after signing the
 7 confidentiality agreement?
 8 A. I'm not sure. I thought it was earlier
 9 than that.
 10 Q. Okay. So you think it may have been in
 11 October?
 12 A. I don't remember exactly.
 13 Q. Okay. So you got the survey report and
 14 you reviewed it, right?
 15 A. Yes.
 16 Q. Did anybody else review it with you?
 17 A. No.
 18 Q. Did you have anybody help you at all?
 19 A. No.
 20 Q. Okay. And then what did you do, did you
 21 call Mike?
 22 A. I believe I did, yeah. I said that, you
 23 know, it appears to have some major problems.
 24 Q. You looked at it and you said, I think
 25 this thing is majorly flawed?

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1 A. Yes.
 2 Q. Had Mike told you before you received it
 3 that he thought it had flaws in it?
 4 A. No, I don't think -- I don't recall him
 5 telling me anything about the survey. I'm not even
 6 sure he read it at that time.
 7 Q. Okay. So you called him -- was it a
 8 telephone conversation after you reviewed the
 9 report?
 10 A. I beg your pardon?
 11 Q. Was your next communication with Mike
 12 after you reviewed the report -- after you reviewed
 13 Ossip's report a telephone conversation?
 14 A. I believe so, yes.
 15 Q. Okay. So you picked up the phone and you
 16 called Mike and you said, I reviewed Al Ossip's
 17 report and I think there's problems with it or
 18 something to that effect?
 19 A. Correct.
 20 Q. Did you discuss the problems?
 21 A. I don't think there was a very detailed
 22 discussion, maybe a couple of minutes. I don't
 23 recall any extensive discussion at that point.
 24 Q. Did you raise the issue of the control?
 25 A. I did.

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1 Q. Right away?

2 A. Right away.

3 Q. And did you raise the issue of the

4 universe right away?

5 A. I don't remember which of these things I

6 did.

7 Q. Okay. Which things jumped out at you

8 right away? Control, anything else?

9 A. You know, control, obviously. I think I

10 recall that originally I did not receive all the

11 exhibits. In other words, all the pages that were

12 shown. I think I got -- I think I received that

13 later, because his report included -- I forget, one

14 or two examples, but I don't think it included all

15 of them.

16 I might have at that time -- I don't

17 remember if I'd already looked at the verbatim

18 responses and didn't find many references to the

19 search term. I'm sure that the issue of real world

20 similarity came up. I don't remember if we talked

21 about the universe. I remember being a little

22 puzzled by the fact that all the respondents were

23 women. But again, I don't remember if that was

24 something that we talked about.

25 As I said, it was a very brief

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1 conversation.

2 Q. Okay. So it sounds like the issue of a

3 lack of control, that jumped out at you right away

4 and you're not exactly sure at what -- how the

5 other issues -- how your other critiques sort of

6 developed over time?

7 A. Right.

8 Q. What you saw and when?

9 A. I beg your pardon.

10 Q. You're not clear on when you got the full

11 report and when you got the verbatims?

12 A. No, there were some verbatims in the

13 report, but originally I read the report rather

14 quickly and I read the report, I looked at the

15 questionnaire itself and a few things jumped at me.

16 Later, obviously before starting to put

17 pen to paper or start putting it on the computer, I

18 obviously read it much more carefully. By then I

19 received the actual questionnaires and so on.

20 Q. Uh-huh. Was there some point in time

21 where a decision was made by you and Mike that you

22 would, in fact, prepare an expert report?

23 A. Yes.

24 Q. And was that fairly soon after reviewing

25 the Ossip report?

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1 A. Yes.

2 Q. So in the first conversation?

3 A. Probably, yes.

4 Q. Okay. So you were given the green light

5 to get going on your report?

6 A. Yes.

7 MR. PHILLIP: Okay. Why don't we take a

8 break, if you don't mind.

9 MR. PAGE: Fine by me.

10 (Lunch recess.)

11 BY MR. PHILLIP:

12 Q. In connection with your work on this case,

13 did you read any specific cases from the ninth

14 circuit regarding trademark infringement?

15 A. No.

16 Q. Are you familiar with the doctrine,

17 initial interest confusion?

18 A. To some degree. I mean, just what I

19 vaguely recall from reading from context of some

20 cases in the past.

21 Q. Okay. And what's your understanding of

22 initial interest confusion?

23 A. These are cases where initially someone

24 thinks that two -- that one mark is related to

25 another mark and that leads to, for example,

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1 searching for more information or to going to a

2 store, those kinds of things.

3 And even though before purchase is made

4 that confusion is resolved, there is still initial

5 interest confusion.

6 Q. That's a good enough description. And you

7 also understand that that is actionable under ninth

8 circuit law?

9 MR. PAGE: Objection. Calls for a legal

10 conclusion.

11 THE WITNESS: Yeah, I'm not sure -- yeah,

12 I -- I believe that there are some cases where that

13 was considered actionable, yes.

14 BY MR. PHILLIP:

15 Q. Uh-huh. Have you ever done a study that

16 tested this concept of initial interest confusion?

17 A. I don't remember. I might have, but I

18 can't think of any right now.

19 Q. Okay. If you do, please let me know.

20 A. Sure.

21 MR. PHILLIPS: Did you happen to see his

22 bill during the lunch break?

23 MR. PAGE: Yes, 59 and a half hours.

24 MR. PHILLIP: Okay. Through November 30th

25 or through the current date?

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1 THE WITNESS: No, no. Through November
 2 30th.
 3 BY MR. PHILLIP:
 4 Q. Okay. And when did the work -- did you
 5 look at the bill during the lunch hour?
 6 A. Not right now.
 7 Q. Do you know when the work commenced?
 8 A. I don't remember. As I said, I think it
 9 started in October, but I'm not sure.
 10 Q. Okay. So in reviewing things -- let me
 11 back up. Have you ever purchased blinds
 12 personally?
 13 A. I might have. It's been a while, but I
 14 remember that we purchased blinds. Yeah, actually,
 15 I have a vivid recollection of something to do --
 16 we even did it perhaps last year.
 17 Q. When you say we, are you referring to you
 18 and your wife?
 19 A. Yes.
 20 Q. So you accompanied your wife in going out
 21 and making some purchases for the home?
 22 A. I don't remember the process, whether it
 23 was -- I don't think it was on the Internet.
 24 Q. Okay. Was -- and did it involve American
 25 Blinds?

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1 A. Not that I know of.
 2 Q. Before this case, had you heard of
 3 American Blinds Wallpaper and More or American
 4 Blinds & Wallpaper Factory?
 5 A. No.
 6 Q. Or American Blinds?
 7 A. No.
 8 Q. Okay. During this case, have you ever
 9 reviewed a catalog from American Blinds?
 10 A. No.
 11 Q. Have you ever reviewed any sales
 12 information regarding American Blinds?
 13 A. No.
 14 Q. Any advertisements from American Blinds?
 15 A. No.
 16 Q. Have you done any searches of the
 17 trademark office to see what registrations they
 18 own?
 19 A. No.
 20 Q. Have you done any searches of LexisNexus
 21 for any news articles about them?
 22 A. No.
 23 Q. Okay. And you would agree that all of
 24 those kinds of things are relevant to whether a
 25 trademark has secondary meaning, correct?

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1 A. When you say kinds of things?
 2 Q. All those types of -- all that kind of
 3 evidence that I just talked about that's relevant
 4 to whether a mark has obtained secondary meaning?
 5 MR. PAGE: I'm going to object as
 6 compound.
 7 THE WITNESS: It could contribute to the
 8 creation of secondary meaning. Obviously, as I
 9 think I said in my report, it's extremely difficult
 10 and getting even more so.
 11 But if you have one mark and you keep
 12 pushing it and promoting it and consumers buy a
 13 product and pay attention and so on, then you may
 14 very well be able to create secondary meaning.
 15 It's not easy, but it can be done.
 16 BY MR. PHILLIP:
 17 Q. Okay. What did you do in preparation for
 18 your deposition today?
 19 A. Just read my report a couple of times. I
 20 reviewed Mr. Ossip's transcript. I skimmed the
 21 transcript of Mr. Layne and Mr. Alderman and I just
 22 skimmed the other documents that I had.
 23 Q. Okay.
 24 A. And I met very briefly yesterday with
 25 Mr. Page.

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1 Q. Okay. Where did you meet?
 2 A. In his office.
 3 Q. And you said it was very briefly; how long
 4 was it?
 5 A. I think it was maybe 25 minutes, maybe 30
 6 minutes, of which maybe 15 minutes had to do with
 7 this case.
 8 Q. Okay. Let's take a look at your report.
 9 You indicate in paragraph 3 that your field of
 10 expertise includes trademark infringement.
 11 Do you see that?
 12 A. Yes.
 13 Q. And I'm trying to understand what it is
 14 that you're saying there, because obviously you're
 15 not a lawyer, right?
 16 A. That's very true.
 17 Q. And you've not taught trademark law or
 18 trademark infringement classes, right?
 19 A. That's correct.
 20 Q. So is what you're saying here when you're
 21 talking about expertise in trademark infringement,
 22 you're talking about your work as an expert in
 23 trademark infringement cases?
 24 A. No. I'm talking about, as you know, I
 25 published three articles in that area.

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1 Q. Okay.

2 A. Two at the Trademark Reporter and one in

3 the Journal of Public Policy and Marketing.

4 Q. Okay.

5 A. So I probably published more about

6 likelihood of confusion surveys -- I don't know,

7 I'm maybe hesitant to say, probably Dr. Jacobe has

8 published more than me in that area, but I guess I

9 could brag and claim I'm the only one who ever

10 received an award for an article published in a

11 journal during a period of three years on that

12 subject.

13 Q. And that subject is trademark and

14 infringement surveys?

15 A. I think the title of the article that

16 received the award from the Journal of Public

17 Policy and Marketing is "Trademark Infringement

18 From the Customer Perspective."

19 And then I went on to discuss the meaning

20 of confusion, conditions for confusion and issues

21 of genericness and talked about the two studies

22 that I conducted in which I contrasted different

23 methods for assessing likelihood of confusion and

24 different methods for assessing genericness.

25 Q. Uh-huh. Okay. So is what you're saying

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1 that you consider yourself an expert in trademark

2 infringement because of all the work that you've

3 done in doing studies in trademark cases and the

4 writing that you've done about that?

5 A. Yes. Of course, having done also some

6 consulting work in the area and having looked at

7 many real-world cases, I've learned from that as

8 well, about situations where confusion, for

9 example, is created or is not created.

10 So it's a combination. But I would --

11 what you see here in paragraph 3, it's mostly on

12 the basis of my academic writings.

13 Q. Have you ever been allowed to give an

14 opinion in a case that there was trademark

15 infringement without having done a study?

16 A. Yes.

17 Q. You've been allowed to testify that in

18 your opinion there was a likelihood of confusion?

19 A. Well, there was a case in Southern

20 California -- in downtown L.A. where I testified at

21 trial that there was no reverse confusion without

22 having done any survey just based on general

23 principles of consumer behavior and confusion and

24 explaining why there is no -- there was no

25 confusion.

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1 Q. Uh-huh.

2 A. Even though there was no surveys in that

3 case. In fact, the plaintiff conducted something

4 that they referred to as a survey, but it had major

5 problems so it was set aside before trial. So it

6 didn't -- you know, it wasn't even mentioned during

7 trial.

8 Q. Other than that one instance, have you, at

9 any other time, given an opinion on infringement

10 likelihood of confusion without having done a

11 survey?

12 A. You know, I don't remember the details,

13 but in the case of Oracle versus -- I think it is

14 called Light Reading or something like that. I

15 think it's listed here.

16 Oracle versus Light Reading, number two in

17 Exhibit B. In that case I prepared a report on

18 behalf of Oracle and did not rely on a survey and

19 even though a significant part of my testimony had

20 to do with branding principles, I believe I also

21 talked about why there was a low likelihood of

22 confusion, obviously without putting a number on

23 that.

24 But saying that there was a low likelihood

25 of confusion and I believe that the other side,

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1 indeed, as you suggested, said, well, this is you

2 being a lawyer. Even though I think I relied on

3 general principles of consumer behavior and

4 marketing as opposed to the law.

5 Q. Right.

6 A. And the Court rejected their claim and

7 allowed in my -- and I believe that the decision

8 was in favor of Oracle in that case.

9 Q. Have you had instances that have gone the

10 other way where you were prevented from giving an

11 opinion on likelihood of confusion without having

12 done a survey?

13 A. I cannot recall a case like that. And I

14 should say it's not something that happens often.

15 There might be situations where you have other

16 sources of data, maybe not surveys, that you can

17 rely on.

18 Q. Okay. So your testimony is that it

19 doesn't happen often to give an opinion on

20 likelihood of confusion without having done a

21 survey?

22 A. It doesn't happen often, but it has

23 happened several times during my work as an expert

24 witness and I cannot recall a single case where my

25 opinion or report was rejected for that reason.

<p style="text-align: right;">Page 94</p> <p>1 Q. Uh-huh. Okay. So then in your report on 2 page 5 the section entitled, summary of 3 conclusions -- and these are several short 4 paragraphs that summarize your conclusions in the 5 overall report? 6 A. Correct. 7 Q. Why do you put a summary of conclusions up 8 front in your report? 9 A. Well, I don't always do this. Sometimes I 10 put it at the end, but just to make it reader 11 friendly. If someone does not want to bother with 12 all the details, at least they see the summary. 13 Q. Okay. And then you have the next section 14 entitled, introduction, on page 8, which in 15 paragraph 19 again states summaries of your 16 critique, right, in very short fashion? 17 A. Correct. 18 Q. And then there's a segue there to two 19 basic questions there that need to be addressed in 20 paragraph 20 there. Do you see that? 21 A. Yes. 22 Q. And -- now, these questions that you say 23 need to be addressed weren't addressed specifically 24 in Mr. Ossip's report, were they? 25 A. That is correct, but I thought that they</p>	<p style="text-align: right;">Page 96</p> <p>1 A. No, they're not misled. It just reflects 2 their reality that you may be going to a store 3 under the impression that they might be carrying a 4 particular product and you go there and you find 5 that they don't, it's out of stock, they don't have 6 the particular model, they no longer carry that 7 brand or whatever reason. 8 Q. Well, if you're talking about a physical 9 store and no one in particular has told them to go 10 to that physical store, that's not analogous to the 11 situation here, is it? 12 A. No, I think it is. If you advertise and 13 let's say if you say, I'm carrying all the famous 14 camera brands, right, so you say, okay, I'm looking 15 for the S-70 model of Cannon and you assume that if 16 they're carrying all well known camera brands, they 17 probably will have a mainstream option such as the 18 Cannon S-70. You go there, they don't. 19 In other cases, I mean, it could be a more 20 direct kind of analogy, if you will, where you 21 advertise specifically that you carry that product 22 and you don't have it, right? Maybe because you 23 sold out, which is not the case here. 24 So that would be even -- maybe direct 25 analogy is not the right word, but in that case,</p>
<p style="text-align: right;">Page 95</p> <p>1 were relevant to his conclusions. 2 Q. Okay. Well, point A is whether a 3 situation whereby consumers go to a store or a 4 website under the belief that the store might offer 5 them a certain product and then find out it does 6 not is uncommon or indicates that consumers were 7 misled, right, that was the first thing you wanted 8 to address? 9 A. Yes. 10 Q. Why did you think that general principle 11 was relevant to the Ossip study? 12 A. Well, because the Ossip survey looked at 13 situations where allegedly consumers are looking 14 for something, let's say that there is this product 15 called American Blinds, they are looking for that, 16 then they click on a particular ad and they do not 17 find the product called American Blinds. 18 So that's a particular situation and the 19 question that I thought was relevant is whether 20 such a situation, in general, is uncommon or is 21 that something that happens often in the real 22 world. 23 Q. Whether they get to a store and find what 24 they're looking for is not there or whether they 25 were actually misled into going into that store?</p>	<p style="text-align: right;">Page 97</p> <p>1 you said something that you're selling, a 2 particular product, and you don't have it. 3 Q. But doesn't that -- doesn't that kind of 4 beg the question here? With all due respect, 5 Dr. Simonson, doesn't this -- isn't this the 6 ultimate issue that you're describing? 7 A. I'm not sure I'm following. 8 Q. Well, we say that people are going to 9 these links because they think they're being told 10 to go to these links because they put in a certain 11 search time. Just like in your example, people 12 would be going to the store, because someone said, 13 if you want to buy a Cannon, go there. 14 And you're saying, no, people just go shop 15 on their own and they're not relying on anybody 16 telling them that they can find what they're 17 looking for here. 18 A. No, I think -- 19 MR. PAGE: Let me object that it misstates 20 his prior testimony and there's no question 21 pending. 22 THE WITNESS: There is no question. 23 MR. PAGE: He didn't ask a question. 24 THE WITNESS: I thought -- 25 MR. PAGE: It's not a debate. When he</p>

<p style="text-align: right;">Page 98</p> <p>1 asks a question, you can answer it.</p> <p>2 THE WITNESS: I may be answering the wrong</p> <p>3 question or maybe you want to rephrase so we'll</p> <p>4 make sure that I'm addressing the right question.</p> <p>5 BY MR. PHILLIP:</p> <p>6 Q. Sure. That's fair enough. Your 20(A),</p> <p>7 asking whether the fact that consumers go to a</p> <p>8 store or website believing that they might find a</p> <p>9 certain product there and it's not there indicates</p> <p>10 that they've been misled, that's something that you</p> <p>11 want to address in your report, right?</p> <p>12 A. Right.</p> <p>13 Q. Isn't that the ultimate issue here as to</p> <p>14 what American Blinds is complaining about?</p> <p>15 A. I don't think it is.</p> <p>16 Q. Why not?</p> <p>17 A. I mean, maybe -- obviously I'm not asking</p> <p>18 you questions here, but you say, isn't that the</p> <p>19 ultimate question? I'm here describing the</p> <p>20 real-world situations from a consumer researcher's</p> <p>21 perspective --</p> <p>22 Q. Right.</p> <p>23 A. -- whereby you were shopping for a</p> <p>24 product, you're looking at different places, in</p> <p>25 many cases you don't know that you want one</p>	<p style="text-align: right;">Page 100</p> <p>1 looking for a good product and as opposed to</p> <p>2 clicking on a sponsored link and saying, ah, it</p> <p>3 necessarily carries brand X, assuming brand X</p> <p>4 exists.</p> <p>5 Q. When you say in 20(A), whether it</p> <p>6 indicates that consumers were misled, what are you</p> <p>7 referring to there, misled about what?</p> <p>8 A. Well, I think it's pretty clear. The fact</p> <p>9 that you often, as a matter of reality, you go to a</p> <p>10 store looking for a particular product, maybe you</p> <p>11 have some idea that you want miniblinds, aluminum</p> <p>12 blinds, wood blinds or whatever, and you go to a</p> <p>13 store and don't find it.</p> <p>14 Does that represent someone being misled?</p> <p>15 The answer is no.</p> <p>16 Q. Well, it could. What if you went to that</p> <p>17 store because your designer said, if you want this</p> <p>18 particular brand of blinds, go to this store and</p> <p>19 you go to that store and it's not there. Isn't</p> <p>20 that a form of being misled?</p> <p>21 A. Totally not. I would just say it's a well</p> <p>22 intentioned designer -- or whoever you said was</p> <p>23 giving me the advice was misinformed or didn't keep</p> <p>24 up with the inventory with that store. I mean, I</p> <p>25 don't think this has anything to do with being</p>
<p style="text-align: right;">Page 99</p> <p>1 particular model or one particular brand, you're</p> <p>2 looking for options.</p> <p>3 Thank God for the Internet. It makes</p> <p>4 things a lot easier. So you go to different</p> <p>5 places, you're looking for a good price, for a good</p> <p>6 product, for a good delivery, installation, what</p> <p>7 have you. You're just gathering information.</p> <p>8 And therefore there is no deception</p> <p>9 involved. This is just the process of consumers</p> <p>10 looking for information, evaluating options,</p> <p>11 crystalizing their own preferences and eventually</p> <p>12 making a purchase decision.</p> <p>13 I mean, this is just the reality of how</p> <p>14 consumers form their preferences.</p> <p>15 BY MR. PHILLIP:</p> <p>16 Q. But that doesn't answer the question of</p> <p>17 what consumers believe when they put in a search</p> <p>18 term in Google and what comes back under the</p> <p>19 sponsored links, does it?</p> <p>20 A. Well, I think it does. I think what it</p> <p>21 says here is that people do not click on a</p> <p>22 particular ad or a sponsored link with the idea</p> <p>23 this link necessarily has a particular brand.</p> <p>24 Instead they're in the process of</p> <p>25 gathering information, looking for a good price,</p>	<p style="text-align: right;">Page 101</p> <p>1 misled. I presume that the person didn't send me</p> <p>2 to that store knowing that what he or she was</p> <p>3 saying was incorrect.</p> <p>4 Q. I see. So they may not have been</p> <p>5 deceitful, they may just have made a mistake?</p> <p>6 A. In that particular example, they may have</p> <p>7 made a mistake.</p> <p>8 Q. Or they might have been deceitful?</p> <p>9 A. I'd just assume they made a mistake,</p> <p>10 especially if they'd like to keep me as a loyal</p> <p>11 customer.</p> <p>12 Q. Okay. So what else -- what -- I still</p> <p>13 don't understand what you were saying here when you</p> <p>14 say, whether that situation indicates that</p> <p>15 consumers were misled. Misled about what? Misled</p> <p>16 about whether a certain product existed there?</p> <p>17 A. No -- yes. Whether they were misled just</p> <p>18 because you didn't find it, doesn't mean that you</p> <p>19 were misled about anything.</p> <p>20 Q. Okay.</p> <p>21 A. You just did not find it.</p> <p>22 Q. Okay.</p> <p>23 A. Because not every store carries</p> <p>24 everything. It's just a fact of life.</p> <p>25 Q. Okay. So your point here is people shop</p>

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1 and sometimes don't find what they're looking for?

2 A. Yes.

3 Q. Okay. And that's just sort of a general

4 observation, I mean, there's no -- that's just your

5 own personal knowledge and opinion based on

6 shopping experience, right?

7 A. Well, I also know it as a consumer

8 researcher, even though I must admit it is also

9 intuitively appealing.

10 Q. It's one of those common sense things,

11 sometimes people shop and don't find what they're

12 looking for?

13 A. Well, and I teach about consumer research

14 and that's related to that. Yeah, I agree with you

15 it's intuitive and I'm sure you don't need a Ph.D.

16 in anything to know that fact.

17 Q. One doesn't have to be an expert to know

18 that people sometimes go shopping and don't find

19 what they're looking for, right?

20 A. I think that's true.

21 Q. Okay. How about (B), 20(B), you wanted to

22 address whether consumers are accustomed to the

23 fact that when they search for information about

24 one product or brand, makers of similar products or

25 brands often target them using ads and other

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1 promotional means.

2 Why did you feel that question needed to

3 be addressed?

4 A. It just -- it is directly relevant, I

5 think, because it's the observation that consumers

6 have come to expect that when they were looking for

7 information, for example, by entering certain words

8 in a search engine or by buying from a catalog or

9 by buying anything at the supermarket, for example,

10 that by that they are revealing their preferences.

11 And sellers of the products at issue will

12 try to get their attention and perhaps offer them

13 their own products of that type. That's just,

14 again, a marketplace reality.

15 Q. Would you agree with me that that is not a

16 matter of common sense to the layperson, that fact?

17 A. I don't think it's a question of common

18 sense. It has to do with consumer learning.

19 Q. Right.

20 A. In other words, because consumers have

21 encountered it numerous times in their real lives,

22 they've come to expect that.

23 Q. What can you -- what kind of empirical

24 data or scientific support do you have for that

25 proposition in 20(B)?

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1 A. Well, I gave one example. You by orange

2 juice at Safeway and you often would get at the

3 check out -- you'd get immediately a coupon for a

4 competing brands brand of orange juice.

5 I mean, you can look at the store display.

6 Are you looking to find a Sony TV, needless to say,

7 on the same shelf you will see other products. I

8 mean, that's one reason for putting them -- for

9 organizing them perhaps side by side.

10 If you just bought a house, you would not

11 be surprised to see offers suddenly arriving from

12 finance companies, presumably the real estate

13 company somehow told someone that you are a

14 prospective customer of mortgages and so on.

15 I mean, there are numerous examples and

16 from what we know about consumer learning, they've

17 made that obvious observation.

18 Q. Consumers have?

19 A. Yes.

20 Q. What empirical research or scientific

21 studies are you aware of that support the

22 conclusion that consumers are accustomed to the

23 fact that when they search for information about

24 one product/brands that makers of similar

25 product/brands often target them using ads and

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1 other promotional needs?

2 A. As I said, it's just a basic principal of

3 consumer learning, when something in your life

4 happens over and over again, you learn that that's

5 a reality.

6 Q. Okay. But do you know if there are any

7 studies that have actually shown that that is a

8 reality for consumers today?

9 A. No, I don't think there is -- it is

10 necessary to conducted a survey for something that

11 is, again, quite intuitive and obvious. Just

12 because something happens over and over again you

13 learn that it happens over and over again.

14 Q. Well, some people and some people might

15 not learn, so you're making a kind of a sweeping

16 statement here about consumers as a general class

17 being accustomed to this.

18 So I'm wondering what kind of support

19 exists for that out in academia or science beyond

20 this general notion of, you know, people start to

21 become aware after they've experienced it over and

22 over again?

23 MR. PAGE: Object to the form of the --

24 the form of the speech. There's no question

25 pending.

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1 MR. PHILLIP: No, there is a question.
 2 MR. PAGE: Okay.
 3 MR. PHILLIP: I can restate it if you'd
 4 like.
 5 THE WITNESS: If you're on the Internet
 6 and you are constantly bombarded by ads for things
 7 that you did not necessarily look for, you just
 8 learn that that's their reality and you know
 9 that -- you don't need to be an expert on cookies
 10 and so on to figure out that if you show that
 11 you're interested in something, then you'll start
 12 getting related ads targeted at you.
 13 Again, it's a matter of -- if you say,
 14 does it apply to 100 percent of consumers, maybe
 15 not. Does it apply to consumers who are looking
 16 for information about blinds on the Internet, it's
 17 extremely likely to apply to the overwhelming
 18 majority of them.
 19 BY MR. PHILLIP:
 20 Q. Okay. Well, I understand that's your
 21 opinion and I understand that you believe it to be
 22 true. What I'm trying to get at is what kind of
 23 empirical data supports that that you're aware of,
 24 any kind of studies, reports, research, articles?
 25 MR. PAGE: I'll object as asked and

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1 answered.
 2 MR. PHILLIP: Okay. Is the answer none?
 3 THE WITNESS: No, the answer is that it's
 4 so obvious, just like, am I aware of studies
 5 showing that consumers recognize that advertisers
 6 try to sell products to them, I haven't seen any
 7 study looking at that. It's just obvious.
 8 BY MR. PHILLIP:
 9 Q. Okay. Let's go to paragraph 27, then.
 10 Are you aware of any studies supporting your
 11 conclusion that when using an Internet search
 12 engine such as Google, consumers are likely to know
 13 that ads and sponsored links that appear on the
 14 screen may very well represent products and brands
 15 that are different from those entered as the search
 16 word?
 17 A. I think I did answer that just saying that
 18 there have been many studies in consumer learning
 19 that apply to anything that consumers learn from
 20 observation, that's one of them.
 21 I don't think that there is any study that
 22 needed to be conducted specifically for that
 23 purpose. You're looking for general principles
 24 that apply also in this case.
 25 Q. So aren't you saying here, Dr. Simonson,

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1 that you don't think people using Google are
 2 confused by sponsored links?
 3 A. What do you mean by confused by sponsored
 4 links, confused about what?
 5 Q. About what the sponsored link represents,
 6 what the -- whether it's related to the search
 7 terms that they typed in, anything?
 8 MR. PAGE: Object as compound.
 9 THE WITNESS: Related, they might be
 10 thinking it's related. For example, if I'm looking
 11 for Sony TV and you show me an ad for a Panasonic
 12 TV, then it's related. Is that -- that's not
 13 confusion, though. I mean, it's just reality that
 14 given that I've shown interest in TVs, then other
 15 brands of TV are trying to get me to buy their
 16 product instead.
 17 BY MR. PHILLIP:
 18 Q. Exactly. So is it your opinion -- are you
 19 offering an opinion that when someone enters a
 20 trademark as a search term, that they are not
 21 confused as to whether the sponsored link is a site
 22 that will take them to someplace where they can do
 23 business with the company whose trademark they put
 24 in the search term?
 25 A. I mean, that's a bit generic. I mean,

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1 obviously there could be truly deceptive sponsored
 2 links, for example, if I'm looking for Sony and
 3 there is a sponsored link saying, buy directly from
 4 Sony and that link is unrelated to Sony, that could
 5 very well be deceptive.
 6 So I don't think you can offer a
 7 generalization, but under normal condition what --
 8 I don't know what's normal, but under most
 9 conditions I think it is true, at least under the
 10 rules that I'm aware of with respect to what Google
 11 allows or does not allow.
 12 Q. Right. So for example, if someone typed
 13 in Sony and a sponsored link came back that said
 14 great TVs, is it your opinion that consumers know
 15 that that link is not related to Sony in any way.
 16 A. I don't know if -- they may click on the
 17 link without having any expectation or knowledge
 18 whether or not Sony is there.
 19 So in other words, if you put -- you enter
 20 Sony and you get a sponsored link saying, buy TVs
 21 for less, I don't think that consumers would
 22 necessarily -- would assume that this particular
 23 website sells Sony.
 24 It's possible, but they wouldn't know.
 25 They would click on that website, they see what it

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1 offers. If they are -- they would only consider
 2 Sony and if that website does not offer Sony, they
 3 would just hit the back button and go back to the
 4 search results.
 5 Q. So do you think it's okay that a
 6 competitor can attract traffic that way?
 7 MR. PAGE: I'm going to object as vague
 8 and ambiguous and calling for a legal conclusion,
 9 perhaps.
 10 THE WITNESS: I think that consumers, as I
 11 said here, consumers would believe that it's quite
 12 possible -- in other words, they don't know which
 13 brands are offered on a sponsored link that is, for
 14 example, that has the heading, buy TVs for less.
 15 BY MR. PHILLIP:
 16 Q. Uh-huh.
 17 A. They're just there. As I said, that
 18 information search happens to be real easy to do on
 19 the Internet. They would just click. If they were
 20 price sensitive and they may find that there is a
 21 Sanyo for less, they may change their mind.
 22 They're not deceived, they're just searching for
 23 options.
 24 Q. If they clicked on that site, though,
 25 believing that they could find a Sony TV there and

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1 they get there and they discover they cannot, there
 2 is no Sony TV for sell there, is that trademark
 3 confusion, in your mind?
 4 A. Now you are asking me a legal conclusion.
 5 Here, what I said is that consumers have come to
 6 expect that when they're looking for a particular
 7 product, sellers of that type of product will try
 8 to target them, which means that even if they
 9 entered a particular trademark, sellers of other
 10 trademarks are likely to try to get their business.
 11 Q. Okay. What -- so is what your saying
 12 that -- are you saying that consumers understand
 13 that sponsored listings are paid advertisements?
 14 MR. PAGE: I'll object that misstates his
 15 prior testimony.
 16 MR. PHILLIP: Is that what you're saying?
 17 THE WITNESS: I don't think -- did I -- I
 18 don't recall saying that.
 19 BY MR. PHILLIP:
 20 Q. That's my question.
 21 A. Whether they know that sponsored links are
 22 paid advertising? I'm not sure if they do or do
 23 not. I assume over time many of them have learned
 24 that fact, whether every single one of them knows
 25 that, I'm not sure.

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1 Q. Well, why do you say consumers are likely
 2 to know that ads and sponsored links that appear on
 3 the screen may represent products and brands that
 4 are different from those entered as a search word?
 5 A. I think I just answered that earlier. As
 6 I said, it's a fact of life that consumers have
 7 learned that when you're looking for a particular
 8 product, you have identified yourself as someone
 9 who is in the market for that type of product and
 10 sellers of that type of product will try to get
 11 your business.
 12 In other words, once you identify in one
 13 way or another by entering a trademark, by entering
 14 the product type, you would expect to see ads that
 15 are trying to get your business by various brands.
 16 Q. Okay. So I think I understand now. So
 17 what you're saying is that consumers have come to
 18 learn that when they put in a particular search
 19 term, whether it's a trademark or a generic product
 20 name, that -- that there will be links returned
 21 from a variety of sources trying to get their
 22 business?
 23 A. There may be, yes. Obviously we know
 24 there are some terms that you enter and you get no
 25 sponsored links at all.

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1 Q. Right. But you don't -- you can't point
 2 to any particular studies that -- that analyze this
 3 issue, in other words, no empirical data on this;
 4 is that right?
 5 A. I'm not aware. But as I said, I don't
 6 think -- it's an interesting question -- but at
 7 least it's not a publishable question for the
 8 simple reason that it's obvious based on the
 9 existing principals.
 10 Q. Okay. But in a trademark infringement
 11 case where, you know, where incidents of confusion
 12 can be as low as 10 percent and be actionable, the
 13 actual number of people who do believe certain
 14 things or don't believe certain things would be
 15 relevant, right?
 16 MR. PAGE: I'll object it calls for a
 17 legal conclusion.
 18 THE WITNESS: Now I think we're confusing
 19 two different things. When you say 10 percent
 20 could be actionable, you mean these are 10 percent
 21 of people who think that brand X originated from
 22 the source of brand B or has affiliation or
 23 received permission, those kinds of things?
 24 BY MR. PHILLIP:
 25 Q. Right.

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1 A. That's quite different than what we are
 2 talking about here.
 3 Q. Okay. How so?
 4 A. I think what we talked about here is the
 5 very generic questions capture inside 20(A) and
 6 20(B).
 7 Q. Well, I'm not so sure I agree with that,
 8 at least as to 20(B), unless I don't understand
 9 your point. But it seems to me that you're saying
 10 in 20(B) and in paragraph 27 that consumers
 11 understand that sponsored links represent something
 12 different from what they put in as a search term.
 13 MR. PAGE: Objection. There's no question
 14 pending.
 15 BY MR. PHILLIP:
 16 Q. Isn't that what your opinion is here?
 17 A. I wouldn't -- I wouldn't phrase it like
 18 that.
 19 Q. No?
 20 A. I would phrase it the way I did.
 21 Q. Well, okay. Go ahead. I'm not trying
 22 to -- I'm just trying to understand and I'm reading
 23 what's on the paper here and that's what it reads
 24 to me.
 25 You used the word different. You say,

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1 very well represent products and brands that are
 2 different from those entered as a search word.
 3 That's your words, right?
 4 A. Yes. In other words, all I'm saying and
 5 I've said it now a few times, is that consumers
 6 have learned that what their -- when they've
 7 identified themselves as looking for something, say
 8 blinds, then sellers of blinds will try to target
 9 them.
 10 Q. And do you believe that consumers
 11 understand that sponsored links represent that
 12 target effort?
 13 A. As I said, they may very well have
 14 recognized that it's not, just as many of their
 15 organic results do not represent any particular
 16 company.
 17 I mean, there are numerous, obviously,
 18 organic results --
 19 Q. Right.
 20 A. -- that have nothing to do -- maybe
 21 nothing to do is too strong, but are not sites that
 22 sell the term that was entered as the search term.
 23 So obviously many of the results that are
 24 on the web pages that are triggered, whatever is
 25 the right word for this, when you enter a search

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1 term, are not originating from the company that
 2 makes that trademark.
 3 Q. Okay. I was focusing on your use of the
 4 word target. You're saying people out there are
 5 targeting the consumer. And when you refer to
 6 being targeted, are you talking about the fact that
 7 they've -- they've paid for a sponsored listing?
 8 A. They might have or might not. I'm not
 9 sure that every consumer needs to know the
 10 financial arrangements between any sponsored link
 11 and Google or the company that bid for that
 12 sponsored link just as they probably do not know
 13 exactly the financial arrangements, if any, between
 14 organic results and Google.
 15 Q. In the last sentence in paragraph 27 you
 16 say, this common situation has nothing to do with
 17 deception or misleading consumers. What do you
 18 mean by that? Why did you find it relevant to talk
 19 about whether this common situation has anything to
 20 do with deception or misleading consumers?
 21 A. Well, my understanding is that the lawsuit
 22 in this case has something to do with alleged
 23 deception or misleading consumers.
 24 Q. Okay.
 25 A. So in that context, I was saying that the

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1 common situation whereby consumers who are looking
 2 for information on the Internet and see links,
 3 sponsored links and other results, that does not
 4 create, generally speaking, deception or anyone
 5 being misled.
 6 Q. How do you know that? How can you say
 7 that people -- that in this common situation people
 8 are never deceived or misled?
 9 MR. PAGE: Objection. That misstates his
 10 testimony.
 11 THE WITNESS: I never said never.
 12 BY MR. PHILLIP:
 13 Q. Okay.
 14 A. As I said, if you said -- if you're
 15 looking for Sony and someone puts an ad saying,
 16 buy -- we are Sony. Buy directly from Sony, but
 17 actually they have no relationship whatsoever with
 18 Sony, that could lead to deception.
 19 Or, you know, just to give you another
 20 example from this case. If I'm entering Wallpaper
 21 USA -- however it's called, USA Wallpaper and I see
 22 an ad for American Wallpaper, I may be deceived in
 23 that case.
 24 In other words, I entered in quotes on
 25 Google, USA Wallpaper, and I see the result

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1 American Wallpaper, and let's say someone told me,
 2 hey, you need to buy wallpaper from USA Wallpaper
 3 and I see an ad from American Wallpaper, and I'd
 4 say, well, probably that person got a little
 5 confused.
 6 And that happens to be the first, you
 7 know, the first listing just above the organic
 8 results, it's conceivable that I would be confused.
 9 You would say that American is sometimes used
 10 interchangeably.
 11 Q. Are you saying it's not conceivable that
 12 someone could be confused by putting in USA
 13 Wallpaper and getting a sponsored link that says
 14 just wallpaper and clicking on that believing that
 15 because they put in USA Wallpaper that they'll be
 16 able to buy it at just wallpaper?
 17 A. I say it's very unlikely.
 18 Q. You're just saying that's very unlikely?
 19 A. I say, given this realty, yes, I'm saying
 20 that's very unlikely and I have not seen any
 21 evidence to the contrary.
 22 Q. Okay. Nor have you seen any evidence
 23 supporting your conclusion that in that situation
 24 there wouldn't be confusion; is that right?
 25 A. As I said, based on the basic principles

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1 that I teach, I would conclude that the likelihood
 2 is low. Have I seen a survey looking at that
 3 specific question? The answer would be no.
 4 Q. Okay. Do you know -- do you have any
 5 information about how many use the Internet in the
 6 United States?
 7 A. I think it's changing all the time. It's
 8 probably by now approaching one hundred million. I
 9 don't know.
 10 Q. Do you know how long Google has been
 11 returning sponsored listings on it's search engine?
 12 A. I don't know the exact date to which they
 13 started.
 14 Q. Do you have an estimation as to the number
 15 of years?
 16 A. Several years. I don't know. I don't
 17 have the exact date.
 18 Q. Okay. Are you aware of any research that
 19 deals with people's understanding as to what a
 20 sponsored listing is?
 21 A. I don't think that I've seen -- I don't
 22 recall seeing a study on that.
 23 Q. You don't?
 24 A. I do not. I kind of vaguely recall maybe
 25 seeing it somewhere, but I could very well be wrong

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1 on that. I definitely do not have any specific
 2 recollection.
 3 Q. Do you think the phrase, sponsored
 4 listing, is clear?
 5 A. I would think so. Sponsored means that
 6 someone sponsored it; i.e., paid for it, which is
 7 what happens with advertising.
 8 Q. Okay. Do you think it's clear that the
 9 person who sponsored it; i.e., paid for it, is
 10 someone other than the name of the trademark that
 11 gets put in as the search term?
 12 A. I would think it's just as clear as any
 13 advertising is clear. You ask me, well, I see an
 14 ad for lighting fixtures. Do I know exactly who
 15 put this ad? I presume it's the store. Maybe it's
 16 the parent company. I don't know.
 17 I don't see any difference between this
 18 and any accepted form of advertising.
 19 Q. Okay. The next section in your report you
 20 criticize Mr. Ossip for not having used a control
 21 in his study; is that right?
 22 A. Yeah, you can put it that way.
 23 Q. Okay. And what generally is a control?
 24 A. A control is designed to estimate the
 25 level of noise or error and any systematic biases

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1 in the survey.
 2 Q. Uh-huh. Is it always necessary to use a
 3 control in a confusion study?
 4 A. Yes. Whenever you are looking at a cause
 5 and effect relationship, you must include a
 6 control.
 7 Q. Uh-huh. Is there ever -- are there ever
 8 situations when it's okay not to have a control?
 9 A. I'm not familiar with such situations.
 10 Q. Have you ever done a confusion survey
 11 without using a control?
 12 A. I don't think so. Certainly not on the
 13 behalf of a plaintiff --
 14 Q. Right.
 15 A. -- but a --
 16 Q. You might not need one on behalf of a
 17 defendant if there was no confusion, right?
 18 A. Exactly.
 19 Q. Okay.
 20 A. But I can't think of any situation where I
 21 did not use a control. It doesn't mean that every
 22 time you label something a control, but whenever
 23 you have a benchmark that's effectively a control.
 24 Q. Right. So you've suggested using the term
 25 blinds as a control for Mr. Ossip's study, right?

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1 A. That would be one obvious control.
 2 Q. And would -- would everything else remain
 3 the same if using that control? In other words,
 4 would it be, in your view, acceptable to -- to have
 5 a control cell with the same questions and stimuli
 6 and the only thing that's different is they're told
 7 that they put in blinds instead of american blinds?
 8 A. I think that would be a big step forward.
 9 The survey may suffer from other flaws.
 10 Q. Right.
 11 A. But because at least some of those flaws
 12 would also apply to the control, perhaps not to the
 13 same degree, but at least some of them may apply to
 14 the same degree. And therefore by including such a
 15 control, you'll be able to find out the level of
 16 noise.
 17 Q. By changing the search term from a
 18 trademark to a generic term, what are you
 19 controlling for?
 20 A. You put the term blinds, for example, you
 21 show the same results, the same sponsored links,
 22 and you ask people -- you point -- A, you ask, you
 23 know, if you wanted to go to find American
 24 Blinds -- let's assume that they research a brand.
 25 Let's say you want to look for American

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1 Blinds, where would you go first? And let's say
 2 that you find that 5 percent point to the sponsored
 3 link as opposed to 10 percent who did it when the
 4 search term was american blinds. So that would be
 5 10 minus 5 would give you a net of five and then
 6 you have to figure out whether five is significant
 7 or not, but that's a separate issue.
 8 Then, as Mr. Ossip did -- again, using his
 9 methodology, you are pointing to, say, just blinds
 10 and you say, would you find American Blinds on
 11 this -- in this website? You look at the
 12 percentage. You do the same thing. So you
 13 followed everything the same way.
 14 Now, obviously, consumers, until they
 15 click on the website, they don't know which brands
 16 are offered there, but because you asked them
 17 whether they'll find American Blinds, in all
 18 likelihood, some people say, maybe many, yes, I'll
 19 find American Blinds, why else would you ask me
 20 this question? That is noise.
 21 In other words, that has nothing to do
 22 with the search term because under your
 23 hypothetical, american blinds was not entered, only
 24 blinds was entered, which is by all views, a
 25 generic term.

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1 In other words, the mere fact that you
 2 pointed to this link and you said, is there
 3 American -- can you buy American Blinds there and
 4 someone said yes, well, it tells you there's
 5 nothing to do with the search term because american
 6 blinds search term was never entered.
 7 Q. Right.
 8 A. It's just because the question was asked
 9 and the survey procedure was followed.
 10 Q. But wouldn't there be a problem because if
 11 you put in just blinds then the person is looking
 12 for information about blinds, not necessarily one
 13 brand of blinds?
 14 If they were looking for American Blinds,
 15 wouldn't they put in american blinds?
 16 A. I'm not sure I understand your question.
 17 The survey is designed to find out how many
 18 consumers were misled.
 19 Q. I understand that. But your posing an
 20 approach where you say, okay, assume you put in
 21 blinds. Now, where would you go for American
 22 Blinds? Well, if I'm a respondent, I would think,
 23 well, that's odd, if I put in -- if I wanted to
 24 find American Blinds, I would put in american
 25 blinds. You don't agree with that?

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1 MR. PAGE: I'll object to the -- well.
 2 THE WITNESS: I don't know. That seems to
 3 me an irrelevant point. The question is, you point
 4 to just blinds.com and you say, can you buy
 5 American Blinds at this website? Now, some people
 6 might say, I don't know.
 7 But if your theory is correct, then
 8 significantly fewer people would say yes, right,
 9 because they didn't enter -- they were not asked to
 10 assume that they entered the term american blinds.
 11 BY MR. PHILLIP:
 12 Q. Uh-huh.
 13 A. So therefore that could be a proper
 14 control.
 15 Q. Would you be concerned about there would
 16 be some confusion -- strike that.
 17 Would you be concerned about the
 18 potential -- what's the word I'm looking for -- the
 19 potential effect on the respondent from telling the
 20 respondent that, you know, assume you put in blinds
 21 and then showing them search result where the
 22 organic search results are mostly talking about one
 23 brand of blinds, American Blinds?
 24 A. I would not.
 25 Q. In other words, that wouldn't be the

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1 search result that the consumer would expect to get
 2 if they just put in blinds?
 3 A. I don't know. I don't think that that
 4 would be a concern. I'm not sure how many
 5 consumers have some theories about the algorithm
 6 that generates organic results or in the context of
 7 the survey that would be a significant factor, that
 8 somehow they would analyze and say, well, here is
 9 American Blinds.
 10 Let's assume that they know to research a
 11 brand or think, is there American Blinds, which
 12 sounds like a perfectly legitimate organic result.
 13 I mean, there are blinds that are made and sold in
 14 America. So there is nothing unusual there.
 15 Q. Okay. So have you any other suggestions
 16 for what a proper control would be?
 17 A. You know, I haven't thought -- that seems
 18 so obvious. I haven't thought about others.
 19 Q. Okay.
 20 A. I mean, you could have asked about a
 21 different brand. That would be another control.
 22 Like, would you find -- I don't know, name another
 23 brand.
 24 Q. Uh-huh.
 25 A. That could be another control.

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1 Q. Okay.
 2 A. This was an especially easy survey for
 3 which to find a control.
 4 Q. Would changing the appearance of the way
 5 the listings come back be a proper control, in
 6 other words, moving the sponsored listings down to
 7 the bottom and putting a disclaimer saying that
 8 these listings aren't related to the search term?
 9 A. I don't know. Now you -- that's an
 10 open -- there are infinite possibilities about
 11 moving it two inches down or an inch and a half up.
 12 I don't see any need for that.
 13 I mean, the key here is whether the
 14 consumers are misled after entering the term
 15 american blinds by the sponsored links that appear.
 16 So I think that's really the question, not exactly
 17 the positioning.
 18 I understand the complaint is not saying,
 19 how come the sponsored links appear two inches to
 20 the right or whatever. My understanding, that's
 21 not the basis for the allegations here.
 22 Q. Well, I think you're mistaken on that.
 23 You're aware that the ordering of listings can have
 24 an impact on the click-through rate, right?
 25 A. Yes.

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1 Q. And that's why right now the sponsored
 2 listings are either at the top of the organic
 3 listings or directly to the right of the top of the
 4 organic listings, correct?
 5 A. Yes.
 6 Q. And so if you assume -- if you just accept
 7 my representation that the manner in which the
 8 listings are presented in response to a search term
 9 in the trademark is part of the problem, would it
 10 be an acceptable control to just move the sponsored
 11 listings down to the bottom and put a disclaimer
 12 up?
 13 A. No.
 14 Q. And why not?
 15 A. No. I mean, I don't think that's the
 16 question. The question is whether -- I forget how
 17 Mr. Ossip defined his mandate, but I believe he
 18 said, whether consumers who enter the search term
 19 american blinds in the Google search engine are
 20 misled by their results by the sponsored links
 21 appearing on the web results.
 22 That's the question. So the question is,
 23 in other words, you have to enter the terms
 24 american blinds and then you are misled by the
 25 links. It doesn't say are misled because the

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1 links -- the sponsored links appear one inch from
 2 the top as opposed to four and a half inches from
 3 the top. I just didn't see that in his objective
 4 for the survey. So therefore that would not be my
 5 control.
 6 Q. Okay. But if it was his control, why
 7 wouldn't that have been acceptable, what would your
 8 criticism be?
 9 A. Because it would have the same problems
 10 that we talked about.
 11 Q. I don't understand. What would the same
 12 problems be?
 13 A. Well, because it still would not show in
 14 any way that the beliefs or the answers had
 15 anything to do with entering the key words,
 16 american blinds.
 17 Q. Well, but you understand that the
 18 infringement is not the fact that people type in
 19 american blinds, or the alleged infringement is not
 20 the fact people type in american blinds, it's what
 21 comes back in response to that?
 22 A. Yeah, that's my understanding.
 23 Q. So if you were to compare what's currently
 24 coming back versus, you know, rearranging it in
 25 some way and you didn't have -- and you didn't have

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1 confusion in the rearranged way, which is your
 2 control cell, why wouldn't that be -- why wouldn't
 3 that be an acceptable control?
 4 A. I guess we might be miscommunicating. The
 5 question is whether people who are, by your
 6 assumption, looking for the brand called or the
 7 company called American Blinds --
 8 Q. Uh-huh.
 9 A. -- are misled by the resulting sponsored
 10 links, right?
 11 Q. Right.
 12 A. So it means these people are looking for
 13 American Blinds, but if they entered, say, blinds,
 14 there is no evidence -- it may be in their head
 15 they're looking for American Blinds, they've not
 16 shown it in their behavior yet.
 17 And therefore, that is the relevant
 18 control. The location has nothing to do with it.
 19 Q. Do you know why Dr. Jacobs didn't use car
 20 insurance as a control in his study?
 21 A. I don't remember his controls.
 22 Q. Okay. Then the next section of your
 23 report is -- it starts on page 14 and is related to
 24 this issue of whether American Blinds is a brand
 25 name and is likely to have secondary meaning,

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1 correct?
 2 A. Yes.
 3 Q. Okay. And what is the basis for your
 4 statement that American Blinds is not a brand name?
 5 A. I just, at least, haven't seen it used as
 6 such. You would think that, for example, if there
 7 is such a brand, it would be displayed among the
 8 listed brands on the American Blinds & Wallpaper
 9 Factory website. It's not.
 10 Q. Okay. So you looked at the website.
 11 Anything else?
 12 A. No, I just looked at various web sites
 13 that sell blinds. I looked at yellow pages. I
 14 just did not encounter that brand.
 15 Q. Okay. Isn't it possible that a company
 16 that's called American Blinds Wallpaper and More
 17 can be known as American Blinds?
 18 A. It's conceivable. I do know, though, how
 19 challenging it is even for companies that
 20 constantly push a particular name to build brand
 21 equity and to build recognition and secondary
 22 meaning that a company that doesn't bother to do it
 23 in a consistent fashion is extremely unlikely to
 24 develop such second meaning.
 25 Q. Do you know how long American Blinds has

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1 been selling blinds at AmericanBlinds.com?
 2 A. When you say AmericanBlinds.com as opposed
 3 to decoratetoday.com?
 4 Q. I'm talking about AmericanBlinds.com, yes.
 5 Do you know how long that they've been using that
 6 website -- that URL, excuse me?
 7 A. I don't remember the exact date. I
 8 probably have seen it someplace. I know that today
 9 if I click on AmericanBlinds.com link, I don't get
 10 that website.
 11 Q. Do you know how long they've distributed
 12 catalogs with the AmericanBlinds.com URL on the
 13 front page of the catalog?
 14 A. I don't know when they started.
 15 Q. Would you agree with me that if a company
 16 had used AmericanBlinds.com as its Internet address
 17 in all of its advertisements and catalogs and such,
 18 that that could give it brand name recognition?
 19 A. I don't know what to make of could. If
 20 that's what they've done, it's unlikely. It's
 21 unlikely for the reason that I indicated.
 22 Obviously there are millions and millions of web
 23 sites and we're bombarded every day by dot.coms all
 24 the time which we don't memorize.
 25 Moreover, this category in particular,

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1 it's not like you're buying blinds every day.
 2 You're probably doing it once every three years,
 3 five years. So you're not paying attention to
 4 blinds all the time. You're only doing it when
 5 you're about to buy the product.
 6 So it's unlikely the fact that they've
 7 been using it for years, it's extremely unlikely
 8 that it would affect any single consumer at the
 9 time when they are actually looking for blinds.
 10 Q. Okay. Did you consider doing a secondary
 11 meaning study?
 12 A. No.
 13 Q. You've done them in the past, though?
 14 A. I have.
 15 Q. And Mr. Ossip didn't do a secondary
 16 meaning study, did he?
 17 A. He did not.
 18 Q. But he did include awareness of American
 19 Blinds as a company or a brand in the screening
 20 questionnaire, didn't he?
 21 A. Without controls, he did.
 22 Q. And then in the -- in the test
 23 questionnaire he, again, repeated American Blinds
 24 as a company and a brand name, didn't he?
 25 A. Yeah, he referred to it -- I don't recall

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1 it exactly, but I think he said, oh, earlier you
 2 told me you're familiar with this. So now assume
 3 that you're looking for that. It's very ambiguous
 4 whether he was referring to a company or to a brand
 5 of blinds.
 6 Q. So getting back to something that we
 7 talked about earlier in this deposition, if at that
 8 point in the survey the consumer believes that
 9 there is a company called American Blinds or a
 10 brand called American Blinds, whether they're
 11 guessing or not, and they enter it in Google
 12 believing that it's a trademark, then if they are
 13 confused as to what the sponsored links represent,
 14 it shouldn't matter whether it's actually a
 15 trademark or not?
 16 A. We don't know if --
 17 MR. PAGE: Objection. There's no question
 18 pending.
 19 BY MR. PHILLIP:
 20 Q. Do you agree with that?
 21 A. No.
 22 Q. Why not?
 23 A. I disagree with it. We don't know if they
 24 believe that there is such a brand at that point
 25 and what it meant, whether it's a company, whether

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1 it's a brand, whether it's blinds made in America.
 2 We don't really know any of that.
 3 In fact, if you look at the open-ended
 4 answers, you would expect if they believe they
 5 research a brand, they would say -- they would make
 6 references to that brand. I didn't see many
 7 references to that or references to the search term
 8 that was entered. Oh, there were a few that did in
 9 the later questions.
 10 BY MR. PHILLIP:
 11 Q. But didn't you agree with me this morning
 12 that you could extrapolate from any one survey that
 13 shows either confusion or no confusion in this
 14 situation, using the Google search engine, that you
 15 could extrapolate from that that applies to any
 16 marks?
 17 MR. PAGE: Object. That misstates his
 18 testimony.
 19 BY MR. PHILLIP:
 20 Q. Wasn't that your testimony this morning,
 21 that logically, that that would follow, which is
 22 why you accepted Mr. Page's revision to your
 23 report?
 24 A. No, I don't think that's what I said.
 25 Q. No?

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1 A. No.
 2 Q. Okay. Well, how did I misstate you just
 3 then?
 4 A. Could you repeat the question again.
 5 Q. Didn't you agree with me this morning that
 6 you could extrapolate from one survey that shows
 7 either confusion or no confusion in this situation
 8 using the Google search engine, that you could
 9 extrapolate from that as it applies to any marks?
 10 A. I thought that what we talked about this
 11 morning focused on a very specific issue.
 12 In other words, if I recall correctly,
 13 what we talked about this morning had to do with
 14 the connection between the search term and products
 15 that are sold by advertisers on the results web
 16 page. I recall -- maybe I'm forgetting what we
 17 talked about. I think that's what I talked about.
 18 I believe that's what we discussed.
 19 Q. I'm referring to how you accepted
 20 Mr. Page's revision to your report from specific
 21 search term, search term at issue to any trademark
 22 put in as a keyword. That's what I'm referring to.
 23 A. And I believe I said -- again, we could --
 24 we have it on the record. I think I remember the
 25 context of what we talked about, and what I said is

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1 that based on the survey results, we can conclude
 2 more generally that the mere fact that a certain
 3 search term was entered does not lead consumers to
 4 believe that every ad that appears on the results
 5 page is by the company named in the search term.
 6 I believe that's what we talked about.
 7 Q. Okay. I had a different understanding,
 8 but that's okay. We'll just move on and let the
 9 record speak for itself on that.
 10 Okay. Then the next section you take
 11 Ossip to task for not approximating marketplace
 12 conditions, right?
 13 A. Yes.
 14 Q. Did you understand what Ossip was -- why
 15 Ossip used the stimuli that he used?
 16 A. I heard what he said --
 17 Q. What was that?
 18 A. -- during his deposition testimony and I
 19 guess also he mentioned it in his report.
 20 Q. And what was that?
 21 A. That he was interested in a world that
 22 would have existed had ABWF not needed to
 23 defensively place sponsored links that are
 24 triggered when the search terms are american
 25 blinds.

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1 Q. Okay. And his stimuli were consistent
 2 with that, correct?
 3 A. Well, they were -- his stimuli deviated
 4 from marketplace conditions in other ways. In
 5 other words, he manufactured a web page that would
 6 never exist even if we were to put aside the
 7 omission of ABWF links.
 8 Q. And how so?
 9 A. Well, for example, as I recall correctly,
 10 in phase one he had just one sponsored link.
 11 That's about half his survey respondents. They saw
 12 only one link. I've tried entering american blinds
 13 and blinds and so on, I've never encountered a case
 14 where there is just one sponsored link.
 15 Q. Okay. Have you ever -- have you been told
 16 by Google that that will never occur?
 17 A. I didn't talk to Google about that. It's
 18 just as a matter of fact does not appear to be the
 19 case.
 20 Q. Okay. But you don't know one way or the
 21 other whether that could, in fact, happen?
 22 A. I think that's obviously extremely
 23 unlikely because the term blinds is a fairly common
 24 term. There are many marketers competing for the
 25 business of people who are looking for information

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1 about blinds. So it's extremely unlikely there
 2 will be just one sponsored link. Is it impossible,
 3 I guess anything is possible.
 4 If blinds go out of fashion and there is a
 5 new technology, maybe.
 6 Q. So how many sponsored links do you believe
 7 would appear even assuming no defensive bidding by
 8 American Blinds?
 9 A. I don't remember exactly. Six -- I don't
 10 know, I'm just throwing a number. I don't remember
 11 exactly. There were several.
 12 Q. Okay. How else are you saying that it
 13 didn't approximate real life conditions even
 14 assuming no defensive bidding by American Blinds?
 15 A. Well, I think the fact there was just one
 16 link and then the four other links -- sponsored
 17 links that were in the so-called phase two, were
 18 also -- again, there is no such situation in the
 19 real world where you have these four.
 20 And again, there is no link that would
 21 take you to ABWF website.
 22 Q. In the sponsored links?
 23 A. Correct. In other words, what he did --
 24 he led you. After he asked you where would you go
 25 first, most of his so-called confusion was

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1 generated by those four sponsored links which
 2 people did not select originally.
 3 So he took them to say, in phase two, to
 4 four links and said, would you find here American
 5 Blinds, would you find here American Blinds,
 6 et cetera. And I was surprised that he didn't find
 7 higher numbers of people saying at least one of
 8 them would allow you to buy American Blinds.
 9 MR. PAGE: Rob, when you get to a good
 10 spot, I could use a break.
 11 MR. PHILLIP: Now is fine.
 12 (Recess taken.)
 13 BY MR. PHILLIP:
 14 Q. So Dr. Simonson, did you save any of your
 15 searches or screen shots when you were trying to
 16 figure out what a representative search result
 17 would look like?
 18 A. No.
 19 Q. Are you aware that you can -- currently,
 20 even with bidding, put in American Blinds in the
 21 search term and not have it come back as the first
 22 sponsored listing?
 23 A. I haven't --
 24 MR. PAGE: Let me object that it assumes
 25 facts.

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1 THE WITNESS: I haven't checked that.
 2 BY MR. PHILLIP:
 3 Q. Okay. Do you know whether if you put in
 4 american blinds currently that it can come back not
 5 in the sponsored listings at all?
 6 MR. PAGE: Same objection.
 7 THE WITNESS: I presume there is a bidding
 8 system, so if you don't bid high enough, I think
 9 order could come in different forms.
 10 BY MR. PHILLIP:
 11 Q. Okay. So there may be -- there may be
 12 situations where using a stimuli that doesn't have
 13 American Blinds in the sponsored listings actually
 14 does replicate market conditions, correct?
 15 A. You mean that it does not appear at all?
 16 Q. Yes.
 17 A. At least I haven't encountered such a
 18 case.
 19 Q. But it could occur?
 20 A. In theory, I presume it could occur. It
 21 clearly is not a typical marketplace condition, at
 22 least as far as I can tell.
 23 Q. Okay. Turn to the next section in your
 24 report that starts on paragraph 48 where you were
 25 critiquing the universe.

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1 So this is the women only issue, correct?

2 A. That's one of them.

3 Q. Okay. Well, first of all, have you ever

4 done a study where you only included women?

5 A. I can't remember one, but it's not

6 inconceivable. It's not inconceivable that I did

7 that, obviously after research showing that

8 100 percent of the relevant consumers are of one

9 gender.

10 Q. Would it have to be 100 percent to justify

11 doing it this way?

12 A. Fairly close, yes. For example, I just --

13 I can't name it. I just recently did a survey

14 involving a certain cosmetic product, and in that

15 case, you would think is overwhelmingly women;

16 turns out not exactly. So I had 80 percent of the

17 respondents women and 20 percent men.

18 Q. Uh-huh.

19 A. And obviously you need to base it on the

20 best evidence available.

21 Q. Right. And if the best evidence available

22 to Mr. Ossip was that the relevant consumer was

23 overwhelmingly women in the case, what harm did he

24 do to the survey by not including any men, assuming

25 that there are some men out there who have

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1 purchased blinds?

2 A. Well, it just misrepresented the relevant

3 universe which is an important principal of surveys

4 conducted in the context of litigation.

5 Q. But does it necessarily make the results

6 so unreliable as to be fatal?

7 A. No, I would not say that.

8 Q. Okay. And if you have a real low

9 percentage of men as customers, would you agree

10 that it can be very difficult and time consuming

11 and expensive to try and find and screen them for

12 the survey?

13 A. Not at all. If you tell me it's one in

14 500, yes. In this case, I'll probably be -- I

15 mean, I haven't looked at the data and it appears

16 that Mr. Ossip didn't either.

17 But I would be more inclined to divide the

18 respondent sample 50/50 between men and women as

19 opposed to doing 100 percent women and 0 percent

20 men because we're dealing with information research

21 on the Internet that we know and Mr. Ossip knew

22 from the documents given to him that men are more

23 likely to use search engines.

24 Q. How did Mr. Ossip know that?

25 A. That was just among one of the documents

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1 that were produced as having been available to him

2 and that was based on a study, I believe, conducted

3 by Pew Research or something like that.

4 Q. Okay. Was that a study that you had seen

5 before?

6 A. No. But I've seen it in the context of

7 this case.

8 Q. Right.

9 A. Furthermore, blinds, that strikes me as a

10 family decision. I would assume that men have a

11 significant role in installing them, so I just

12 don't see any reason why anything close to

13 100 percent women would be representative of the

14 relevant universe.

15 Q. Uh-huh. Okay. If you go to the next

16 section in your report about the survey questions

17 being biased and leading. What were biased about

18 the questions?

19 A. There were -- if you have the

20 questionnaire here, I can be very specific. But

21 they were biased in the sense that they suggested

22 that one or more of the sponsored links offered

23 American Blinds products.

24 Q. How are they any more bias than, you know,

25 the ever-ready questions?

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1 A. Well, ever-ready questions are open-ended.

2 In other words, you don't say, who puts

3 out the Sanyo camera? You don't ask that. And you

4 don't ask, does Sanyo camera put out Sony cameras,

5 which would be equivalent to what Mr. Ossip did.

6 You show them a product and you say, which

7 company puts it out? And then you ask, is it

8 affiliated with another company? And if they say

9 yes, say, which other company? These are

10 open-ended questions. Whereas Mr. Ossip pointed to

11 one link after asking, where would you go first?

12 Q. So that first question was okay, that

13 wasn't biased?

14 A. That question was not biased, putting

15 aside the presentation of, for example, one link,

16 one sponsored link and the fact that the question

17 is highly ambiguous, but it was not biased.

18 Q. Okay. And that's the question four, four

19 (A)?

20 A. Could be.

21 Q. Yeah. Okay. So you're saying that it was

22 the follow-up questions where he had the cursor

23 move to a specific link and they were asked what

24 they think they would get by clicking on that link?

25 A. No, they didn't ask that question. They

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1 asked, could you -- to paraphrase, could you buy
 2 American Blinds on that website?
 3 Q. Right.
 4 A. That's what I mean. That's a
 5 suggestive -- leading, biased -- whatever you want
 6 to call it, question. And then he repeated that,
 7 let's say in phase two, for four different links.
 8 Q. Okay. In his question five he said,
 9 without actually doing so, if you were to click on
 10 the particular listing I have moved the cursor on,
 11 do you think it would or would not take you
 12 directly -- or link you to a website where you
 13 could order American Blinds online or don't you
 14 know.
 15 So they had an option to say that it would
 16 or would not and they had an option to say they
 17 didn't know. Does that help to make it nonbias and
 18 nonleading?
 19 A. No, it's still bias and leading because
 20 you selected a particular thing. In other words,
 21 think on the psychology of the respondent here.
 22 You first asked where would you go first.
 23 All those 10 percent or so who gave the right
 24 answer, they selected the link as he designated
 25 representing confusion.

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1 Now, the remaining people are now asked,
 2 now, let me take you to this one, can you get
 3 American Blinds there or not? If you're a
 4 respondent saying to yourself, well, you know,
 5 obviously I got it wrong and now they're trying to
 6 help me out. Let's say you still say, well, I
 7 don't know.
 8 So then they give you another chance.
 9 They take you to the next one and say, well, how
 10 about this one? You've got here a tough respondent
 11 who is not giving up. And they're continuing,
 12 third time and fourth time, saying, now, is this
 13 it?
 14 At some point -- I guess in this case not
 15 most people, but some people are going to say,
 16 yeah, how many chances would I get here, they're
 17 trying to tell me something about the fact that I
 18 can't buy there.
 19 Q. Well, in looking at the verbatim
 20 responses, was there anybody who said no, no, no,
 21 all right, yes already?
 22 A. No, respondents tend not to say those
 23 kinds of things.
 24 Q. Did you see anyone who said no, no, no,
 25 and then yes at the fourth one?

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1 A. No. Even from the first one that they
 2 were asked was biased and leading because, as I
 3 said, the first question was, where would you go
 4 first? You said something like you pointed to some
 5 organic result.
 6 Okay. Now, you're thinking to yourself --
 7 okay, now they take you by the hand, effectively,
 8 and they say now, could you get it here? Wouldn't
 9 a reasonable respondent say, well, they're trying
 10 to tell me something here?
 11 Q. Okay. So how else were the questions
 12 biased or leading?
 13 A. I think that's the --
 14 Q. That's it?
 15 A. I think that's the main way. These are
 16 pretty much all of the questions that he had there.
 17 Q. Right. You stated that -- at the last
 18 section of your report about what can we learn, you
 19 end up concluding that a negligible percentage,
 20 less than 3 percent, made any reference to the
 21 search term when explaining why they said yes when
 22 asked whether they could order American Blinds from
 23 the links shown to them. Do you recall that?
 24 A. I do.
 25 Q. Okay. Do you have a tally of which

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1 responses constitute that 3 percent?
 2 A. You know, I just went through his report
 3 and he has certain pages where he listed all the
 4 open-ended answers that he counted as reflecting
 5 confusion and I just counted on those pages how
 6 many referred to the search term.
 7 Q. Okay. But you haven't -- I mean, you
 8 could have indicated by respondent number or
 9 response which ones you were including and which
 10 ones you weren't including, right?
 11 A. I could have, but numbers were so small
 12 that I saw no reason to do that. If it was
 13 borderline, maybe I would have thought to do it,
 14 but I thought the evidence and the conclusion was
 15 so clear that there was no sense of doing that.
 16 Q. Except there's no way for us to tell
 17 whether it's 3 percent or 6 percent or 9 percent
 18 based on what you've done here. That's not a
 19 question.
 20 MR. PAGE: What he said.
 21 MR. PHILLIP: I beat you finally.
 22 Q. Have you ever, in preparing a report,
 23 reviewed the verbatims and made your calculations
 24 of confusion answers based on your own personal
 25 review of the verbatims?

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1 A. As I said, I looked at the answers that he
 2 considered as reflecting confusion and just counted
 3 how many people.
 4 Q. Right. In your own experience, though, in
 5 doing other studies, have you created reports based
 6 on those studies where you tallied up what you
 7 considered the confusion responses to be by
 8 reviewing the verbatims?
 9 A. By reviewing the verbatims, I don't have a
 10 recollection of that. I did reanalyze the other
 11 side's survey results. I don't remember if that
 12 was necessarily based on verbatims.
 13 Q. I'm talking about in cases where you've
 14 done your own surveys and issued your own reports,
 15 have you --
 16 A. I'm sorry. So you're asking about my own
 17 reports?
 18 Q. Yes.
 19 A. Whether I classified it based on -- in a
 20 few cases?
 21 Q. And is that -- I mean, was there anything
 22 improper in doing it that way in the few cases that
 23 you did it that way?
 24 A. When I did it, it was proper.
 25 Q. Oh, okay. Have the rules changed?

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1 A. What do you mean?
 2 Q. I take from your answer that you're
 3 implying that somehow when Mr. Ossip did it, it was
 4 improper?
 5 A. I see. Are you asking whether I coded the
 6 responses myself?
 7 Q. Yes.
 8 A. I'm sorry. I completely misunderstood
 9 you. I thought that you were asking whether I
 10 looked at it. No, I don't do that.
 11 Q. Okay.
 12 A. I asked -- in fact, Larry Herman, who is
 13 now with Target Research Grouch, but I've worked
 14 with him over the years when he was in various
 15 companies.
 16 He works with another firm that does the
 17 coding of open-ended answers. They don't know
 18 anything about who sponsors the survey, what a
 19 survey is about. They just take the open-ended
 20 answers and code them.
 21 Q. Right.
 22 A. And I asked them to prepare a very
 23 detailed list of code so they don't need to use any
 24 judgment. Unless someone used virtually the same
 25 words, they would put it in separate categories.

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1 And then they prepare tables to see what
 2 percentages -- what are the frequencies of each
 3 specific word or phrase.
 4 And then we report it and then the results
 5 are tabulated and then I use it in my report. No,
 6 I do not in the context of litigation or in other
 7 context. In fact, if I were to submit an article
 8 to a journal, a referee journal with me, the
 9 researcher, who knows the hypothesis doing the
 10 coding, the reviewers would reject that paper.
 11 Because whether I intend to be so or not,
 12 you cannot be objective about your own hypothesis.
 13 Now, there are some cases where it's just a matter
 14 of counting words. Like, how many words the
 15 respondents used. Something like that, that's
 16 different, that's something you could do. Whenever
 17 there is any subjective judgment involved, you need
 18 to use so-called blind judges.
 19 Q. What's the lowest percentage of confusion
 20 results that you have reported as indicating a
 21 likelihood of confusion in a case?
 22 A. I don't remember.
 23 Q. You don't?
 24 MR. PAGE: Let me also object as calling
 25 for a legal conclusion.

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1 BY MR. PHILLIP:
 2 Q. Well, don't you typically, in your
 3 reports, say, this study shows that there's a
 4 likelihood of confusion?
 5 A. I would say, I mean, if it's borderline, I
 6 would say it appears to be above noise level. I'm
 7 on record of saying -- and this is really a legal
 8 question.
 9 Q. Yes.
 10 A. So what I have said many times, is when
 11 it's 15 percent or over, courts have typically
 12 regarded that as significant.
 13 Q. Uh-huh.
 14 A. If it's between, you know, 10 or so, you
 15 know, I think there were a couple of cases where
 16 even less than 10 was regarded as sufficient, up to
 17 15, you know, it depends, I think, on the survey.
 18 If you have a strong survey that does not
 19 have major flaws, has proper control, et cetera,
 20 then it could be significant. If it's, say, below
 21 5 percent -- and again, this is a legal issue -- if
 22 it's below 5 percent, I'm not aware of any case
 23 where that was regarded as significant.
 24 Q. Okay. What's the lowest where you have
 25 said this is in the ballpark, 10?

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1 A. You know, I can think -- there is a case
 2 that's going on now where there are two parts of
 3 the survey where one part -- with different
 4 stimuli, one part showed, I think, something like
 5 close to 9 percent and the other one showed close
 6 to 17 percent or 16 percent.
 7 So if you combined the two, you get to
 8 about whatever it is, 12, 13, and I regarded that
 9 as significant, especially considering that I think
 10 that I've used a very conservative methodology.
 11 Q. Okay. So that's the lowest you can
 12 remember, 12 to 13?
 13 A. I cannot remember -- I cannot remember
 14 another case that was lower, but as I said, I'm
 15 aware there were cases where 8 percent was regarded
 16 as significant.
 17 Q. Do you have any opinion about whether a
 18 Google user is more or less likely to be misled or
 19 confused if the trademark is used in the ad text of
 20 a sponsored link versus only as a keyword?
 21 A. Versus only?
 22 Q. As a keyword?
 23 A. Could you repeat that question?
 24 Q. Sure. Do you have an opinion about
 25 whether a Google user is more or less likely to be

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1 misled or confused if the trademark is used -- if
 2 it appears in the ad text of a sponsored link as
 3 opposed to only as the keyword?
 4 A. I have no evidence of confusion, period.
 5 So I really can't answer that.
 6 Q. Okay. Do you have -- do you agree that
 7 Google knows that users tend to click on the first
 8 four or five or six or seven links displayed in
 9 response to an inquiry?
 10 MR. PAGE: I'll object that it calls for
 11 speculation.
 12 THE WITNESS: I have no idea.
 13 BY MR. PHILLIP:
 14 Q. Okay. Are you aware of a patent
 15 application that Google has filed for a method of
 16 reducing confusion from the manner in which search
 17 results are returned?
 18 A. Nope.
 19 MR. PAGE: Object as it assumes facts.
 20 BY MR. PHILLIP:
 21 Q. Do you know how much time and money
 22 American Blinds has spent developing its brand?
 23 A. Which brand?
 24 Q. American Blinds?
 25 A. Nope.

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1 Q. Any other brand?
 2 A. No. I mean, as I said, I read those
 3 deposition transcripts, but I don't know.
 4 Q. Okay. Is it your opinion that Google
 5 users want to see ads in response to their
 6 inquiries?
 7 A. I haven't tested it. If you ask me
 8 generically speaking, I think there are many
 9 situations where consumers who are in the market
 10 for a product are looking for more sources of
 11 information and the Internet offers those sources
 12 of information.
 13 For example, in the area of blinds, you
 14 click on some of those web sites, they offer you a
 15 wide range of brands and product types and price
 16 ranges. As a consumer, I think that it could be
 17 quite useful.
 18 Q. Do you have any empirical support for that
 19 statement?
 20 A. What statement?
 21 Q. What you just said.
 22 A. That consumers prefer more information to
 23 less, yes.
 24 Q. But I'm talking about consumers using
 25 Google?

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1 A. Again, coming back to what we discussed
 2 earlier --
 3 Q. Right.
 4 A. -- information search is one of the most
 5 basic components of consumer education and purchase
 6 process and consumers want more information about
 7 more options.
 8 In fact, sometimes they get more
 9 information than they need or can handle, but
 10 they -- other things equalled, they like more
 11 information, more options, cheaper prices,
 12 et cetera, and they use the Internet to obtain such
 13 information.
 14 Probably if you think about what's the
 15 most important contribution of the Internet, it's
 16 probably exactly that.
 17 Q. Are you aware of any empirical support for
 18 the proposition that ads enhance the Google user
 19 experience as Google claims in this case?
 20 A. I didn't get it.
 21 Q. Are you aware of any empirical support for
 22 the proposition that advertisements enhance the
 23 Google user experience as Google claims in the
 24 case?
 25 A. As I said, in general, I thought we just

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1 discussed it. In general ads that provide more
 2 information about more options about better prices
 3 and so on are certainly benefitting consumers.
 4 Q. Okay. I understand that's your opinion,
 5 but I'm getting at whether this issue of whether
 6 there's empirical support for that?
 7 A. Yes. If you open any basic consumer
 8 behavior or marketing management textbook, you'll
 9 find a fairly lengthy section talking about
 10 consumer's need for information before they make
 11 purchase and the Internet provides that
 12 information.
 13 There have been numerous, numerous studies
 14 that have documented consumer's search for
 15 information. And also search for information on
 16 the Internet.
 17 Q. And as to the latter category, can you
 18 identify any of those studies?
 19 A. I don't remember specifics off the top of
 20 my head, but there have been many studies regarding
 21 the effect of the manner in which people search for
 22 information on the Internet.
 23 Q. How come you didn't site to any of those
 24 in your report?
 25 A. I didn't see the need to do that.

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1 Q. Other than the Pew report that you saw
 2 from Mr. Ossip's files, are you aware of any other
 3 reports that provide empirical support for the
 4 notion that if men had been used in Mr. Ossip's
 5 study that this would have effected or reduced the
 6 confusion rate?
 7 A. No. As I said, we don't know what the
 8 results would have been, but we do know that there
 9 is the basic principal of surveys conducted in the
 10 context of litigation that the sample universe
 11 should be representative of the relevant
 12 population.
 13 The results could be different, but we
 14 will not know.
 15 Q. Okay. I asked you earlier this morning
 16 about whether you had any financial interest in
 17 Google directly, but I didn't ask you if you're
 18 aware of any indirect financial interest such as
 19 through Stanford's investments, pension plans,
 20 401Ks, anything of that sort?
 21 A. Not that I'm aware. I know that Stanford
 22 benefitted, I think, handsomely from owning Google
 23 stocks, I think because the founders of Google did
 24 some of the work while they were Stanford students.
 25 So I think that Stanford made some money

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1 on those stocks. I'm not aware that the business
 2 school has any connection with Google and
 3 unfortunately I wasn't wise enough to invest in
 4 that stock when it was possible.
 5 MR. PHILLIP: Okay. Let's just take a
 6 short break. I think I'm almost done.
 7 (Recess taken.)
 8 BY MR. PHILLIP:
 9 Q. Just a couple of things here. You
 10 mentioned your article, that you -- one of the
 11 articles that you published in the Trademark
 12 Reporter titled, "The Effect of Survey Method on
 13 Likelihood of Confusion Estimates."
 14 A. Right.
 15 Q. And one of the things you stated in the
 16 article is that, quote:
 17 "It is important to remember that
 18 measuring confusion is a very
 19 difficult task and any specific
 20 estimation procedure is likely to
 21 have some flaws and is at best an
 22 approximation."
 23 A. Right.
 24 Q. That's your position?
 25 A. It is.

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1 Q. Okay. The other thing is, in paragraph 13
 2 of your report you -- on this issue of
 3 approximating marketplace conditions you said that
 4 Mr. Ossip chose to omit all sponsored links related
 5 to ABWF even though such links always appear on the
 6 resulting web page when the search term american
 7 blinds is entered in the Google search engine.
 8 Do you see that?
 9 A. Yes.
 10 Q. I'm going to admit some examples for you
 11 to see showing that's not true. Let's go ahead and
 12 mark this next in order.
 13 (Exhibit 4 was marked for
 14 identification.)
 15 MR. PHILLIP: Let's mark this Exhibit 5.
 16 (Exhibit 5 was marked for
 17 identification.)
 18 MR. PHILLIP: And Exhibit 6.
 19 (Exhibit 6 was marked for
 20 identification.)
 21 MR. PAGE: Rob, are you making the
 22 representation that in each of these three exhibits
 23 your clients don't have any sponsored links? That
 24 seems to be what was implied by your question.
 25 MR. PHILLIP: I'm asking the witness to

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1 confirm that American Blinds does not appear as --
 2 ABWF does not appear as a sponsored link.
 3 MR. PAGE: Then I'll object that it
 4 misstates the document. You've got ads on two of
 5 these three.
 6 MR. PHILLIP: As sponsored links?
 7 MR. PAGE: Yeah.
 8 MR. PHILLIP: Which ones are you pointing
 9 to?
 10 MR. PAGE: On Exhibit 5, all blinds up to
 11 85 percent off, americanblindfactory.com.
 12 On Exhibit 6, all blinds up to 85 percent
 13 off, americanblindfactory.com.
 14 I realize you're confused by the many
 15 brand names your client has. Sorry, I couldn't
 16 resist that.
 17 MR. PHILLIP: Your comments are noted,
 18 Michael.
 19 Q. But on Exhibit 4, Exhibit 4 is a search
 20 for american blinds and there is no -- there is no
 21 American Blinds link in the sponsored links,
 22 correct?
 23 A. It appears in that one case from 2004 it
 24 does not appear. Obviously it's listed first on
 25 the organic results.

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1 Q. Right. And in Exhibits 5 and 6, it
 2 appears -- americanblindfactory appears in the
 3 sponsored links on the right-hand side, but not at
 4 the top, not the top two positions, correct?
 5 A. You mean -- not in the sponsored links
 6 above the organic results, is that your question?
 7 Q. That's right.
 8 A. That's correct.
 9 MR. PHILLIP: Okay. Thank you,
 10 Dr. Simonson. I don't have any further questions.
 11 THE WITNESS: Thank you.
 12 (The deposition proceedings were
 13 concluded at 3:23 p.m.)
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 6 CERTIFICATE OF WITNESS
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 9
 10 I have read the foregoing deposition
 11 transcript and by signing hereafter, approve same.
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 13 Dated _____.
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 17 _____
 18 (Signature of Deponent)
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1 DEPOSITION OFFICER'S CERTIFICATE
 2 STATE OF CALIFORNIA }
 3 } ss.
 4 COUNTY OF SACRAMENTO }
 5
 6 I, James Beasley, hereby certify:
 7 I am a duly qualified Certified Shorthand
 8 Reporter in the State of California, holder of
 9 Certificate Number CSR 12807 issued by the Court
 10 Reporters Board of California and which is in full
 11 force and effect. (Fed. R. Civ. P. 28(a)).
 12 I am authorized to administer oaths or
 13 affirmations pursuant to California Code of Civil
 14 Procedure, Section 2093(b) and prior to being
 15 examined, the witness was first duly sworn by me.
 16 (Fed. R. Civ. P. 28(a), 30(f)(1)).
 17 I am not a relative or employee or
 18 attorney or counsel of any of the parties, nor am I
 19 a relative or employee of such attorney or counsel,
 20 nor am I financially interested in this action.
 21 (Fed. R. Civ. P. 28).
 22 I am the deposition officer that
 23 stenographically recorded the testimony in the
 24 foregoing deposition and the foregoing transcript
 25 is a true record
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1 of the testimony given by the witness. (Fed. R.
2 Civ. P. 30 (f)(1)).

3 Before completion of the deposition,
4 review of the transcript [] was [] was not
5 requested. If requested, any changes made by the
6 deponent (and provided to the reporter) during the
7 period allowed, are appended hereto. (Fed. R. Civ.
8 P. 30(e)).

9
10 Dated: _____, 2006

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12 _____
13 JAMES BEASLEY, CSR No. 12807
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