

1 about to identify those sponsored links that  
2 might be initially interest confusing from those  
3 that are not confusing; have you?

4 A. No, we have not.

5 Q. We know from this morning's  
6 questions and your answers that, for example,  
7 the Neiman Marcus search results page; do you  
8 recall that?

9 A. Yes.

10 Q. That two of the sponsored links,  
11 that were displayed in response to that search,  
12 the one was by Bloomingdales, a competitor;  
13 correct?

14 A. Yes.

15 Q. And it indicated in the sponsored  
16 link that it was Bloomingdales; right?

17 A. Yes.

18 Q. And it was your view that that  
19 sponsored link was not susceptible to initial  
20 interest confusion; true?

21 The very first sponsored link that  
22 came up on the right-hand side of the Neiman  
23 Marcus search was for Bloomingdales; correct?

24 A. I believe so, yes.

25 Q. It indicated that in some portion

1 majority of people -- there may be some people  
2 who are confused and think iPad is a Dell  
3 product, but I think most people would say I  
4 know iPad is an Apple product and Apple is a  
5 competitor, a direct competitor.

6 Q. So I guess then the likelihood of  
7 initial interest confusion, in part, depends  
8 upon what the product is that's being sold.  
9 Would you agree with that?

10 A. No. I think it has -- it's not so  
11 much the product being sold as the strength of  
12 the brands or the marks that are in the searched  
13 for brand and the searched for trademark and the  
14 sponsored link brand or mark.

15 Q. Okay. You would agree that the  
16 likelihood of initial interest confusion would  
17 vary, depending upon the mark or the strength of  
18 the mark?

19 MR. FENSTER: Object to form.

20 THE WITNESS: I think that that  
21 certainly would be a factor.

22 BY MR. MORAN:

23 Q. Indeed, in your report you mention  
24 that's a factor when you compare the well-known  
25 brand name of Southwest Airlines and the lesser

1 well-known brand of Trek; true?

2 A. Yes.

3 Q. And so the initial interest  
4 confusion or the likelihood of initial interest  
5 confusion would, in fact, vary, depending upon  
6 the strength of the brand, as you say in your  
7 own report; true?

8 A. Yes.

9 Q. Would that also -- but sometimes  
10 there's -- you can have a brand that is not  
11 synonymous with the goods or services sold by  
12 either that brand or the company that owns that  
13 brand; true?

14 MR. FENSTER: Object to form.

15 THE WITNESS: Yes.

16 BY MR. MORAN:

17 Q. All right. And would you agree  
18 that the possibility of initial interest  
19 confusion could also vary, depending upon the  
20 products or services sold, independent of  
21 whether or not they're a registered trademark  
22 for that good or service?

23 A. I think there's a much -- my  
24 results show that a much higher likelihood of  
25 initial interest confusion when it isn't -- when

1 Q. All right. That's common. It's  
2 in your report, the difference between Trek and  
3 Southwest Airlines; right?

4 MR. FENSTER: Object to form.

5 THE WITNESS: Yes.

6 BY MR. MORAN:

7 Q. All right. And then would you  
8 also agree the initial interest confusion could  
9 also be affected by the language that may be  
10 contained in the sponsored link?

11 MR. FENSTER: Object to form.

12 THE WITNESS: I think less so. I  
13 hadn't really thought about that.

14 BY MR. MORAN:

15 Q. Did you test for that?

16 A. No, I did not.

17 Q. Suppose a search term is iPad and  
18 then the sponsored link that comes up is for PC  
19 Magazine. Would your results here suggest that  
20 there is initial interest confusion as to that  
21 ad?

22 A. Yes. I would think there would be  
23 because, again, while you can't buy -- I don't  
24 believe you can buy an iPad through PC Magazine,  
25 but the second part of the component, is there

1 interest confusion to the extent they have an  
2 expectation of being able to buy a Delta ticket  
3 on United.

4 Q. Do you think consumers have that  
5 expectation?

6 MR. FENSTER: Objection to form.

7 THE WITNESS: There may be some.  
8 I think most consumers probably do not. I guess  
9 those two are now --

10 BY MR. MORAN:

11 Q. Would you agree that you have to  
12 look at each sponsored link, each ad at a time,  
13 to assess initial interest confusion?

14 A. I think generically someone would  
15 have to look at it. Again, taking the first  
16 component, to the extent that is the consumer  
17 able to buy the product or service from the  
18 searched for firm on the sponsored link. If the  
19 answer is no, by looking at them individually or  
20 collectively or however, if the answer is no,  
21 then you've got, you've got --

22 Q. Initial interest confusion, in  
23 your mind?

24 A. That's correct.

25 MR. FENSTER: Can you let the