

1 Q. Why was Neiman Marcus not one of  
2 the marks that you surveyed in this case?

3 A. Well, looking at this exhibit,  
4 both the other two search engines -- the  
5 sponsored links are well-known brands, so one  
6 wouldn't expect to find Neiman Marcus, buy  
7 Neiman Marcus clothes at a Bergdorf or  
8 Bloomingdales stores. Clearly they were  
9 competitive. Searchers were not likely to  
10 think, yes, I can buy clothes from Neiman Marcus  
11 at Bloomingdales.

12 Q. Why was that important to your  
13 work in this case?

14 A. Again, I was trying to find out  
15 for sponsored links the likelihood if they are  
16 to buy directly from those. It seems to me if  
17 you get one that is a direct competitor that the  
18 answer is going to be no, I know both brands.  
19 The equivalent example would be can I buy  
20 Dunkin' Donuts at McDonald's or Krispy Kreme  
21 donuts. Clearly not.

22 Q. You wouldn't expect any consumer  
23 confusion with respect to those two you just  
24 mentioned?

25 A. That is correct, I would not.

1 Q. You would not expect any initial  
2 confusion between Neiman Marcus or Bloomingdales  
3 or Bergdorf Goodman; correct?

4 MR. FENSTER: Object to form.

5 THE WITNESS: I wouldn't think so,  
6 they are both well-known brands or marks.

7 BY MR. MORAN:

8 Q. So at this point in time have you  
9 decided on the marks you were going to survey as  
10 of April 8th or are you still looking for marks  
11 to survey?

12 A. We were still looking at that  
13 time. I hadn't decided, we hadn't decided as to  
14 what marks would be appropriate.

15 Q. Okay. What was going to be the  
16 determining factor as to what would be the  
17 appropriate mark or marks to survey?

18 A. Marks where there was -- they  
19 weren't clearly identifiable as competitors,  
20 where it wasn't clear, for example, that the --  
21 the companies are in direct competition, trying  
22 to find sponsored links that were of not direct  
23 competitors.

24 Q. Why?

25 A. Because the whole issue is whether



1           Q.     So did you go to the various  
2 sponsored links and then click through that  
3 sponsored link and ascertain or determined  
4 whether or not they could purchase tickets or  
5 not purchase tickets on Southwest Airlines? Is  
6 that how you chose the sponsored links?

7                     MR. FENSTER:   Excuse me.   Object  
8 to form.

9                     THE WITNESS:   That's how Southwest  
10 Airlines was selected, because it was my  
11 understanding and confirmed by Mr. Meyer that  
12 you can't buy Southwest Airlines tickets on  
13 anything other than Southwest Airlines.

14                    And the second one that was  
15 suggested either by Mr. Meyer or me was the Trek  
16 website and looking at the Trek website I didn't  
17 see evidence that they sold -- at the sponsored  
18 link I didn't see where they sold or any  
19 evidence that they sold Trek bicycles.

20 BY MR. MORAN:

21           Q.     As a result of that investigation,  
22 that determination by you, you decided in this  
23 case to survey as to that particular sponsored  
24 link?

25           A.     That seemed to be an appropriate

1 because -- you see below it it's not space, it's  
2 specs to be determined, okay, not space. So  
3 it's specifications to be determined and those  
4 were, again, with the first one, identified  
5 regular airline travelers. If you look at the  
6 screener questions, do you use an airline, would  
7 you use an airline search engine to buy airline  
8 tickets.

9                   And I estimated that you see a  
10 10 percent and then the second one, the same  
11 criteria, but here I thought it was actually  
12 going to be more difficult because we had to  
13 identify people who rode bicycles. We have to  
14 go back and look at the screener questions.

15               Q.    Why was it important to you to  
16 attempt to target regular airline travelers?

17               A.    Well, because, the Southwest,  
18 sample has to be people from the universe of  
19 airline travelers. If they don't go back and  
20 look at the surveys -- if they don't travel on  
21 airline then they're not likely to search for  
22 airline tickets using a Google search or  
23 Southwest Airlines.

24                   Similarly, if they are not bicycle  
25 riders oriented in possibly buying a bicycle



1 they wouldn't know of or consider a Trek  
2 bicycle, searching for Trek bicycles. So it's  
3 getting people in the universe of the -- so I  
4 was able to draw the appropriate sample from the  
5 appropriate universe.

6 Q. All right. And we'll talk about  
7 the universe a little bit later, but do you know  
8 how many invitations were extended for potential  
9 respondents on the Trek survey?

10 A. I don't know. I mean, in my  
11 report there's a footnote as to the number of  
12 people who responded to the Southwest and the  
13 Trek survey. And the significantly  
14 higher percent -- the issue is screen outs  
15 versus completes and a significant number of  
16 people who responded to the Trek survey screened  
17 out because they didn't meet the screening  
18 criteria, so the number was higher. Again,  
19 using the 10 percent initial estimate, that's  
20 what I would base it on.

21 Q. Okay. So it would be your  
22 testimony that at least or approximately 2,000  
23 invitations would have been extended for the  
24 Southwest survey and 2,000 for the Trek survey,  
25 perhaps more for the Trek?