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Vol. IX, Tab 46 - Ex. 70 - Deposition of Kent Van Liere (NERA Expert - Statistical Analysis)

Kent Van Liere
NERA

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

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ROSETTA STONE LTD.,
Plaintiff,
vs.
GOOGLE, INC.,
Defendant.

Civil Action No.
1:09cv736

VIDEOTAPED DEPOSITION OF KENT. D. VAN LIERE, Ph.D.
Wednesday, January 13, 2010

Job No. 233898

PAGES 1 - 146

Veritext Corporate Services

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<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p>Videotaped deposition of KENT. D. VAN LIERE, Ph.D., taken at 555 Twin Dolphin Drive, Redwood Shores, California, commencing at 9:06 a.m., Wednesday, January 13, 2010, before Cynthia Manning, CSR No. 7645.</p>	<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p>REDWOOD SHORES, CALIFORNIA; WEDNESDAY, JANUARY 13, 2010; 9:06 A.M.</p> <p>THE VIDEOGRAPHER: Good morning. My name is Alex Dias of Veritext. 09:06:30 The date today is January 13th, 2010, and the time is 9.06 a.m. This deposition is being held in the office of Quinn Emanuel, located at 555 Twin Dolphin Drive, Redwood Shores, California. 09:06:45 The caption of this case is Rosetta Stone versus Google, in the United States District Court for the Eastern District of Virginia, Alexandria Division. The name of the witness is Mr. Kent Van 09:07:03 Liere. At this time counsel will identify themselves and the parties they represent, after which our court reporter, Cynthia Manning of Veritext, will swear the witness and we can proceed. 09:07:17 MS. CARUSO: Margret Caruso of Quinn Emanuel, representing Google, Inc., defendant MS. GALVIN: Cheryl Galvin, Quinn Emanuel, representing Google, Inc. MR. ROSS: Terence Ross, Crowell & Moring, 09:07:28</p>
3	5
<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p>APPEARANCE OF COUNSEL: FOR PLAINTIFF: CROWELL & MORING BY: TERENCE P. ROSS, ESQ. 1001 Pennsylvania Avenue, N.W. Washington, D.C. 20004-2595 202.624.2645 tross@crowell.com FOR DEFENDANT: QUINN EMANUEL URQUHART OLIVER & HEDGES LLP BY: MARGRET CARUSO, ESQ. CHERYL GALVIN, ESQ. 555 Twin Dolphin Drive, Suite 560 Redwood Shores, California 94065 650.801.5000 margretcaruso@quinnemanuel.com cherylgalvin@quinnemanuel.com ALSO PRESENT: Alex Dias, Videographer</p>	<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p>representing plaintiff, Rosetta Stone, Ltd. 09:07:30 KENT D. VAN LIERE, Ph.D., having first been duly sworn, testified as follows: 09:07:39 EXAMINATION BY MS. CARUSO: Q. Good morning, Mr. Van Liere. A. Van Liere. 09:07:48 Q. Van Liere. How are you this morning? A. Fine. Q. Good. You understand that you are under oath, 09:07:51 same as if you were in a courtroom? A. I do. Q. So that we have a clean transcript, I ask that you wait until I finish asking my questions before you start answering. 09:08:01 Do you understand that? A. I do. Q. And you agree to do that? A. I do. Q. Good. 09:08:06</p>

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6	<p>1 I understand you've been deposed before -- 09:08:07</p> <p>2 A. Yes.</p> <p>3 Q. -- is that correct?</p> <p>4 So you're familiar with the types of</p> <p>5 questions lawyers usually ask at the beginning of a 09:08:13</p> <p>6 deposition about whether you're taking any</p> <p>7 medication right now?</p> <p>8 I don't know if you're usually asked that</p> <p>9 question, but have you taken any medication within</p> <p>10 the last 24 hours? 09:08:27</p> <p>11 A. No.</p> <p>12 Q. Okay. Have you ever been arrested?</p> <p>13 A. No.</p> <p>14 Q. Let's talk about other things then.</p> <p>15 When were you first contacted in connection 09:08:37</p> <p>16 with this case?</p> <p>17 A. I don't recall the exact date, but it was</p> <p>18 sometime in probably January, February of 2009.</p> <p>19 Q. Who did you speak with at that time?</p> <p>20 A. I believe I was initially contacted by 09:08:54</p> <p>21 Terry Ross.</p> <p>22 Q. What did you discuss with him?</p> <p>23 A. I believe he just simply indicated that</p> <p>24 they had a case involving Rosetta Stone in which</p> <p>25 they may need a likelihood-of-confusion survey and 09:09:10</p>	8
7	<p>1 asked if I was available to do it. 09:09:14</p> <p>2 Q. And what did you say?</p> <p>3 A. Yes.</p> <p>4 Q. Have you worked with Mr. Ross before?</p> <p>5 A. Yes. 09:09:22</p> <p>6 Q. In what matters?</p> <p>7 A. I'll understand that the matters that are</p> <p>8 confidential, that I won't discuss because they are</p> <p>9 confidential. But as far as cases where I have been</p> <p>10 disclosed and been used by Mr. Ross, it would be the 09:09:42</p> <p>11 American Airlines versus Google case.</p> <p>12 Q. Without identifying the parties for the</p> <p>13 confidential matters, how many times have you worked</p> <p>14 with Mr. Ross in a consulting capacity?</p> <p>15 A. With Mr. Ross specifically, I don't know 09:10:06</p> <p>16 that there are any others.</p> <p>17 Q. What about with any other attorneys at</p> <p>18 Gibson, Dunn & Crutcher?</p> <p>19 A. There may have been maybe another two or</p> <p>20 three matters in which I was involved. 09:10:15</p> <p>21 Q. Have you worked with any lawyers at</p> <p>22 Mr. Ross's current firm, Crowell & Moring, before?</p> <p>23 A. Not that I'm aware of.</p> <p>24 Q. Do you have a written retainer agreement</p> <p>25 concerning your services in this case? 09:10:34</p>	9
8	<p>1 A. I don't specifically recall if we do. If 09:10:40</p> <p>2 we do, it would be our standard engagement letter,</p> <p>3 but I don't recall if I have that or not.</p> <p>4 Q. You prepared a report in connection with</p> <p>5 your work as an expert in this matter? 09:10:52</p> <p>6 A. I did.</p> <p>7 MS. CARUSO: I'd like to mark as Exhibit 1</p> <p>8 a document entitled "Expert Report of Kent Van</p> <p>9 Liere."</p> <p>10 (Deposition Exhibit No. 1 was marked for 09:11:06</p> <p>11 identification)</p> <p>12 BY MS. CARUSO:</p> <p>13 Q. Mr. Van Liere, do you recognize what's been</p> <p>14 marked as Exhibit 1?</p> <p>15 A. Yes. This looks like the report that I 09:11:46</p> <p>16 have turned in in this case.</p> <p>17 Q. All right. Did you review any materials in</p> <p>18 connection with preparing your report?</p> <p>19 A. Yes.</p> <p>20 Q. What were those? 09:11:59</p> <p>21 A. I've -- I think I have identified the main</p> <p>22 ones in this report, but, basically, it was the</p> <p>23 complaint and certain general treatises about these</p> <p>24 kinds of studies. I think those were the main</p> <p>25 things. 09:12:14</p>	9
9	<p>1 I'd have to look at the appendix to confirm 09:12:14</p> <p>2 whether there was any other specific documents.</p> <p>3 Q. Sure.</p> <p>4 If you turn to Exhibit B of this Exhibit 1,</p> <p>5 does that listing of three items reflect all the 09:12:24</p> <p>6 documents that you relied upon in preparing this</p> <p>7 report?</p> <p>8 A. That's all that I specifically recall.</p> <p>9 Q. The complaint, the Reference Guide on</p> <p>10 Survey Research, and sections from McCarthy on 09:12:40</p> <p>11 Trademarks, is that correct?</p> <p>12 A. That's correct.</p> <p>13 Q. Do you usually rely on the Reference Guide</p> <p>14 on Survey Research that you relied on in this</p> <p>15 matter? 09:13:00</p> <p>16 A. We frequently -- I frequently use in the</p> <p>17 work I do various treatises that establish certain</p> <p>18 general standards for -- for work in this -- in this</p> <p>19 area of litigation, and Sheri Diamond's chapter is</p> <p>20 one that we often use. 09:13:22</p> <p>21 Q. Is that also true for Chapter 52 of</p> <p>22 McCarthy on Trademarks and Unfair Competition?</p> <p>23 A. Yes.</p> <p>24 Q. Is there anything in those treatises,</p> <p>25 chapters that you disagree with that you think is 09:13:37</p>	9

3 (Pages 6 to 9)

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10	<p>1 incorrect? 09:13:41</p> <p>2 MR. ROSS: Based on his present memory or</p> <p>3 do you want him to actually go back and look at them</p> <p>4 to do that?</p> <p>5 MS. CARUSO: Based on his present memory. 09:13:51</p> <p>6 THE WITNESS: Without looking at each one,</p> <p>7 I wouldn't want to represent that I have reviewed</p> <p>8 each to see if each sentence or each position taken</p> <p>9 in those papers I agree or disagree with.</p> <p>10 Certainly, they have generalized advice and 09:14:00</p> <p>11 guidelines, and sometimes those guidelines apply and</p> <p>12 sometimes they don't.</p> <p>13 BY MS. CARUSO:</p> <p>14 Q. Sure.</p> <p>15 You said you often review those documents. 09:14:10</p> <p>16 When is the last time you remember looking at them?</p> <p>17 A. Well, let me clarify if you mean reading</p> <p>18 them cover to cover or simply having glanced through</p> <p>19 parts of them?</p> <p>20 Q. Why don't we take both. 09:14:29</p> <p>21 A. I imagine it's been a year or more since I</p> <p>22 have read them cover to cover.</p> <p>23 I would say probably in the last month I</p> <p>24 have looked at one or both, you know, for just some</p> <p>25 particular issue I was looking for. 09:14:42</p>	12
11	<p>1 Q. How are you being compensated in this 09:14:44</p> <p>2 matter?</p> <p>3 A. By hours, by time and materials billings.</p> <p>4 Q. What's your hourly rate?</p> <p>5 A. For this case, it's \$495 an hour. 09:14:53</p> <p>6 Q. Is that for all work? Is there a different</p> <p>7 rate for testimony?</p> <p>8 A. No, that's my rate for all work.</p> <p>9 Q. Okay. Do you believe that this report</p> <p>10 marked as Exhibit 1 accurately reflects your opinion 09:15:12</p> <p>11 in this case?</p> <p>12 A. Yes.</p> <p>13 Q. Sitting here today, is there anything about</p> <p>14 it that you think is incorrect that you plan to</p> <p>15 change? 09:15:26</p> <p>16 A. There is no part I intend to change based</p> <p>17 on my current understanding.</p> <p>18 Q. Is there any additional work that you are</p> <p>19 continuing to do in connection with your retention</p> <p>20 in this matter, leaving aside this deposition? 09:15:40</p> <p>21 A. No. At this stage, the only thing I've</p> <p>22 been asked to do is do this report and appear at</p> <p>23 this deposition.</p> <p>24 Q. Is there any work that you considered doing</p> <p>25 in connection with preparing this report that you 09:15:56</p>	13
	<p>1 didn't do? 09:15:59</p> <p>2 A. No.</p> <p>3 Q. Okay. Exhibit A to your report has some</p> <p>4 biographical information about you. Did you prepare</p> <p>5 this Exhibit A? 09:16:28</p> <p>6 A. I believe so, yes.</p> <p>7 Q. Is everything in it accurate?</p> <p>8 A. I believe so, yes.</p> <p>9 Q. When's the last time you updated this?</p> <p>10 A. This version is dated October 2009 and was 09:16:57</p> <p>11 the version that was submitted at the time my report</p> <p>12 was done. So there is probably a newer version of</p> <p>13 this than this, but this is the one that was</p> <p>14 submitted with my report.</p> <p>15 Q. In the newer version, or not yet in the 09:17:19</p> <p>16 newer version, are there any pieces of information</p> <p>17 that have been added to this since October 2009?</p> <p>18 A. I would have to check for sure, but I don't</p> <p>19 believe so. I believe this is up-to-date with</p> <p>20 respect to the litigation matters that I've put in 09:18:00</p> <p>21 reports or testimony in.</p> <p>22 Q. You're a member of the American Association</p> <p>23 of Public Opinion Research?</p> <p>24 A. I am.</p> <p>25 Q. How long have you been a member of that 09:18:19</p>	
	<p>1 organization? 09:18:21</p> <p>2 A. Well, off and on since I was in graduate</p> <p>3 school.</p> <p>4 Q. How do you become a member?</p> <p>5 A. Just simply join. 09:18:29</p> <p>6 Q. Okay. Have you had any leadership roles in</p> <p>7 that organization?</p> <p>8 A. Not in the last five or six years. I don't</p> <p>9 recall back when I was a professor whether I</p> <p>10 actually sat on any of their committees or things 09:18:46</p> <p>11 like that. I don't recall specifically.</p> <p>12 Q. You're also a member of the American</p> <p>13 Statistical Organization?</p> <p>14 A. I am.</p> <p>15 Q. When is the most recent time that you 09:18:57</p> <p>16 joined that?</p> <p>17 A. For the last four or five or six years,</p> <p>18 something like that.</p> <p>19 Q. How do you become a member of the</p> <p>20 statistical association? 09:19:11</p> <p>21 A. Again, you simply join.</p> <p>22 Q. How do you define your area of expertise</p> <p>23 that's relevant to this case?</p> <p>24 A. Well, as a general matter in litigation,</p> <p>25 I'm usually referred to as an expert in survey 09:19:27</p>	

14

1 research or sampling or statistical analysis. And 09:19:31
 2 in intellectual property matters like this, my
 3 expertise is primarily in conducting surveys to
 4 measure areas of interest to that type of
 5 litigation, which would include likelihood of 09:19:46
 6 confusion, secondary meaning, things of that nature.
 7 Q. Aside from the survey that you conducted in
 8 connection with this action, have you designed
 9 surveys in connection with any other trademark
 10 infringement actions involving confusion arising 09:20:12
 11 from advertising on the internet?
 12 A. Yes.
 13 Q. How many times have you conducted surveys
 14 like that?
 15 A. With regard to matters that -- where I have 09:20:30
 16 been disclosed and, therefore, can talk about them,
 17 I think there is three or four on my CV. And then
 18 there would be some other additional number of those
 19 studies, but I don't know the exact count.
 20 Q. Of the ones that have been disclosed, do 09:20:49
 21 you recall the names of those cases?
 22 A. If I can look at my CV --
 23 Q. Sure, absolutely.
 24 A. -- I think I can advise you.
 25 Matters which involved in some way issues 09:21:11

15

1 associated with trademarks and the web presentation 09:21:14
 2 of those would include the Lulu case, the American
 3 Airlines case, the Mary Kay case, and to some degree
 4 the Real Estate Disposition Corporation case.
 5 Q. When did you conduct the survey in the Lulu 09:21:35
 6 case?
 7 A. I don't recall specifically, but the report
 8 is dated October of 2007. So it must have been
 9 sometime in that fall-ish period of 2007.
 10 Q. What about the facts in that case were 09:21:57
 11 alleged to be confusing?
 12 A. I don't recall the details specifically,
 13 but, in general, what I recall is that Lulu
 14 Enterprises was claiming that Hulu Technology and
 15 their website Hulu was confusingly similar to Lulu. 09:22:17
 16 Q. Did the survey involve -- you said their
 17 website advertising?
 18 A. They were two websites: Lulu.com and
 19 Hulu.com. So in that sense, it was web-related.
 20 Q. So your survey compared those two sites? 09:22:41
 21 A. It had to do with those two names, yes.
 22 Q. Did you find that there was confusion in
 23 that case?
 24 A. I don't recall specifically, I don't want
 25 to say. 09:22:54

16

1 Q. Were you retained on behalf of the 09:23:00
 2 plaintiff, the trademark owner, in that matter?
 3 A. I believe in that case I was retained by
 4 Lulu.
 5 Q. Do you recall whether Lulu was claiming 09:23:15
 6 that Hulu was infringing its rights or Hulu was
 7 claiming that Lulu was infringing its rights?
 8 A. I quite honestly don't remember the
 9 details, so I don't want to say.
 10 Q. In the American Airlines action, when did 09:23:32
 11 you conduct that survey?
 12 A. The expert report, original expert report,
 13 in that one went in in May of 2008, according to my
 14 CV, so it must have been in the spring, essentially,
 15 of 2008. 09:23:58
 16 Q. Do you recall the subject matter of the
 17 survey you conducted in connection with that matter?
 18 A. The American Airlines case was very similar
 19 to this one, in which American Airlines was
 20 generally claiming that Google was contributing to 09:24:14
 21 trademark infringement by selling its keyword, so it
 22 was of the same nature.
 23 Q. And what did you attempt to determine
 24 through your survey and report in that action?
 25 A. The survey was conducted to measure the 09:24:38

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1 extent to which there was a likelihood or actual 09:24:40
 2 confusion, and, therefore, an opinion of likelihood
 3 of confusion with regard to sponsored links.
 4 Q. What did you find?
 5 A. I don't recall the specific numbers, but 09:24:54
 6 essentially I found that there was net confusion
 7 suggesting that consumers were confused that the
 8 sponsored links were either American Airlines
 9 websites or endorsed by American Airlines.
 10 Q. Did that survey involve questions to the 09:25:16
 11 respondents specifically asking if they believed
 12 that the links they were viewing were "endorsed"?
 13 Is that the word that was used in the survey?
 14 A. I believe so, yes.
 15 Q. Do you recall what any of the sponsored 09:25:38
 16 links were in the survey you conducted for American
 17 Airlines in your test stimulus?
 18 A. Without looking back at actual stimuli, I
 19 wouldn't want to from recall remember exactly which
 20 was which. 09:25:53
 21 Q. Do you remember anything about the types?
 22 Were they competitors of American Airlines?
 23 A. I'll generally say that some would have
 24 been competitors, yes.
 25 Q. The Mary Kay case, when was that survey 09:26:10

18	<p>1 conducted? 09:26:15</p> <p>2 A. The expert report was turned in in December</p> <p>3 of 2008, so I believe it must have been sometime</p> <p>4 during the late fall of 2008.</p> <p>5 Q. Do you recall what your opinion was in that 09:26:41</p> <p>6 case?</p> <p>7 A. I don't recall specifically, no.</p> <p>8 Q. Do you recall anything about the facts</p> <p>9 relating to your survey?</p> <p>10 A. Well, in general, the case, among other 09:26:56</p> <p>11 things, claimed that Amy and Scott Weber and their</p> <p>12 Touch of Pink website was infringing Mary Kay's</p> <p>13 trademarks. And part of the issue were whether the</p> <p>14 consumers who went to Touch of Pink's website were</p> <p>15 confused whether that was a Mary Kay site or whether 09:27:20</p> <p>16 it was endorsed or sponsored by Mary Kay. That's</p> <p>17 generally how I recall it.</p> <p>18 Q. Do you recall what the survey question was</p> <p>19 in that case, "sponsored" or "endorsed"? Do you</p> <p>20 know if that was the language you used? 09:27:35</p> <p>21 A. I don't recall the language without going</p> <p>22 back to the survey.</p> <p>23 Q. Have you ever done an internet search</p> <p>24 yourself?</p> <p>25 A. Yes. 09:27:58</p>
19	<p>1 Q. About how many times? 09:27:59</p> <p>2 A. I have no way of guessing.</p> <p>3 Q. How many times in the last week?</p> <p>4 A. I don't know with certainty.</p> <p>5 Q. Proximate range on any given day? 09:28:11</p> <p>6 A. I'll guess in the last week it was more</p> <p>7 than 10 and less than 200, but I don't think I could</p> <p>8 guess any better than that.</p> <p>9 Q. Do you recall when you first started doing</p> <p>10 searches on the internet? 09:28:31</p> <p>11 A. No.</p> <p>12 Q. Do you think it was at least five years</p> <p>13 ago?</p> <p>14 A. I imagine it probably was, but I don't -- I</p> <p>15 don't have a specific -- 09:28:49</p> <p>16 Q. All right. Sure.</p> <p>17 A. -- recall of when I started searching.</p> <p>18 Q. Have you ever used the internet to</p> <p>19 comparison shop?</p> <p>20 A. Probably. 09:28:59</p> <p>21 Q. Have you ever purchased any items through</p> <p>22 the internet?</p> <p>23 A. Probably. None immediately comes to mind,</p> <p>24 but...</p> <p>25 Q. Have you ever clicked on a sponsored link? 09:29:09</p>
20	<p>1 A. I don't specifically recall one instance 09:29:14</p> <p>2 where I did that, but probably I have.</p> <p>3 Q. All right. Do you recall ever being</p> <p>4 confused about the relationship between a sponsored</p> <p>5 link and what you thought you were looking for? 09:29:24</p> <p>6 A. I don't have a specific recollection of</p> <p>7 when search first started what I did or didn't think</p> <p>8 about, you know, things that came back in a search.</p> <p>9 I really don't recall as I sit here today.</p> <p>10 Q. Have your expectations of search results 09:29:46</p> <p>11 changed since the time you first started doing</p> <p>12 searches?</p> <p>13 MR. ROSS: What do you mean by the word</p> <p>14 "expectations"?</p> <p>15 BY MS. CARUSO: 09:29:59</p> <p>16 Q. Earlier you said you can't recall</p> <p>17 whether -- what you thought back when you first</p> <p>18 started doing searches. And I'm just trying to</p> <p>19 understand if now when you see search results you</p> <p>20 think that you have a different sense of what it is 09:30:17</p> <p>21 that is being presented to you, what its</p> <p>22 relationship is to the keyword that you used, than</p> <p>23 you did when you first started doing searches.</p> <p>24 A. I don't recall exactly what search looked</p> <p>25 like back when we first started doing it, whenever 09:30:36</p>
21	<p>1 that was, and so I'm having a hard time saying 09:30:39</p> <p>2 whether my understanding of it today is different</p> <p>3 than it was then because I just don't really</p> <p>4 remember --</p> <p>5 Q. Sure. 09:30:47</p> <p>6 A. -- what the search results used to look</p> <p>7 like.</p> <p>8 Q. All right. Have you published any articles</p> <p>9 on the subject of trademark confusion relating to</p> <p>10 the internet? 09:30:56</p> <p>11 A. Is it okay if I look at my CV?</p> <p>12 Q. Certainly.</p> <p>13 A. And can I understand what you mean by</p> <p>14 "published"?</p> <p>15 Q. Well, what I mean is whatever you meant in 09:31:23</p> <p>16 listing publications in your Exhibit A.</p> <p>17 MR. ROSS: Page 8.</p> <p>18 MS. CARUSO: Page 8.</p> <p>19 THE WITNESS: Yes, I have published a paper</p> <p>20 relating to the use of surveys and trademark 09:31:38</p> <p>21 infringement on the web.</p> <p>22 BY MS. CARUSO:</p> <p>23 Q. And to be clear, what did you mean by</p> <p>24 "publications"?</p> <p>25 A. I didn't have a specific understanding. 09:31:48</p>

22	<p>1 It's just sometimes there is a distinguishing 09:31:50 2 between peer-reviewed journals and something else. 3 In this particular case, that's a 4 published -- a conference paper published in a 5 proceedings for a conference. It isn't a 09:32:01 6 peer-reviewed. So I just wanted to make sure there 7 was no lack of clarity there. 8 MS. CARUSO: I'm going to mark as Exhibit 2 9 a document entitled "Emergent Issues In The Use of 10 Surveys and Trademark Infringement On The Web." 09:32:15 11 (Deposition Exhibit No. 2 was marked for 12 identification) 13 BY MS. CARUSO: 14 Q. Take a look at that, please. 15 MR. ROSS: Thank you. 09:32:23 16 THE WITNESS: (Witness reviewing document.) 17 BY MS. CARUSO: 18 Q. Do you recognize this document? 19 A. Yes. 20 Q. This is the article referenced on page 8 of 09:32:40 21 your Exhibit A, the top one? 22 A. I believe so, yes. 23 Q. Good. 24 Does this article reflect the substance of 25 a presentation that you gave in Seattle, Washington 09:32:59</p>	24	<p>1 Q. Okay. Do you recall whether you divided up 09:34:29 2 the subject matter -- trying to get a sense of your 3 working relationship on this article -- or was -- 4 she drafted it, you looked over it? 5 A. I really don't recall. 09:34:42 6 Q. All right. When is the last time you read 7 this paper? 8 A. If by "read" you mean cover to cover, I 9 don't know if I have ever actually read it since we 10 published it, but I've looked at it in the last 09:35:01 11 month or two. 12 Q. All right. Is there anything about what 13 you have reviewed in the last month or two that you 14 now feel differently about than is written in the 15 article? 09:35:15 16 A. Not that I'm aware of, but I've not 17 specifically reviewed every sentence to make a 18 decision about whether I currently hold that opinion 19 still or not. 20 Q. Understood. 09:35:27 21 Leaving aside reviewing it in the last 22 month or two, since writing the article, is there 23 anything that's come to your attention that you no 24 longer agree with in this article? 25 A. Not that I'm specifically aware of. 09:35:43</p>
23	<p>1 September 2007? 09:33:04 2 A. It was written as a paper to be included in 3 the proceedings for that conference, and I was asked 4 to speak on that topic. I don't recall the extent 5 to which the content and what I actually said during 09:33:21 6 the conference matches this identically, so I don't 7 want there to be a confusion about that. 8 Q. Sure. 9 You're identified as the first author of 10 this paper with Sarah Butler as the second. 09:33:32 11 How did that -- could you describe your 12 contributions to the article compared to hers? 13 A. I don't remember specifically back in 2007 14 when we put this paper together who did what, who 15 had which role in it. So I don't want to represent 09:33:57 16 that I did one amount of work and she did a 17 different amount of work because I don't recall that 18 specifically. 19 Q. Do you regularly work with Ms. Butler? 20 A. Yes. 09:34:10 21 Q. Does she work at NERA? 22 A. Yes. 23 Q. Have you co-authored other articles before? 24 A. I don't think we co-authored anything else 25 that would be considered "published." 09:34:27</p>	25	<p>1 Q. Is there anything that you're generally 09:35:47 2 aware of? 3 A. No, I don't think I'm generally aware of 4 either. 5 Q. All right. 09:35:56 6 A. I mean, this was written a couple of years 7 ago, so... 8 Q. Do you believe it's important in surveys 9 that they replicate as closely as possible actual 10 market conditions? 09:36:19 11 A. As a general rule, that's a criteria that 12 we look at. Obviously, in many trademark-related 13 matters there is a certain artificialness to the 14 exercises that we engage in, but to the extent we 15 can, we try to make them realistic to marketplace 09:36:34 16 conditions. 17 Q. Do you believe surveys should provide clear 18 definitions for otherwise unknown terms? 19 A. Generally, to the extent we have unique 20 words that consumers may or may not understand, 09:36:50 21 we're -- we wouldn't necessarily define them in the 22 survey, but we would be concerned to understand how 23 consumers understood the words. 24 Q. How would you approach figuring out if 25 consumers understood the words? 09:37:04</p>

26

1 A. There is a variety of techniques we use in 09:37:07
 2 survey research generally.

3 Q. Such as?

4 A. They might be in-depth interviews, they
 5 might be focus groups, they might be some other kind 09:37:17
 6 of cognitive-interviewing exercise. So there are
 7 various tools that are used.

8 Q. All right. The tools that you described,
 9 would those be separate and apart from a primary
 10 survey or integrated with it? 09:37:33

11 A. It varies by the nature of the assignment,
 12 the nature of the engagement, the reason for doing
 13 the work.

14 Q. Did you design the survey that's referenced
 15 in your report in this action, the survey in Exhibit 09:37:56
 16 1?

17 A. Yes.

18 Q. Did anyone assist you with it?

19 A. Yes, in the sense that there is a number of
 20 aspects of that survey that are essentially what 09:38:11
 21 I'll call "boilerplate." There's similar
 22 information that are used in other surveys of this
 23 type. And certainly my staff would have, you know,
 24 found those boilerplate things and put them together
 25 and then I would review them; but the core-question. 09:38:26

27

1 strategy would be work that I would have done. 09:38:29

2 Q. What parts of the survey are boilerplate?

3 A. And I don't want to represent that I don't
 4 review everything. But if you look through the
 5 instruments in the appendix, you'll see that there 09:38:45
 6 are words that are part of the introduction and part
 7 of the transitions between when you go from the
 8 screening into the -- you know, into the actual
 9 interviewing room, things like that that have
 10 similar -- have a similar look and feel to them from 09:38:59
 11 prior studies.

12 Q. You reference your staff helping pull
 13 together that. How large of a staff do you have
 14 that worked on this?

15 A. On the Rosetta case, the work would have 09:39:16
 16 primarily been done by Sarah Butler and Arie Singer.
 17 That's a -- Sarah is a senior consultant in my group
 18 and Arie Singer is an analyst.

19 Q. How long have you worked with Ms. Butler?

20 A. Maybe three years. 09:39:44

21 Q. How long have you worked with Mr. Singer?

22 A. Ms. Singer.

23 Q. Ms. Singer, excuse me.

24 A. Five, six, seven years, something like
 25 that. 09:40:16

28

1 Q. Aside from assisting you with the 09:40:16
 2 boilerplate parts of the survey, did Ms. Butler and
 3 Ms. Singer contribute anything else to the survey
 4 design?

5 A. Well, I would have discussed the question 09:40:26
 6 strategies with them, but I don't recall that as any
 7 other kind of specific contribution.

8 Q. Did you conduct any preliminary surveys
 9 before the one that's referenced in the report?

10 A. No. 09:40:45

11 Q. Do you know if any preliminary testing was
 12 conducted by anyone else that was used in your
 13 report?

14 A. Not that I'm aware of.

15 Q. Do you have any reason to believe that 09:40:57
 16 someone did preliminary testing before asking you to
 17 create this survey?

18 A. No.

19 Q. Before creating the survey, did you look at
 20 anything, leaving aside the three things we talked 09:41:27
 21 about earlier -- the complaint and those two
 22 treatise sections -- that assisted you in designing
 23 the survey?

24 A. Well, I believe it would be correct to say
 25 that when I was first approached about the case, I 09:41:47

29

1 would have done some Rosetta Stone Google searches 09:41:51
 2 just to see what they look like, what kind of things
 3 came up, and so on. So I don't want to specifically
 4 say how many or things like that, but at the time I
 5 first got the case I'm -- I'm sure I looked at 09:42:07
 6 several Google searches just to see the nature of
 7 what the search-results pages look like.

8 Q. Is there anything else that you can think
 9 of that you looked at?

10 A. I don't recall anything else in this case. 09:42:24

11 Q. Did you look at Google's answer before
 12 designing the survey?

13 A. I'm sorry, what?

14 Q. Google's response to Rosetta Stone's
 15 complaint that was filed in court. 09:42:37

16 MR. ROSS: A legal pleading is called "an
 17 answer."

18 THE WITNESS: Yeah. Well, I guess the
 19 reason I was confused is because this work was done
 20 before the complaint was filed. So I didn't do -- I 09:42:45
 21 didn't have any of the pleadings at the time that we
 22 designed the work.

23 BY MS. CARUSO:

24 Q. All right. When was the survey conducted?

25 A. I don't recall the exact dates, but I want 09:42:56

30

1 to say basically late April until end of May, 09:42:59
 2 something like that, early June, perhaps.
 3 Q. This late-April-to-early-June time frame,
 4 approximately, is that the time frame during which
 5 respondents were responding to questions or does 09:43:25
 6 that time period cover more that happened in
 7 connection with the survey?
 8 A. I think that's pretty much the period of
 9 time in which we were designing the actual
 10 instruments that went into the field, putting it 09:43:40
 11 into the field and getting the data back.
 12 Q. Was the field part of the survey all -- how
 13 long of a period was that time?
 14 A. I don't want to say I remember with
 15 certainty, but typically it's in the two-to-four 09:44:06
 16 weeks. So somewhere in that range would have been
 17 two, three, four weeks of fieldwork.
 18 Q. Do you recall when in the calendar these
 19 two to four weeks occurred?
 20 A. I don't. 09:44:25
 21 Q. Do you have any documents that would help
 22 pin down when the survey was in the field?
 23 A. I don't.
 24 Q. Does anyone at NERA?
 25 A. I don't know. 09:44:36

31

1 Q. Do you know if the lawyers for Rosetta 09:44:38
 2 Stone do?
 3 A. Sorry, I missed the question.
 4 Q. Do you know if the lawyers for Rosetta
 5 Stone have any documents that would pin down the 09:44:45
 6 field dates?
 7 A. I don't know.
 8 Q. Do you know if there are contracts with the
 9 companies that actually conducted the survey in the
 10 field? 09:45:07
 11 A. I don't know if we have a specific like
 12 work-order agreement with those companies or not.
 13 Q. Did you consult with Rosetta Stone's
 14 lawyers about the questions that would be asked in
 15 the survey? 09:45:42
 16 A. I guess what do you mean by "consult"?
 17 Q. Did you talk to them about questions?
 18 A. I believe I had at least one call where we
 19 described generally the questioning strategy, but I
 20 don't recall anything more specific than that. 09:46:09
 21 Q. Do you recall who you had that call with?
 22 A. I don't.
 23 Q. Was it Mr. Ross?
 24 A. I believe Mr. Ross and some people from
 25 Rosetta were on this initial call, but I don't 09:46:24

32

1 recall who. 09:46:26
 2 Q. Do you -- was there anything discussed
 3 during that call by which you changed your
 4 questioning strategy?
 5 A. No, I don't believe so. 09:46:51
 6 Q. Did your questioning strategy change at any
 7 time between when you first thought of the strategy
 8 and when it was actually implemented?
 9 A. I don't recall that exactly. I mean, there
 10 is issues that are unique to each of these cases and 09:47:14
 11 you sort of have to sort through what's the issues
 12 that will arise and so on. And I had that mental
 13 process, but I don't recall specific the nature of
 14 what I first thought and what I later thought.
 15 Q. What issues did you identify as unique to 09:47:30
 16 the Rosetta Stone case?
 17 A. I don't really recall anything specific,
 18 other than that, you know, the way these are
 19 ultimately done is you identify a test and control
 20 stimulus, which is a search-result page. 09:48:01
 21 Q. Right.
 22 A. And so we need to identify a page that
 23 essentially is reflective of the kinds of pages to
 24 which the complaint is addressed. And so in that
 25 sense, things about the search-results page are what 09:48:17

33

1 are sometimes unique. You know, certain kinds of 09:48:21
 2 trademarks may bring up certain kinds of links,
 3 where other trademarks bring up other kinds of
 4 things. So in that sense, we had to see what comes
 5 up when you search for Rosetta Stone. 09:48:37
 6 Q. What kinds of links did you find that were
 7 coming up with Rosetta Stone? Question mark.
 8 A. I think the areas that concerned us when we
 9 were choosing a stimulus had to do with, for
 10 example, how many horizontal links and how many 09:48:53
 11 right-hand-side-sponsored links came up, roughly
 12 what was the general nature of the companies that
 13 were in those links, roughly what was the nature of
 14 the language that was used in the links, these sorts
 15 of dimensions. 09:49:12
 16 Q. So you wanted to use a test stimulus that
 17 would be typical of the numbers of sponsored links
 18 on search-result pages for Rosetta Stone queries?
 19 A. I don't know for sure what "typical" means,
 20 but would be reflective of what you would frequently 09:49:38
 21 see if you did those searches.
 22 Q. So, in other words, if during one of your
 23 searches there were eight links on the right-hand
 24 side but most of the time there were five, you would
 25 prefer to go with the five versus the eight? 09:49:55

34

1 A. That's a specific hypothetical, so I want 09:50:00
 2 to be careful with that. But, you know, some
 3 searches always produce only one or two over on the
 4 right side and there is no horizontal links. Others
 5 produce 10 or 15 or 20, or sometimes onto a second 09:50:13
 6 page --
 7 Q. Right.
 8 A. -- under the sponsored links.
 9 So it was more a matter of are we talking
 10 about a search term where it's just one or two, a 09:50:22
 11 whole list of them and then on to second pages, or
 12 something in that, you know, three to five or six on
 13 the right and one or two at the top.
 14 And in the Rosetta case, I think it was
 15 generally there was, you know, one to three at the 09:50:36
 16 top and two to five or six on the side, something
 17 like that. I don't remember the exact counts, but
 18 roughly of that character, as opposed to just one or
 19 two all together --
 20 Q. Right. 09:50:49
 21 A. -- or 10, 15, 20 of them all together.
 22 Q. All the search queries that you looked at,
 23 were they just for "Rosetta Stone," just those two
 24 words, as one search query?
 25 A. You're asking me when I did searches? 09:51:06

35

1 Q. In connection with preparing the survey. 09:51:08
 2 A. I believe I did searches on more than one
 3 Rosetta-Stone-related thing, like just "Rosetta,"
 4 "Rosetta Stone," "RosettaStone.com," various of
 5 these things, to see what comes up, but I don't 09:51:30
 6 recall which searches I did. And I'm certain that
 7 my staff also looked at some things other than
 8 simply "Rosetta Stone."
 9 Q. Mm-hmm. The survey only tested just
 10 "Rosetta Stone," just those two words; correct? 09:51:44
 11 A. That's right.
 12 Q. Does your opinion -- is it limited to just
 13 Rosetta Stone, that one trademark entered by itself?
 14 A. "Rosetta Stone" is what I tested. To the
 15 extent that searching on one of the other trademarks 09:52:10
 16 would produce a search result that was similar, you
 17 know, it might be reasonable to expect that the
 18 results would be similar, but "Rosetta Stone" is the
 19 specific words we tested.
 20 Q. You mentioned considering some variations 09:52:39
 21 on Rosetta Stone. The complaint identifies a number
 22 of other trademarks Rosetta Stone claims. Did
 23 you -- such as "dynamic immersion" or "language
 24 libraries," "SharedTalk." Did you consider doing a
 25 text with any of those? 09:52:59

36

1 A. I don't recall that we did. 09:53:03
 2 Q. Have you ever done a search for any of
 3 those other trademark terms?
 4 A. I don't recall if I did or I did not.
 5 Q. So you don't recall whether those results 09:53:16
 6 are similar or different from results for just
 7 "Rosetta Stone"?
 8 A. As I sit here today, I don't recall.
 9 Q. So the survey was conducted, it was in the
 10 field, you said pretty much finished around June of 09:53:48
 11 2009?
 12 A. I think I said early June.
 13 Q. Early June.
 14 And when I say "finished," I mean the data
 15 had all been collected. Had it been analyzed at 09:54:05
 16 that point?
 17 A. I imagine that it was; I mean, this is a
 18 pretty straightforward calculation, but I don't
 19 recall specifically that we, you know, did anything
 20 to note that at that point. 09:54:19
 21 Q. When did you draft your report?
 22 A. I think I was advised in, I forget,
 23 sometime in November that they would be needed by
 24 the 14th of December, and so it was probably drafted
 25 primarily in the early December period. 09:54:36

37

1 Q. Before drafting it, did you ask Rosetta 09:54:52
 2 Stone's lawyers for any other information that might
 3 be relevant to your report?
 4 A. I think the complaint.
 5 Q. Okay. You hadn't seen the complaint when 09:55:03
 6 the survey was initially drafted?
 7 A. That's correct.
 8 Q. You saw the complaint first around
 9 December?
 10 A. I don't recall if we got a copy when it was 09:55:18
 11 first filed. And if we did, I may have just glanced
 12 at it; but since we weren't being asked to do any
 13 work on the case at that time, I don't recall that I
 14 read it. The first time I really read through it
 15 would have been when I did my report. 09:55:36
 16 Q. At that time, any other time before
 17 finalizing your report, did you have the opportunity
 18 to review Google's responsive pleading?
 19 A. I don't recall that I have ever seen any
 20 Google pleadings in this case. 09:55:58
 21 Q. Have you asked to see any?
 22 A. I don't recall that I have ever asked, but
 23 I don't recall.
 24 Q. Have you seen any rulings the court has
 25 made in this action? 09:56:13

38	<p>1 A. I don't believe I have. 09:56:16</p> <p>2 Q. Are you aware of whether there have been</p> <p>3 any rulings with the court in this action?</p> <p>4 A. As I sit here right now, I can't recall</p> <p>5 anyone saying anything about any rulings to me. 09:56:26</p> <p>6 Q. What assumption -- excuse me.</p> <p>7 What assumptions did you make in designing</p> <p>8 the survey?</p> <p>9 A. That's an awfully broad question. Maybe</p> <p>10 you could narrow in to what domain of interest you 09:56:54</p> <p>11 have.</p> <p>12 Q. Sure.</p> <p>13 Did you make any assumptions about what</p> <p>14 someone who enters the search query "Rosetta Stone,"</p> <p>15 just those two words separated by a space, is 09:57:06</p> <p>16 searching for?</p> <p>17 A. No, I -- I think the assumption we make is</p> <p>18 that they could read the card that had "Rosetta</p> <p>19 Stone" on it, that they could type it in --</p> <p>20 Q. Right. 09:57:38</p> <p>21 A. -- and they could hit the search button.</p> <p>22 We assumed those things.</p> <p>23 Q. All right. Let me ask, then, a different</p> <p>24 question.</p> <p>25 Not limited to creation of the survey but 09:57:46</p>	40	<p>1 have drafted. 09:59:52</p> <p>2 Q. Recognizing that for purposes of the survey</p> <p>3 your assumptions regarding the respondent's entry of</p> <p>4 "Rosetta Stone" was that they could read it on the</p> <p>5 card and type it in and press enter, in 10:00:19</p> <p>6 extrapolating from the survey results to the real</p> <p>7 world that you are giving the opinion in, did you</p> <p>8 make any assumptions about user behavior on the</p> <p>9 internet?</p> <p>10 MR. ROSS: I'll just object to the form of 10:00:39</p> <p>11 the question as being vague and ambiguous, but if</p> <p>12 you understand it, go ahead and answer.</p> <p>13 THE WITNESS: I guess I would have to ask</p> <p>14 for a clarification. I mean, there is so many</p> <p>15 levels of things about people interacting with the 10:00:52</p> <p>16 web that you may be asking about and I can't really</p> <p>17 understand what you may be asking me about.</p> <p>18 BY MS. CARUSO:</p> <p>19 Q. All right. The different levels of people</p> <p>20 interacting with the web, can you give me some 10:01:04</p> <p>21 examples of what you mean by that?</p> <p>22 A. Well, simply the extent to which they</p> <p>23 understand various things about the way a computer</p> <p>24 works, the way the web works, those sorts of things.</p> <p>25 Q. Did you make any assumptions about how 10:01:19</p>
39	<p>1 the formation of your opinion in this case, did you 09:57:50</p> <p>2 make any assumption about what someone who enters</p> <p>3 the search query "Rosetta Stone" is looking for?</p> <p>4 A. I'd have to look back at the exact script,</p> <p>5 but essentially they understand that they have been 09:58:11</p> <p>6 asked to do that exercise because they expressed an</p> <p>7 interest in learning a language. So they have first</p> <p>8 as a frame of reference as they start the</p> <p>9 experiment.</p> <p>10 Q. In terms of giving respondents a frame of 09:58:54</p> <p>11 reference about learning the language, was that the</p> <p>12 only question that would help provide them with that</p> <p>13 frame of reference, screener question, before they</p> <p>14 started taking the survey?</p> <p>15 A. I'm not sure what you're asking me. There 09:59:22</p> <p>16 are screening questions.</p> <p>17 Q. All right. Let's get to those then a</p> <p>18 little bit later.</p> <p>19 You earlier answered my question about when</p> <p>20 the report was drafted by saying that it was drafted 09:59:32</p> <p>21 in the December period.</p> <p>22 Did you draft it?</p> <p>23 A. Yes. It would have been, again, some</p> <p>24 combination of my staff and I on various of the</p> <p>25 paragraphs, but the large majority of it I would 09:59:49</p>	41	<p>1 people understand the web to work? 10:01:21</p> <p>2 A. Well, the exercise asked them to conduct a</p> <p>3 search and they see a search-results page. We</p> <p>4 assume they have a general understanding of search</p> <p>5 in that regard. We try not assume much more than 10:01:42</p> <p>6 that, but...</p> <p>7 Q. Right.</p> <p>8 My question is not so much about the</p> <p>9 respondents to your survey but about when you opine</p> <p>10 that a significant portion of the public is likely 10:01:56</p> <p>11 to be confused by -- well, let me stop for a second.</p> <p>12 What do you conclude is likely to confuse a</p> <p>13 significant portion of the public, the relevant</p> <p>14 public?</p> <p>15 A. Well, I think the opinion here is that a 10:02:13</p> <p>16 significant proportion of consumers who enter</p> <p>17 "Rosetta Stone" into a Google search and who look at</p> <p>18 a search-results page are confused in that they</p> <p>19 believe the sponsored links are either Rosetta Stone</p> <p>20 company websites or endorsed by Rosetta Stone. 10:02:39</p> <p>21 I'd have to look at my report to get the</p> <p>22 exact wording, but that's basically the idea.</p> <p>23 Q. Sure. If you want to look at your report,</p> <p>24 I believe that conclusion is towards the end,</p> <p>25 paragraph 44 on page 12. 10:03:06</p>

42	<p>1 A. Okay. 10:03:35</p> <p>2 Q. Is there anything about -- that you want</p> <p>3 change about the answer you just gave?</p> <p>4 A. I don't specifically recall the answer I</p> <p>5 just gave. So if you want to have her read it back, 10:03:48</p> <p>6 we can do that.</p> <p>7 MS. CARUSO: Yes. Could you please read it</p> <p>8 back?</p> <p>9 (Whereupon the reporter read the record as</p> <p>10 follows: 10:04:11</p> <p>11 "Answer: Well, I think the opinion here is</p> <p>12 that a significant proportion of consumers</p> <p>13 who enter 'Rosetta Stone' into a Google</p> <p>14 search and who look at a search-results</p> <p>15 page are confused in that they believe the 10:02:31</p> <p>16 sponsored links are either Rosetta Stone</p> <p>17 company websites or endorsed by Rosetta</p> <p>18 Stone."</p> <p>19 THE WITNESS: Well, I'll refer you to my</p> <p>20 report as my conclusion, but I think what I just 10:04:19</p> <p>21 heard sounds like the same as what I have said here.</p> <p>22 BY MS. CARUSO:</p> <p>23 Q. My question to you is: In your conclusion</p> <p>24 that after a consumer has conducted a Google search</p> <p>25 using a Rosetta Stone trademark as a keyword, 10:04:33</p>	44	<p>1 What's your understanding of how many 10:06:08</p> <p>2 people who are interested in learning a language</p> <p>3 pursue a commercial route to doing so versus an</p> <p>4 academic/classroom approach?</p> <p>5 A. I don't think I have any specific 10:06:23</p> <p>6 statistics in my mind on how many people go to</p> <p>7 classroom-based teaching versus learn it through</p> <p>8 software or some combination. I don't have any</p> <p>9 numbers.</p> <p>10 Q. Did you consider at any point asking as 10:06:40</p> <p>11 part of the screening question whether the</p> <p>12 respondent was interested in purchasing language</p> <p>13 software?</p> <p>14 A. You're asking -- go ahead and repeat the</p> <p>15 question. 10:07:02</p> <p>16 Q. Did you consider in designing the survey</p> <p>17 questions, the screening questions in particular,</p> <p>18 did you consider asking whether the respondent was</p> <p>19 interested in purchasing language-learning software?</p> <p>20 A. You're asking if I considered that, and I 10:07:20</p> <p>21 don't recall specifically that I did or I didn't.</p> <p>22 Q. Sitting here today, do you think that would</p> <p>23 have been a better question to ask?</p> <p>24 A. Just to be clear, what question would I --</p> <p>25 what question am I responding to that I -- 10:07:47</p>
43	<p>1 that -- just focusing on that phrase, did you make 10:04:36</p> <p>2 any assumptions about what consumers who conduct a</p> <p>3 Google search using a Rosetta Stone trademark as a</p> <p>4 keyword are looking for when they enter that Rosetta</p> <p>5 Stone trademark as a search query? 10:04:53</p> <p>6 A. I think you're looking for an answer that I</p> <p>7 don't really understand. But, I mean, we set up the</p> <p>8 experiment that these were people interested in</p> <p>9 learning a language, who would use the internet to</p> <p>10 search for information about learning a language, 10:05:20</p> <p>11 who would use Google in the past or use Google in</p> <p>12 the future -- and would use Google in the future,</p> <p>13 and who are aware of Rosetta Stone as a language</p> <p>14 software product.</p> <p>15 And then we had them enter "Rosetta Stone" 10:05:38</p> <p>16 into the search bar and then we had a series of</p> <p>17 specific questions we asked them about that results</p> <p>18 page.</p> <p>19 Q. Right.</p> <p>20 So people who are interested in learning a 10:05:48</p> <p>21 language, do you have an understanding of the</p> <p>22 language-instruction market?</p> <p>23 A. I have a general understanding of it. I</p> <p>24 don't want to say I have a specific understanding.</p> <p>25 Q. Sure. 10:06:08</p>	45	<p>1 Q. Sure, absolutely. 10:07:50</p> <p>2 A. -- that would have been better to ask?</p> <p>3 Q. Instead of asking whether the respondents</p> <p>4 were interested in learning a language, if they were</p> <p>5 interested in purchasing language-learning software? 10:07:58</p> <p>6 A. For this case, no, I don't believe that's a</p> <p>7 better question.</p> <p>8 Q. Why is that?</p> <p>9 A. It's my understanding that the complaint</p> <p>10 and the alleged infringement have to do with the 10:08:17</p> <p>11 consumers' understanding of the search-results page</p> <p>12 -- that they get back if they would be in the market to</p> <p>13 look for information that involve that trademark --</p> <p>14 look for information, and to use Google in this</p> <p>15 case. And they do not -- the relevant market is not 10:08:35</p> <p>16 defined in this case simply as potential purchasers.</p> <p>17 It's potential searchers, essentially.</p> <p>18 So to have restricted the screening to</p> <p>19 purchasers would have restricted the market in a way</p> <p>20 that I don't think is completely consistent with 10:08:54</p> <p>21 this case.</p> <p>22 Q. Let's try a different question then.</p> <p>23 The question "Do you expect in the next six</p> <p>24 months to search for information about language</p> <p>25 software -- change that. 10:09:20</p>

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46	<p>1 "Do you expect to search for information 10:09:23 2 about -- that's the question I want. 3 "Do you expect to search for information 4 about language software online in the next six 5 months," do you think that would have been a more 10:09:40 6 appropriate question for this survey? 7 A. I think I would have to look at the wording 8 of your question against the wording of the question 9 that we actually used -- 10 Q. Sure. Let's turn to that. 10:09:59 11 A. -- because I'm not exactly sure how it's 12 different from what we asked. 13 Q. If you go to Exhibit C, page 3 of 7. And 14 S41 says: "Yes, you will use the internet to search 15 for information about learning a foreign language." 10:10:53 16 And my proposal is: Yes, will use the internet to 17 search for information about foreign-language 18 software. 19 A. As I sit here today, I don't have any 20 reason to think that your version of the question is 10:11:20 21 better than the question that we've asked. 22 Q. Why do you think that? 23 A. The relevant market would be individuals 24 who would potentially search for information related 25 to learning a language. 10:11:36</p>	48	<p>1 measure the extent to which consumers who enter 10:13:15 2 Rosetta Stone trademarks into the Google search bar 3 are confused and believe that the return-sponsored 4 links are either owned by or endorsed by Rosetta 5 Stone. 10:13:35 6 Q. What type of confusion did you test? 7 Are you familiar with the phrase 8 "initial-interest confusion"? 9 A. I've heard that term. 10 Q. Are you familiar with the phrase 10:13:55 11 "point-of-purchase confusion"? 12 A. I've heard that term. 13 Q. Do you have an understanding of what 14 "point-of-purchase confusion" means? 15 A. I have a general understanding that 10:14:08 16 consumers -- that there is theories about consumers 17 being involved in phases of a process of making a 18 decision to purchase and then purchasing it, and 19 that those -- the language of those two things are 20 related to, you know, phases of that process. 10:14:27 21 Q. What phase of the process did you assess 22 confusion for? 23 A. Well, I don't want -- the way we've done 24 the work, it would not be -- it would depend on the 25 mind-set that the consumer had, and some might have 10:14:47</p>
47	<p>1 They may, as a result of that, come to 10:11:39 2 understand that they want to purchase 3 language-learning software, I think that's the word 4 you used, but the -- that -- it is not simply the 5 language-learning-software searchers that might 10:11:54 6 enter "Rosetta Stone" as a search term into the 7 results page. You may just be learning how to learn 8 a foreign language and enter -- and hear about 9 Rosetta Stone and enter it. 10 So we define the market as those who would 10:12:09 11 be interested in -- who would search for information 12 about learning a foreign language on the internet, 13 as opposed to what you said. 14 MR. ROSS: Do we need to take a break for a 15 tape change or something? 10:12:26 16 THE VIDEOGRAPHER: It was the only 17 audiotape. We still have 50 minutes on the record. 18 MR. ROSS: 15, one five, or five zero? 19 THE VIDEOGRAPHER: Five zero. 20 BY MS. CARUSO: 10:12:58 21 Q. What was your objective in creating this 22 survey? 23 A. Well, I think to fulfill my assignment. 24 Q. Which was what? 25 A. Well, I was asked to conduct a study to 10:13:12</p>	49	<p>1 been in a prepurchase mode, some may have been in a 10:14:50 2 search mode. So the experiment itself is not set up 3 to be one specific kind. Whatever the, you know, 4 individuals in our sample had in their mind is the 5 range of those. It's not post-purchase confusion, I 10:15:05 6 will say that. 7 Q. Indeed. 8 In taking the survey, were respondents 9 allowed to click on the links -- 10 A. No. 10:15:24 11 Q. -- that were displayed? 12 So they never -- the pages that the 13 advertisement is linked to were never displayed to 14 them? 15 A. I'm understanding you to mean if you click 10:15:37 16 on a link and it takes you to a different page? 17 Q. Correct. 18 A. That's correct. The only page they ever 19 saw was the search-results page, that's correct. 20 Q. No one can purchase Rosetta Stone software 10:15:49 21 directly from a link that appeared on that Google 22 test stimulus of the search-result page, correct? 23 MR. ROSS: Object. There is an element of 24 confusion there. Can I explain my confusion or do 25 you want me to just shut up? 10:16:12</p>

13 (Pages 46 to 49)

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<p style="text-align: right;">50</p> <p>1 MS. CARUSO: Sure. 10:16:14</p> <p>2 MR. ROSS: I think the confusion is, you</p> <p>3 know, you could purchase because they don't go</p> <p>4 anywhere, as opposed to nobody can purchase in</p> <p>5 clicking a link if it were a live link. See what I 10:16:20</p> <p>6 am saying? You've collapsed two different things in</p> <p>7 one sentence.</p> <p>8 MS. CARUSO: I want to be clear that I</p> <p>9 address your objection, Mr. Ross.</p> <p>10 So your objection is no one can purchase 10:16:36</p> <p>11 anything because that wasn't part of the survey</p> <p>12 conditions?</p> <p>13 MR. ROSS: It was physically impossible.</p> <p>14 You couldn't go anywhere.</p> <p>15 MS. CARUSO: Right. 10:16:47</p> <p>16 Q. If someone was actually going to purchase a</p> <p>17 product, they wouldn't purchase it just from the</p> <p>18 search-result page; right?</p> <p>19 A. You're asking me a technical question or</p> <p>20 are you asking me what consumers think? 10:17:08</p> <p>21 Because it is true that even in some of the</p> <p>22 responses we see here consumers act as though</p> <p>23 clicking on them is somehow directly taking them to</p> <p>24 a purchase place. So that word "direct" is kind of</p> <p>25 an unusual word here. 10:17:25</p>	<p style="text-align: right;">52</p> <p>1 Q. Okay. Whatever phase they might have been 10:18:56</p> <p>2 interested in exploring Rosetta Stone to, the test</p> <p>3 condition limited their ability to pursue to its</p> <p>4 natural conclusion any actual purchasing decisions?</p> <p>5 MR. ROSS: I'm just going to object to the 10:19:28</p> <p>6 form of the question. That's got several</p> <p>7 assumptions built in it as to his past testimony.</p> <p>8 It's also got a lot of vague and ambiguous</p> <p>9 statements.</p> <p>10 To the extent you can answer, go ahead and 10:19:39</p> <p>11 answer if you understand.</p> <p>12 THE WITNESS: Now I forgot. What was the</p> <p>13 question?</p> <p>14 (Whereupon the reporter read the record as</p> <p>15 follows: 10:20:00</p> <p>16 "Question: Whatever phase they might have</p> <p>17 been interested in exploring Rosetta Stone</p> <p>18 to, the test condition limited their</p> <p>19 ability to pursue to its natural conclusion</p> <p>20 any actual purchasing decisions?) 10:19:44</p> <p>21 THE WITNESS: Again, I'll just repeat that</p> <p>22 the way the test is set up, they cannot click on any</p> <p>23 link, and, therefore, they don't ever look at a link</p> <p>24 beyond the search-results page, yes.</p> <p>25 //</p>
<p style="text-align: right;">51</p> <p>1 But I don't have an understanding that on a 10:17:27</p> <p>2 search-results page, that I can put in my credit</p> <p>3 card anywhere on that page and receive back the</p> <p>4 software.</p> <p>5 Q. Right. 10:17:35</p> <p>6 So in the -- going back to the phases of</p> <p>7 making a purchasing decision that you were talking</p> <p>8 about earlier, no one was presented with an</p> <p>9 opportunity to see information -- no one was</p> <p>10 presented with the opportunity to look at the 10:17:54</p> <p>11 product that was being advertised?</p> <p>12 A. I'll just say that you correctly</p> <p>13 understand. You cannot click on any of the links in</p> <p>14 our testing control stimuli and, therefore, you</p> <p>15 never see a page beyond the search-results page, 10:18:14</p> <p>16 whatever that page might or might not have included.</p> <p>17 Q. So irrespective of what was in the mind-set</p> <p>18 of the respondents when they entered in "Rosetta</p> <p>19 Stone," which you said you didn't make any</p> <p>20 assumptions about, just mattered that they could 10:18:40</p> <p>21 read the card and put it in --</p> <p>22 A. And, just to be clear, I also said and that</p> <p>23 they were set up to understand this was about</p> <p>24 searching for information, about learning a language</p> <p>25 and all that as well. 10:18:54</p>	<p style="text-align: right;">53</p> <p>1 BY MS. CARUSO: 10:20:15</p> <p>2 Q. Do you think if a consumer was interested</p> <p>3 in purchasing a product, it would want -- the</p> <p>4 consumer would want to do more than just look at the</p> <p>5 advertisement for a website page? 10:20:26</p> <p>6 MR. ROSS: So I'm going to object on the</p> <p>7 grounds that's calling for speculation as to what's</p> <p>8 in the mind of other people, but go ahead and</p> <p>9 answer.</p> <p>10 THE WITNESS: Sorry, what was that one 10:20:38</p> <p>11 again?</p> <p>12 (Whereupon the reporter read the record as</p> <p>13 follows:</p> <p>14 "Question: Do you think if a consumer was</p> <p>15 interested in purchasing a product, it 10:20:38</p> <p>16 would want -- the consumer would want to do</p> <p>17 more than just look at advertisement for a</p> <p>18 website page?")</p> <p>19 THE WITNESS: I've not done any research to</p> <p>20 say with certainty among some sample of consumers 10:21:00</p> <p>21 who do a search result how often they simply look at</p> <p>22 the search-results page, how often they click</p> <p>23 through to one or more of the links. So I don't</p> <p>24 have a specific understanding of how often those</p> <p>25 things occur. Certainly some consumers may look 10:21:15</p>

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1 beyond the search-results page. 10:21:22
2 BY MS. CARUSO:
3 Q. But that doesn't matter to you in forming
4 your conclusion in this case?
5 A. No. The experiment, as I've conducted it, 10:21:32
6 asked them about the degree to which they're
7 confused as they look at search-results page.
8 Q. Did you attempt to identify what, if
9 anything, about the search-results page caused the
10 confusion that you identified? 10:22:07
11 A. Yes.
12 Q. What did you determine?
13 A. Well, the experiment is set up with a test
14 and a control to measure the degree to which the
15 allegedly infringing part of the search-results 10:22:26
16 page, which in this case is the sponsored links, is
17 causing confusion above what confusion would exist
18 in a noninfringing world, which is the net confusion
19 I've reported.
20 Q. Beyond just generally the links causing 10:22:49
21 confusion, is there anything that you identified
22 about the links, the sponsored links, that led to
23 the confusion you identified in your experiment?
24 I'll give you some examples: the placement
25 on the page, the horizontal-sponsored links you

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1 identified versus the vertical ones, the ranking in 10:23:19
2 the vertical order, the wording of the
3 advertisement, the presence of the Rosetta Stone
4 name in the destination URL, presence of Rosetta,
5 any of its trademarks in the creative text of the 10:23:36
6 advertisement or the title.
7 Did you identify any of those things as
8 being the cause of the confusion you identified?
9 A. If I understand your question, the way this
10 experiment is set up, it tests the allegedly 10:23:49
11 infringing elements of the search-results page
12 against a noninfringing control. And many of the
13 elements you've just described are attributes of the
14 search results in the sponsored area, but the test
15 is designed to test all those things, which are part 10:24:18
16 of the alleged infringement.
17 So all of those are potentially
18 contributing causes to the confusion we find.
19 Q. But your opinion doesn't specify which of
20 those things causes the confusion or which may not 10:24:34
21 cause confusion?
22 MR. ROSS: I just object. That assumes
23 that there is a mono cause, that there is a single
24 cause here, as opposed to multiple causes. So it
25 assumes a fact that is not in evidence. 10:24:47

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1 Go ahead and answer. 10:24:50
2 THE WITNESS: The -- my opinion is what it
3 says, which is that there was net confusion
4 associated with the sponsored links. And at least
5 I've not been asked to develop that opinion for any 10:25:09
6 of the specific attributes that you just listed.
7 BY MS. CARUSO:
8 Q. Do you have any idea how you might go about
9 determining that based on the results of the
10 experiment you conducted? 10:25:28
11 A. I would have to think about how to either
12 use the data as it exists or to design a different
13 study to do what you've asked.
14 Q. Right.
15 When you were discussing the control, you 10:25:47
16 said the purpose was to have something that didn't
17 contain the allegedly infringing elements of the
18 test condition?
19 A. That's correct.
20 Q. And the control contained no sponsored 10:25:58
21 links at all?
22 A. That's correct.
23 Q. So is it your understanding, then, that the
24 presence of any sponsored links, irrespective of
25 what they say or what they're for, cause confusion? 10:26:14

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1 A. As you've worded it, I think I agree that, 10:26:24
2 essentially, the test here is about the whole
3 sponsored region of the search-results page. That's
4 the -- if I understand it correctly, that's the
5 alleged infringement here. 10:26:41
6 Google causes the sponsored links and the
7 elements -- all the elements that you mentioned to
8 occur. And to some extent or another they are
9 contributing to the measured confusion in my test.
10 Q. Exhibit D to your report, first page of 10:27:10
11 that, I believe contains the test stimulus; is that
12 correct?
13 A. I believe that's correct.
14 Q. And it shows two sponsored links at the top
15 of the page; right? 10:27:31
16 A. Yes.
17 Q. Neither of those sponsored links is for
18 RosettaStone.com; correct?
19 A. That's correct.
20 Q. When you were doing your initial search 10:27:44
21 queries for Rosetta Stone results on Google, did
22 you -- do you recall there being any search results
23 in which RosettaStone.com was not a sponsored link?
24 THE WITNESS: Can I hear the question
25 again? 10:28:05

15 (Pages 54 to 57)

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<p style="text-align: right;">58</p> <p>1 (Whereupon the reporter read the record as 10:28:17 2 follows: 3 *Question: When you were doing your 4 initial search queries for Rosetta Stone 5 results on Google, did you – do you recall 10:28:05 6 there being any search results in which 7 RosettaStone.com was not a sponsored 8 link?*) 9 THE WITNESS: I don't specifically recall 10 one way or the other; I just don't remember. 10:28:20 11 BY MS. CARUSO: 12 Q. This particular screenshot, did you print 13 this out? 14 A. I'm not sure what you're asking me. 15 Q. Not the physical copy that's before you but 10:28:37 16 what was attached to your report, was it an actual 17 screenshot from Google's search pages? 18 A. The test stimuli was an actual search 19 result from a search except that I believe it 20 originally had a "Rosetta.com" at the top, which we 10:29:01 21 deleted before we made it the test stimuli. 22 Q. Why did you do that? 23 A. Well, I think in this case the issue was 24 the extent to which there are confusion about links 25 that aren't the company's link, and that the company 10:29:26</p>	<p style="text-align: right;">60</p> <p>1 A. Because, again, Rosetta Stone would not 10:30:53 2 have purchased – would not have spent the money to 3 purchase that link if it wasn't that it was doing it 4 to be above its competitors. 5 Q. Do you think the presence of Rosetta.com in 10:31:06 6 the test condition would have affected the results 7 here? 8 A. I don't know specifically whether it would 9 or would not have. 10 Q. Do you have any prediction? 10:31:23 11 MR. ROSS: You're asking him to guess? 12 MS. CARUSO: I'm asking him if he has any 13 prediction. 14 THE WITNESS: I wouldn't want to speculate 15 on what the results would be. 10:31:32 16 BY MS. CARUSO: 17 Q. Can you say with certainty that it would 18 not have affected the data you collected? 19 A. I'm – I'm testifying I don't know. I have 20 no idea which way it would have affected the results 10:31:47 21 or if it would have affected them at all. It may 22 have produced the same result; I don't know. 23 Q. Whose idea was it to leave the 24 RosettaStone.com-sponsored link out of the test 25 stimulus? 10:32:11</p>
<p style="text-align: right;">59</p> <p>1 itself feels that it has to pay to be at the top of 10:29:30 2 the listing because otherwise its competitors will 3 be at the top of the listing. 4 So the approach we've taken here is to say, 5 well, the RosettaStone.com would not – absent 10:29:45 6 Google's behavior with these sponsored links, would 7 not pay to move itself into the top-sponsored 8 position. So we want to test the position where 9 they are not buying their way to the top of the 10 list. 10:30:04 11 Q. I thought the purpose of the test condition 12 was to test the real-world conditions under which 13 consumers would see the allegedly infringing 14 activity? 15 A. It is with the understanding that Rosetta 10:30:13 16 would not – absent Google's behavior would not have 17 bought itself into that list. 18 Q. I thought the position of Rosetta Stone 19 was: Absent Google's behavior, none of the 20 sponsored links would appear. 10:30:31 21 A. That is their position with regard to the 22 use of their trademark in search. But for testing 23 purposes, we were testing not Rosetta Stone's 24 homepage. 25 Q. And why is that? 10:30:50</p>	<p style="text-align: right;">61</p> <p>1 A. I don't remember that there was a specific 10:32:16 2 author of that concept. It was a similar procedure 3 that we used in the American Airlines case, so we 4 already had this understanding that this was an 5 issue; so we used the same logic when we did these 10:32:30 6 tests. 7 Q. Going back to my original question on this 8 topic, you said this was an actual search-result 9 page except for the removal of the RosettaStone.com 10 link; is that right? 10:32:53 11 A. That's my understanding, yes. 12 Q. How did you come to obtain this particular 13 page? 14 A. One of my consultants, Sarah – I'll say 15 that I generally understood that Rosetta had some 10:33:12 16 kind of monitoring program going on, so they had 17 some cache of screenshots. Sarah reviewed a variety 18 of those screenshots along the lines that we talked 19 about earlier, the attributes, and she is the one 20 that actually gave me this one to review. So – and 10:33:29 21 it was my understanding all of the ones that we 22 looked at were actual screenshots that had been 23 captured in whatever this monitoring process was. 24 Q. So you didn't actually print out the page 25 that led to this screenshot? 10:33:46</p>

16 (Pages 58 to 61)

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62	<p>1 A. That's not my understanding. It's my 10:33:49 2 understanding it came from this cache.</p> <p>3 Q. Do you have an understanding of when the 4 screenshot was printed?</p> <p>5 A. Well, no, I don't have a specific 10:34:06 6 understanding of the date, other than I have a 7 general understanding it was, you know, within the 8 last short-ish period of time, meaning the last year 9 or two. I don't know the exact date.</p> <p>10 Q. It was before April of 2009; right? 10:34:24</p> <p>11 A. Yes, and certainly it was before April of 12 2009.</p> <p>13 Q. After completing the experiment, have you 14 since gone to Google's website and performed 15 searches for Rosetta Stone? 10:34:45</p> <p>16 A. I don't recall that I specifically have.</p> <p>17 Q. Has anyone on your staff?</p> <p>18 A. I don't know. I have not asked them if 19 they did or they did not.</p> <p>20 Q. Have you discussed with anyone since 10:34:59 21 concluding the experiment what search-result pages 22 for Rosetta Stone look like?</p> <p>23 A. No.</p> <p>24 Q. Are you aware that Google changed its 25 policy regarding the use of trademarks in connection 10:35:19</p>	64	<p>1 A. No, I don't even have that. 10:36:33</p> <p>2 Q. Would it affect the conclusion reflected in 3 your report if any of these types of sponsored links 4 displayed in this test stimulus no longer would 5 appear on Google's search-result pages for Rosetta 10:37:12 6 Stone queries?</p> <p>7 MR. ROSS: I'm going to just object to the 8 phrase "these types of sponsored links" since it's 9 unclear to me what that means.</p> <p>10 THE WITNESS: Can I ask you to repeat the 10:37:26 11 question, then?</p> <p>12 BY MS. CARUSO:</p> <p>13 Q. Sure.</p> <p>14 I'll take a step back and ask -- remind you 15 of an earlier discussion we had about choosing types 10:37:35 16 of sponsored links that were typical or the kind of 17 sponsored links that you saw when you did the 18 preliminary searches.</p> <p>19 Do you recall us talking about those?</p> <p>20 MR. ROSS: I'm just going to object because 10:37:50 21 he specifically said that he doesn't use the word 22 "typical." So that misstates his prior testimony.</p> <p>23 MS. CARUSO: I hate to engage in lawyer 24 colloquy, but it's my understanding that objections 25 are limited to the basis for the objection and 10:38:04</p>
63	<p>1 with sponsored links in June of 2009? 10:35:23</p> <p>2 A. I don't want to testify that I specifically 3 understand that. I do recall some general 4 press-release-type stuff that they were making a 5 change, but that's all I really know about that. 10:35:40</p> <p>6 Q. The press-release stuff, how did that come 7 to your attention?</p> <p>8 A. I believe through one of the intellectual 9 property tracking services that NERA subscribes to, 10 but I don't recall specifically. 10:35:57</p> <p>11 Q. Did you discuss that change with Rosetta 12 Stone?</p> <p>13 A. No.</p> <p>14 Q. Or Rosetta Stone's lawyers?</p> <p>15 A. No. 10:36:03</p> <p>16 Q. Do you have any understanding of whether 17 the types of sponsored links that are reflected in 18 the test stimulus would be displayed under Google's 19 new policy?</p> <p>20 A. I don't have a specific understanding of 10:36:21 21 how the links we used would have been the same or 22 would have been different from -- under the new 23 policy.</p> <p>24 Q. Do you have a general understanding of how 25 they would be different? 10:36:32</p>	65	<p>1 speaking objections are not -- 10:38:07</p> <p>2 MR. ROSS: It wasn't a speaking objection. 3 That was an objection -- I am required under the 4 rules of the Eastern District of Virginia to 5 identify my objection in such a way that you can 10:38:14 6 cure it so that you cannot complain at a later point 7 of time you didn't know what I was complaining of. 8 And I limited it to that. I told you exactly what 9 you needed to fix in order to have the question go 10 forward. Doesn't mean you have to fix it, though. 10:38:29</p> <p>11 BY MS. CARUSO:</p> <p>12 Q. Mr. Van Liere, let's look at -- sorry, Dr. 13 Van Liere, do you -- if we look at the sponsored 14 links on Exhibit D, the top one is for Amazon.com. 15 Do you have an understanding of what Amazon.com 10:39:00 16 does?</p> <p>17 A. I have a general understanding.</p> <p>18 Q. Have you ever been to Amazon.com's web 19 page?</p> <p>20 A. I believe I have. I don't remember a 10:39:12 21 specific instance of it, but...</p> <p>22 Q. Do you know whether Amazon.com sells 23 Rosetta Stone products?</p> <p>24 A. I don't have a specific understanding that 25 they do or they don't. 10:39:25</p>

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1 Q. In connection with your experiment, did you 10:39:30
2 ever look at -- you or anyone on your staff, to your
3 knowledge, look at Amazon.com's page to determine if
4 they sell Rosetta Stone's products?
5 A. I don't recall that we looked up each of 10:39:47
6 these links; I don't recall that.
7 Q. The next -- before we move on, earlier we
8 talked about types of sponsored links and I believe
9 one category you identified was competitors.
10 Do you recall that? 10:40:16
11 MR. ROSS: Just object again as misstating
12 his earlier testimony.
13 THE WITNESS: I understand that some kinds
14 of sponsored links are competitors.
15 BY MS. CARUSO: 10:40:27
16 Q. Do you understand Amazon.com to be a
17 competitor?
18 A. I'm not sure technically in what regard you
19 mean.
20 Q. I don't mean technically in any regard 10:40:43
21 other than the regard in which you mentioned
22 competitors earlier this morning.
23 A. Well, I have a general understanding that
24 Rosetta does not authorize or approve or allow
25 people who resell its product to buy its keyword. 10:41:08

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1 So in that sense, it would not -- it would appear 10:41:13
2 here as a competitor to RosettaStone.com's site.
3 So if you're asking me does
4 Amazon.com/Rosetta Stone compete with
5 RosettaStone.com, I would say my general 10:41:31
6 understanding is that yes, because Rosetta Stone has
7 asked them not to buy the keyword. But do they sell
8 Rosetta Stone's product, if they do, then, you know,
9 they are a reseller. So I understand it that way.
10 Q. What's the basis of your understanding that 10:41:45
11 Rosetta Stone has asked Amazon not to use its
12 keywords?
13 A. I believe in the original conversations
14 about this case, you know, when I first -- I don't
15 recall if it was in a specific conversation with a 10:41:58
16 specific lawyer or part of that one group call I was
17 on, but that I -- I asked are these -- any of these
18 people authorized to buy your keyword, and it was my
19 understanding that no, they were not.
20 By "keyword," I mean your trademark, 10:42:14
21 Rosetta Stone.
22 Q. The next sponsored link is for
23 CouponCactus.com. Do you have an understanding of
24 what CouponCactus.com is?
25 A. No, I don't have an understanding. 10:42:32

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1 Q. Do you have a general understanding? 10:42:35
2 A. No, other than it's a site that bought
3 Rosetta Stone's trademark and appears as a sponsored
4 link here.
5 Q. Are you familiar with the term 10:42:46
6 "affiliates"?
7 A. I've heard that word.
8 Q. Have you heard that word in connection with
9 this lawsuit?
10 A. I don't believe I have, no. 10:43:00
11 Q. Have you heard of companies that pay other
12 companies to drive traffic to their website?
13 A. I have a general understanding of the
14 concept I think you're referring to.
15 Q. Do you know whether any of the sponsored 10:43:22
16 links in these stress stimulus are to affiliates?
17 MR. ROSS: Affiliates of RosettaStone.com?
18 MS. CARUSO: Yes.
19 THE WITNESS: I don't have a specific
20 understanding of what any of this particular group's 10:43:37
21 sponsored links is to Rosetta Stone, other than I
22 have a general understanding they should not have
23 purchased Rosetta Stone's trademark and appeared on
24 this page.
25 //

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1 BY MS. CARUSO: 10:43:51
2 Q. So you don't know whether Rosetta Stone
3 products are available for sale on any of these
4 pages, these sponsored links, through these
5 sponsored links? 10:44:09
6 A. Yes, that's correct. I don't specifically
7 know for each link whether it says the product or
8 doesn't or whether it sells competing products or
9 not.
10 Q. And that's not relevant to your conclusion 10:44:19
11 in this case?
12 A. No, not in this case.
13 Q. If you were to learn that of the sponsored
14 links that appear in this test stimulus only one of
15 them currently would qualify to be returned as a 10:44:46
16 search-results-sponsored link now, would that affect
17 your opinion?
18 A. I don't know if it would or would not.
19 Q. Would you need more information to make
20 that determination? 10:45:12
21 A. Certainly that would be one thing I would
22 want, is more information.
23 Q. What else would you want to know to make
24 that determination?
25 A. I'm not certain that I understand. The 10:45:21

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1 test and control here is not over any one of these 10:45:25
2 individual links, per se. This is not a lawsuit
3 against one of the links. It's a lawsuit about the
4 information that generally appears in the sponsored
5 area, yes. 10:45:42
6 Q. Mm-hmm.
7 A. And so we've chosen a test stimuli that I
8 think is generally reflective of the search results
9 that we understood existed. And you're describing
10 to me a situation where somehow those are materially 10:45:57
11 different now than they would have been, but I have
12 not -- I have no evidence of that. I have just your
13 big general description of it.
14 So I really don't know how I would judge
15 that. 10:46:11
16 Q. Okay. I'll try to have this not be a
17 vague, general description.
18 If the only sponsored link that appeared in
19 the test stimulus was an Amazon.com-sponsored link,
20 do you think that would have affected the results of 10:46:32
21 your experiment?
22 A. Well, I can't say with a certainty, but,
23 again, this goes to the issue of how many links
24 there were. And I guess what you're describing to
25 me is a situation where there is just one sponsored 10:46:50

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1 link. 10:46:53
2 Is that what you're describing?
3 Q. For purposes of this question, yes.
4 A. And we chose this test stimuli because that
5 is not the circumstance that we generally found, one 10:47:01
6 sponsored link. We found that generally there was 2
7 couple on the top and several on the side.
8 So I don't specifically know how that
9 change would affect the net confusion that we found.
10 I don't have a specific understanding. 10:47:17
11 Q. So is it your understanding that no matter
12 what these ads say, the very fact that there are
13 ads, that's what is causing the confusion?
14 A. I believe, as we talked earlier, there is
15 many attributes to this L-shaped-sponsored area. 10:47:33
16 It's placement, the color of it, the fonts that are
17 in it, the -- generally the content of the ads. All
18 those attributes are part of what Google does to
19 display that section. And the confusion I've said
20 that we've identified is associated with those -- 10:47:56
21 that section, not with any just single element of
22 those attributes that you have just described.
23 Q. Is there anything about the data that you
24 collected that supports that conclusion; that the
25 confusion is associated with the collection of all 10:48:15

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1 of those elements? 10:48:18
2 A. I guess I'm really not sure what you're
3 asking me. All the test is designed to do is
4 measure the net confusion associated with that set
5 of attributes or characteristics of that area. 10:48:40
6 Q. If you look at the data that's attached in
7 Exhibit E -- by the way, have you --
8 MR. ROSS: Excuse me.
9 BY MS. CARUSO:
10 Q. -- attempted to code in any way the 10:49:03
11 open-end responses to the data?
12 A. No formal coding exercise was done with
13 these verbatims.
14 Q. Are you aware of any informal coding
15 exercise that was done with them? 10:49:28
16 A. No, not as -- other than -- by that, I just
17 simply mean my looking at them and getting a general
18 understanding of the nature of the types of things
19 that people brought up. So in that sense, I suppose
20 there is mental coding. 10:49:45
21 Q. Was there anything in the responses
22 themselves, these open-end responses, found on pages
23 1 through 234 of this Exhibit E?
24 MR. ROSS: Page what again?
25 //

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1 BY MS. CARUSO: 10:50:08
2 Q. There is two parts to Exhibit E. There is
3 an 80-page section and then 234-page section. So
4 what I'm talking about right now is the 234-page
5 section that has the open-end responses. 10:50:21
6 Was there anything in any of these
7 responses that affected your calculation of
8 confusion?
9 MR. ROSS: Do you know what she is
10 referring to in there? 10:50:34
11 THE WITNESS: I do. She is referring to
12 the last 200 pages. That's this section.
13 MR. ROSS: This section?
14 THE WITNESS: Right.
15 Sorry, what was the question? 10:50:44
16 BY MS. CARUSO:
17 Q. Did any of the data in this 234-page
18 section affect your calculation of confusion?
19 A. No, for this study I did not rely on the
20 verbatims to adjust or contribute to the calculation 10:50:57
21 of the confusion.
22 Q. What -- I assume that the data that's
23 reflected here in this report resides electronically
24 somewhere in your office; is that correct?
25 A. I would have that understanding. 10:51:27

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1 Q. Do you have an understanding of whether it 10:51:29
 2 is in an Excel spreadsheet?
 3 A. I generally believe that's the form it's
 4 in.
 5 Q. All right. 10:51:39
 6 A. I also generally have an understanding that
 7 it's two sheets. That's why it's two data sets. It
 8 came to us as two separate things, so just to be
 9 clear.
 10 Q. Correct. Okay. 10:51:52
 11 We requested an electronic copy of this
 12 electronically. Is that something -- I assume that
 13 was not brought today; is that right?
 14 A. Yeah, I didn't have an understanding I was
 15 supposed to have an electronic version with me. 10:52:08
 16 Q. Okay.
 17 MS. CARUSO: I'm going to mark as Exhibit 3
 18 the notice of deposition.
 19 MR. ROSS: Thank you.
 20 (Deposition Exhibit No. 3 was marked for 10:52:45
 21 identification)
 22 BY MS. CARUSO:
 23 Q. Dr. Van Liere, have you seen Exhibit 3
 24 before?
 25 A. I don't believe I've ever seen this. 10:53:18

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1 Q. If you turn to page 4 of this notice, Item 10:53:25
 2 3 requests "electronic versions of all data
 3 collected by you and included as data in your expert
 4 report."
 5 Could we get a copy of that electronic 10:53:44
 6 data?
 7 A. I believe so. I don't understand legally
 8 how that works, but I understand we have an
 9 electronic spreadsheet.
 10 Q. All right. Great. Thank you. 10:53:56
 11 Given that none of the verbatims -- you
 12 didn't adjust the calculation for any of the
 13 verbatims, why were they asked?
 14 A. Well, I think that in these kinds of cases
 15 there is a couple of reasons. One, the -- it is 10:54:22
 16 frequently suggested that you ask why as part of
 17 these cases. And so, as a general understanding,
 18 lawyers often expect to see it, the courts often
 19 expect to see it.
 20 So we do it in part so that the court has 10:54:44
 21 comfort that we have done what they often ask for
 22 and it's -- it's there. Second, it does provide me
 23 with a general understanding that respondents appear
 24 to be reasonably understanding the exercise; that,
 25 you know, to the extent that they would give us 10:55:04

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1 verbatim responses that were suggested, they just 10:55:07
 2 had no clue about what we were trying to do, it
 3 would raise concern for us about the overall
 4 design of the research.
 5 So I think there is a number of reasons to 10:55:18
 6 include that question; however, in that case, we
 7 don't use it to actually adjust confusion because of
 8 the way in which we've designed the experiment.
 9 Q. For each respondent that was counted as
 10 confused, did you check to see that the respondent 10:55:43
 11 had provided some reason for his or her response?
 12 A. We generally looked at that. I don't
 13 recall that we ever did a thing to make sure that
 14 everyone answered the why question for every link
 15 for which they -- we eventually count them as 10:56:03
 16 confused.
 17 I don't recall that we ever -- I didn't --
 18 I did not specifically do that specific check. But
 19 they were asked the question. We know that they
 20 were asked it because of the way the programming in 10:56:17
 21 the survey worked.
 22 Q. But it didn't matter if they answered it or
 23 not?
 24 A. Yeah, well, first of all, I don't have an
 25 understanding that there was any significant number 10:56:29

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1 of people that said a link was either a Rosetta 10:56:31
 2 Stone company site or endorsed by Rosetta, then we
 3 asked the why and did not give an answer. I
 4 don't -- I don't believe there is very much of that
 5 in the data, if it's in there at all. But, 10:56:44
 6 secondly, for purposes of calculating confusion, we
 7 did not use the verbatims.
 8 Q. Going back to the test stimulus, Exhibit D.
 9 You were talking earlier about the idea that in your
 10 opinion it's all of the sponsored links together 10:57:09
 11 that cause confusion, not -- you didn't look at it
 12 on an ad-by-ad basis; is that correct?
 13 MR. ROSS: Just going to object that
 14 misstates his prior testimony.
 15 BY MS. CARUSO: 10:57:23
 16 Q. Dr. Van Liere, did you look at confusion on
 17 an ad-by-ad basis?
 18 A. No, I did not calculate confusion on an
 19 ad-by-ad basis.
 20 Q. If any one of these ads showed a very low 10:57:45
 21 confusion rate when looked at individually, for
 22 example, zero or one percent, would that affect your
 23 conclusion in any way?
 24 A. I believe I've stated, and I want to be
 25 clear about the nature of the experiment here. The 10:58:07

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1 experiment is testing the degree to which people are 10:58:09
 2 confused about anything that appeared in this
 3 sponsored area, in this case the six links. And so
 4 cumulatively they all contribute to the confusion
 5 associated with the sponsored links. 10:58:24
 6 So some of those links may have had more or
 7 less on an individual basis, but the test was not
 8 about individual links; it was about the cumulative
 9 confusion and not confusion associated with the
 10 sponsored links. 10:58:40
 11 Q. And so if a respondent chose any one of
 12 these sponsored links in response to the questions,
 13 he or she was counted as confused?
 14 A. I think I agree with what you said, but
 15 just to be specific about the calculation, in the 10:59:01
 16 test, you were counted as confused if you thought
 17 any of these six sold Rosetta Stone company products
 18 and/or believed that that site then took you to a
 19 Rosetta Stone company website or was endorsed by
 20 Rosetta Stone. 10:59:23
 21 Q. Okay. And there were six opportunities in
 22 the test condition for someone to be confused on any
 23 given question?
 24 A. Yes.
 25 Q. If there had been eight different 10:59:40

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1 opportunities in any specific question for someone 10:59:44
 2 to be confused, would you expect there to be a
 3 higher confusion number?
 4 A. I don't want to speculate what would happen
 5 if we had used four or two or eight or nine. We 10:59:56
 6 chose six because this was generally reflective of
 7 what we saw in the other kinds of searches, as
 8 opposed to what we said before, you know, just one
 9 or two versus ten or fifteen.
 10 But I don't know how the confusion would 11:00:13
 11 have moved around based simply on the count of them,
 12 which is the attribute that you're currently
 13 referring to.
 14 Q. In all your work as an expert, have you
 15 encountered any set of facts by which the more 11:00:28
 16 opportunity someone is given to express confusion,
 17 the more likely it is they will express confusion?
 18 A. I don't think I have seen any research of
 19 that character.
 20 Q. Okay. Looking back at the control, the 11:00:48
 21 next page of Exhibit D, this was the control that
 22 was used in your experiment, right?
 23 A. Yes.
 24 Q. How big of a computer screen was used in
 25 the experiments? 11:01:11

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1 A. All the facilities received the same 11:01:14
 2 computer and it was a laptop. I forget the exact
 3 size of the screen.
 4 Q. The control condition, how did you come up
 5 with the actual page that was shown to people? 11:01:32
 6 A. Well, the set of organic listings that are
 7 on this page should be identical to the listings on
 8 the test stimuli, and then they simply were rendered
 9 to the size of the page that Google would have had
 10 if it had been these. So it just looks like a 11:01:59
 11 Google search result.
 12 And just to be clear, these are printed
 13 portrait, but this isn't the dimensions they show up
 14 on the computer. The computer renders them just
 15 like a Google search would. 11:02:15
 16 Q. Okay.
 17 THE WITNESS: You know what? I wonder if
 18 we can take a quick break.
 19 MS. CARUSO: That's fine.
 20 THE WITNESS: I've got a morning's worth of 11:02:35
 21 coffee.
 22 THE VIDEOGRAPHER: This is the end of Disc
 23 No. 1 in the deposition of Mr. Ken Van Liere. We
 24 have been on the record 1 hour, 56 minutes. The
 25 time is 11:02 a.m. and we are off the record. 11:02:47

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1 (Recess taken) 11:02:49
 2 THE VIDEOGRAPHER: This is the beginning of
 3 Disc No. 2 in the deposition of Mr. Kent Van Liere.
 4 The time is 11:12 a.m. and we are back on the
 5 record. 11:12:06
 6 BY MS. CARUSO:
 7 Q. Looking at the control condition page, the
 8 second page of Exhibit D, is it your understanding
 9 that all of these natural links appear together on
 10 an actual search-result page? 11:12:26
 11 A. Yes.
 12 Q. In the course of any of the searches that
 13 you have done, not just for Rosetta Stone but any
 14 Google searches, have you ever observed two
 15 Wikipedia results on the same search page? 11:12:56
 16 A. I don't recall a specific instance where it
 17 has happened, but I believe I have seen other
 18 situations where the same word, you know, produces
 19 two different parts of the entry in Wikipedia.
 20 Q. Looking at these natural links, do you have 11:13:33
 21 an understanding of what information is on the
 22 websites that any of them link to?
 23 A. Not specifically. I mean, obviously I have
 24 the content that's on the links as they exist here
 25 to look at, but I did not go to each one of these 11:13:55

21 (Pages 78 to 81)

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1 links to understand it more. 11:13:58
2 Q. So you didn't -- did you go to the
3 Wikipedia link that says, "Rosetta Stone Software,"
4 the third link down?
5 A. I may have. I don't specifically recall 11:14:15
6 that I did or didn't, but -- so that's my answer.
7 Q. Do you recall ever looking at a Wikipedia
8 entry for any topic before?
9 A. I think I've been on Wikipedia a few times.
10 Q. Have you ever been presented with the 11:14:41
11 opportunity to purchase any products on Wikipedia?
12 A. I don't recall specifically if -- you know,
13 how purchase works relative to a commercial
14 Wikipedia entry.
15 Q. Do you have an understanding today as to 11:14:57
16 whether clicking on the Wikipedia entry for Rosetta
17 Stone software, that web page would present an
18 opportunity to purchase Rosetta Stone software?
19 A. Well, as you say the word "opportunity" --
20 I'll just say again, I know we had consumers who 11:15:22
21 think if we go there it would provide a link to
22 RosettaStone.com, so therefore they could purchase
23 the product sort of logic.
24 So I don't know exactly what you're asking,
25 but I have an understanding some consumers may think 11:15:34

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1 that 11:15:38
2 Q. Right. But I'm asking as the designer of
3 the survey, do you have an understanding of whether
4 Rosetta Stone software was in fact available for
5 purchase on Wikipedia? 11:15:47
6 A. I don't have a specific understanding one
7 way or another about how purchasing Rosetta Stone
8 software would work relative to the Wikipedia entry,
9 I don't know.
10 Q. I understand. 11:16:07
11 I'm not asking, though, about how it works.
12 I'm just asking if you know if Rosetta Stone
13 software could be purchased on the Wikipedia page.
14 A. I'm trying not to be vague.
15 Q. I'll ask a different question. 11:16:26
16 To your knowledge, does the Wikipedia page
17 offer the opportunity to purchase from the Wikipedia
18 website Rosetta Stone software?
19 A. I don't know specifically.
20 Q. How did you calculate confusion for the 11:16:47
21 control?
22 A. So, essentially, the respondent looks at
23 the control screenshot and then they're asked the
24 three questions that are in the study. So if they
25 thought -- first they were asked which sites do they 11:17:01

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1 think sell Wikipedia -- sell Rosetta Stone software, 11:17:07
2 and so they identify some subset of these. And then
3 that subset, they're asked do they think that is a
4 Rosetta Stone company website and do they think
5 those links are endorsed by. 11:17:24
6 You were counted as confused in that
7 exercise if you thought that any of the links other
8 than the first RosettaStone.com was -- first, sold
9 the product, and then was the Rosetta Stone company
10 website. 11:17:43
11 Q. Okay.
12 A. And you were counted as confused on
13 "endorsed" if you thought any of the other sites
14 except Rosetta Stone software was a site that sold
15 the product and/or was endorsed by. 11:18:00
16 Q. Okay.
17 A. So that is how we did the calculation.
18 Q. So it's your understanding that the Rosetta
19 Stone software Wikipedia site is endorsed by Rosetta
20 Stone? 11:18:17
21 A. That was my understanding.
22 Q. What's the basis of that understanding?
23 A. The -- an issue that came up -- has come up
24 before and came up in this case is whether Rosetta
25 Stone, the company, contributes to the content and 11:18:30

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1 reviews the content of the Wikipedia entry about 11:18:34
2 them, and that they do that and, therefore,
3 essentially, they are endorsing the content in the
4 sense that they are monitoring it and contributing
5 to it. 11:18:51
6 So we've treated that as a site that they
7 endorse for purposes of calculating confusion.
8 Q. Is that what "endorse" means to you,
9 contributes to and monitors and reviews?
10 A. In that interest, in that context, it is 11:19:12
11 essentially that they are approving of it. And so
12 in that sense, endorsement generally includes a
13 notion of supporting or approving another party's
14 work or activity, whatever it is. That's my general
15 understanding of "endorsement." 11:19:36
16 Q. So your general understanding of
17 "endorsement" is that a company supports or approves
18 another party's products?
19 A. Products, activities, whatever the specific
20 type of activity that's being asked about. 11:20:08
21 Q. Did any other respondents ask what
22 "endorsed" means?
23 A. I don't recall that coming up as an issue.
24 A concern about that came up in the American
25 Airlines case as well, and so we attended to it 11:20:49

<p style="text-align: right;">86</p> <p>1 make sure that there wasn't a concern with 11:20:53 2 endorsement and that -- you know, people were 3 saying, "Well, what do you mean?" And I don't have 4 any reports that that was any kind of an issue. 5 People did the exercise. You have seen the answers 11:21:06 6 they gave and they seem to generally have understood 7 it. 8 Q. When you say you attended to the issue in 9 American Airlines, how did the issue present itself 10 there? 11:21:19 11 A. Well, I think in that case, as well, the 12 question was raised: "What's meant by 13 "endorsement"?" 14 Q. Right. 15 A. And so we've in this case made sure we also 11:21:28 16 were pretty sure consumers had a reasonable 17 understanding what endorsement was and attended to 18 whether we heard people saying, Well, I don't 19 understand what that word means, and we never had 20 that feedback. So I don't have a general 11:21:41 21 understanding that people didn't understand the word 22 in the question. 23 Q. Were the respondents invited to ask 24 questions of the interviewers if they didn't 25 understand any of the questions that they were 11:21:53</p>	<p style="text-align: right;">88</p> <p>1 Q. Right. 11:23:17 2 A. -- and then said it was endorsed by, they 3 were not counted as confused. 4 Q. If the Wikipedia site doesn't actually sell 5 Rosetta Stone software, weren't the respondents in 11:23:29 6 fact confused? 7 A. I'm trying to think through what you have 8 just asked me, so let me just think for a second. 9 I don't know with a certainty if the 10 Rosetta Stone software site sells or doesn't sell 11:24:15 11 it, but the -- if a respondent believed that that 12 was one of the sites that sold it and then we asked 13 them "And does Rosetta Stone endorse it," and they 14 said, "Yes, Rosetta Stone endorsed it," they were 15 not considered confused. 11:24:34 16 Q. But if the site doesn't in fact sell it, 17 their belief that it was sold was mistaken, right? 18 A. If the consumer understood it sold the 19 product -- well, I want to be careful with that 20 interpretation because -- you're saying to assume 11:25:25 21 that they do not sell the product and a consumer 22 says they do -- it does sell the product -- 23 Q. Right. 24 A. -- are they confused? 25 Q. Yes. 11:25:56</p>
<p style="text-align: right;">87</p> <p>1 asked? 11:21:55 2 A. I don't recall specifically if there is a 3 probe for that or a statement for that in the 4 interview instructions, but certainly to the extent 5 that they don't understand the questions, 11:22:05 6 respondents will often say that. So if we were 7 going to -- if it was major problem, we would have 8 heard about it. 9 Q. Okay. If someone had asked, "What do you 10 mean by 'endorsement,'" what would they have been 11:22:21 11 told? 12 MR. ROSS: I'm going to object that that's 13 a hypothetical question, if I heard it right. 14 THE WITNESS: I'd have to look back and see 15 if we have a specific wording in these instructions 11:22:35 16 for that. So if you want me to, I'll look back. 17 BY MS. CARUSO: 18 Q. You could look back at lunch perhaps. 19 A. Okay. 20 Q. So in counting confusion, if someone said 11:22:57 21 that the Rosetta Stone software site was endorsed by 22 Rosetta Stone, they were not count as confused; 23 correct? 24 A. Yeah, just to be clear, if they said it 25 sold the product -- 11:23:15</p>	<p style="text-align: right;">89</p> <p>1 A. By the definition as we used it in this 11:25:57 2 study, they were not confused if they thought it was 3 endorsed by. 4 I guess I would have to think about whether 5 the way in which you've formulated it, whether I 11:26:09 6 would count that as confusion or not. I'd have to 7 think about that. 8 Q. When you say the way that confusion was 9 defined in this study they weren't confused -- 10 A. Well, let me just clarify -- 11:26:27 11 Q. Yes. 12 A. -- one part of why this is concerning me. 13 Q. Yes. 14 A. In the test stimuli, we don't count you as 15 confused if you believe one of these sponsored links 11:26:37 16 sells the product. We don't use that as the basis. 17 So we would not want to use that as the basis in the 18 control. Even though, just as you described, in 19 fact, some of these may not sell the product. So 20 from a point of view of creating net confusion, we 11:26:56 21 want to use the same rule in the test as we use in 22 the control. 23 So if I was to use the rule as you just 24 described it in the control, then I should have 25 calculated confusion in the test at the -- on the 11:27:11</p>

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1 first question, rather than using it just as a 11:27:18
 2 filter question.
 3 Q. Mm-hmm.
 4 A. So that's what's causing me an issue about
 5 thinking it through. It's not just simply the kind 11:27:25
 6 of what you have said about this one link and what
 7 makes sense or not. It has to do with the design of
 8 the whole experiment.
 9 Q. What was the purpose in asking the filter
 10 question? 11:27:38
 11 A. We were interested in having them focus on
 12 that set of links that they thought had a commercial
 13 interest in them as opposed to artifact sites, for
 14 example.
 15 Q. In the artifact sites you refer to the 11:28:02
 16 sites dealing with the actual Rosetta Stone?
 17 A. Yeah, things like that.
 18 Q. Right.
 19 Because Rosetta Stone is not just a
 20 trademark run by the plaintiff, it is a word that 11:28:13
 21 has independent meaning in the rest of the world,
 22 correct?
 23 A. Well, Rosetta Stone as thing is a thing.
 24 Q. Right.
 25 A. There is a thing called the "Rosetta 11:28:25

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1 Stone," yes. 11:28:27
 2 Q. In these natural links, you didn't -- for
 3 purposes of the experiment, you weren't concerned
 4 with any -- identifying as infringing any of the
 5 natural links; right? 11:28:45
 6 A. That's correct, the natural or organic
 7 listings are not at issue in this case.
 8 Q. All right.
 9 A. That's my understanding.
 10 Q. Does it appear to you that any of the other 11:29:11
 11 natural links are for commercial products other than
 12 the top link for Rosetta Stone?
 13 A. Well, you're asking me as though what I
 14 perceive and what mattered is what did the consumers
 15 in the test perceive, and certainly many did think 11:29:37
 16 some of these sold the product.
 17 Q. When you say that they thought that these
 18 sites sold the product, you mean the Rosetta Stone
 19 language software?
 20 A. Yes, their responses to that first question 11:29:58
 21 in the sequence.
 22 Q. Right.
 23 So if, for example, this -- one, two,
 24 three, four, five -- six links down, right in the
 25 middle, there is "Rosetta Stone for UNIX." And 11:30:20

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1 that's described: "A Sysadmin's Unixersal 11:30:24
 2 Translator (Rosetta Stone) or what do they call that
 3 in this world? Contributions and corrections
 4 gratefully accepted."
 5 If that same link appeared in the 11:30:41
 6 advertise- -- in the sponsored-link section, you
 7 would be interested in determining whether or not it
 8 was causing confusion; right?
 9 A. Well, you're asking me about a specific
 10 link and I'm not sure how I would answer that. The 11:31:07
 11 test is set up to compare the sponsored-link area --
 12 the confusion generated by the sponsored-link
 13 area --
 14 Q. Right.
 15 A. -- using the question sequence we've asked, 11:31:17
 16 and netting out of it the confusion that is created
 17 by the nature of the experiment we did, by people's
 18 general misunderstandings about the web and how it
 19 works, what listings are or aren't, all these
 20 various attributes that are not part of the action 11:31:36
 21 and, therefore, are not considered infringing
 22 So just as we talked about there is many
 23 elements of the sponsored area that might be
 24 contributing to why a person was confused, the same
 25 would be true in the organic listings. You know, 11:31:49

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1 some people see the word "Rosetta Stone" in all the 11:31:53
 2 listings and that has an impact. Some maybe respond
 3 to the order. Some may respond to the text or URLs.
 4 All those things you mentioned before about here
 5 (indicating) are at work here (indicating), but here 11:32:07
 6 they're noninfringing.
 7 So what we're trying to measure is the
 8 confusion associated with a noninfringing word,
 9 which is what this does, and subtract that with the
 10 infringing part of the control. 11:32:26
 11 And there was, as you know from the report,
 12 significant confusion in both pieces; so it's not
 13 that this generated no confusion.
 14 Q. Right.
 15 A. There is still confusion as we asked the 11:32:36
 16 questions.
 17 Q. Right.
 18 A. So we're netting out that general confusion
 19 people have, which came for a variety of reasons, no
 20 one of which I understand I'm supposed to 11:32:44
 21 specifically sort out. It's the general confusion
 22 from all those attributes in a noninfringing world
 23 compared to the confusion with the allegedly
 24 infringing part of the world.
 25 Q. Have you compared the sponsored links that 11:32:59

94	<p>1 appeared to the natural links in the test condition 11:33:03</p> <p>2 to determine if there were any other attributes</p> <p>3 other than their placement as sponsored links that</p> <p>4 might account for the level of confusion between the</p> <p>5 testing control conditions? 11:33:17</p> <p>6 MR. ROSS: Could you just read that back</p> <p>7 again?</p> <p>8 (Whereupon the reporter read the record as</p> <p>9 follows:</p> <p>10 "Question: Have you compared the sponsored 11:33:20</p> <p>11 links that appeared to the natural links in</p> <p>12 the test condition to determine if there</p> <p>13 were any other attributes other than their</p> <p>14 placement as sponsored links that might</p> <p>15 account for the level of confusion between 11:33:20</p> <p>16 testing control conditions?")</p> <p>17 MS. CARUSO: I'll ask a different question.</p> <p>18 THE WITNESS: Okay.</p> <p>19 BY MS. CARUSO:</p> <p>20 Q. Comparing the natural links to the 11:33:48</p> <p>21 sponsored links, have you looked to see whether</p> <p>22 there are any attributes of the sponsored link, the</p> <p>23 content of the sponsored links, that differs from</p> <p>24 the content or any of the other attributes of the</p> <p>25 natural links that might account for the confusion, 11:34:16</p>	96	<p>1 attention to the sponsored area. That we feel is 11:35:42</p> <p>2 inappropriate.</p> <p>3 So they don't know that we care about</p> <p>4 sponsored. They just know we're interested in what</p> <p>5 they think about that whole page. So we collect the 11:35:52</p> <p>6 data on the organic listings, which you have, and</p> <p>7 then we do it here.</p> <p>8 But we wouldn't do anything to look at that</p> <p>9 data relative to the data in the control. Is that</p> <p>10 what you're asking me? No. Again, I'm confused -- 11:36:08</p> <p>11 Q. No.</p> <p>12 A. -- about what you're really asking me, so</p> <p>13 I'm sorry.</p> <p>14 Q. No, I'm not asking about the data. I'm</p> <p>15 asking about just looking at the links themselves, 11:36:17</p> <p>16 comparing the organic links to the sponsored links.</p> <p>17 It's my understanding that what you've tried to do</p> <p>18 is have a control such that the only thing that will</p> <p>19 drive confusion, net confusion, will be the</p> <p>20 placement of the sponsored links. 11:36:49</p> <p>21 A. Well, just to be clear, it's not just</p> <p>22 placement --</p> <p>23 Q. And appearance --</p> <p>24 A. -- all the elements of sponsoredness --</p> <p>25 Q. -- font sizes -- 11:36:55</p>
95	<p>1 the net confusion that you identified, aside from 11:34:24</p> <p>2 their placement as sponsored links?</p> <p>3 A. I'll answer this way. I do not understand</p> <p>4 your question.</p> <p>5 Q. All right. 11:34:46</p> <p>6 A. I mean, the test is set up to test in</p> <p>7 aggregate the confusion associated with the</p> <p>8 sponsored area in the test condition and the general</p> <p>9 background confusion associated with search results</p> <p>10 in a noninfringing world in the control condition. 11:35:02</p> <p>11 Both those are a range of sets of attributes.</p> <p>12 The --</p> <p>13 Q. I'm sorry to interrupt you, but this I</p> <p>14 think will help clarify what I am after.</p> <p>15 A. All right. 11:35:15</p> <p>16 Q. You're talking about the range of</p> <p>17 attributes?</p> <p>18 A. Right.</p> <p>19 Q. What I want to know is: Do you view those</p> <p>20 range of attributes to be equal as between the 11:35:20</p> <p>21 natural results and the sponsored-link results?</p> <p>22 A. Well, again, I'm not sure -- the organic</p> <p>23 listings in the control section -- I mean in the</p> <p>24 test condition, we asked the respondent to look at</p> <p>25 all the links because we don't want to draw their 11:35:40</p>	97	<p>1 A. Right. 11:36:58</p> <p>2 Q. Right. Yes.</p> <p>3 So what I'm interested in is whether there</p> <p>4 is anything else about comparing these two sets of</p> <p>5 links that might account for net confusion. 11:37:09</p> <p>6 A. I know you have something in your mind or</p> <p>7 you wouldn't ask me that question, but, quite</p> <p>8 honestly, I don't -- sure there are slight</p> <p>9 differences in the way these are presented to the</p> <p>10 consumer, but that wouldn't have -- we only counted 11:37:28</p> <p>11 you as confused if you answered our questions a</p> <p>12 certain way with regard to the sponsored area.</p> <p>13 So I'm not sure how that has anything to do</p> <p>14 with on the test page what they -- you know, what</p> <p>15 the look or feel of the organic listings was other 11:37:44</p> <p>16 than we rendered them the way they would be rendered</p> <p>17 in a search result and then we did that here as</p> <p>18 well.</p> <p>19 Q. Okay. I'll ask a different question.</p> <p>20 MR. ROSS: Before we go on, can I just -- 11:37:56</p> <p>21 for clarity of the record, can we agree, Margaret,</p> <p>22 you and I, that -- because you guys are using</p> <p>23 certain words a different way, that "natural" links</p> <p>24 and "organic" links mean the exact same thing?</p> <p>25 MS. CARUSO: Yes. 11:38:09</p>

25 (Pages 94 to 97)

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1	MR. ROSS: Okay. Good	11:38:09	
2	THE WITNESS: I can agree to that if you		
3	can.		
4	BY MS. CARUSO:		
5	Q. Yes.	11:38:13	
6	A. Okay.		
7	Q. And I will try -- your preferred term is		
8	"organic" links?		
9	A. I think I typically refer to them that way,		
10	but --	11:38:22	
11	MR. ROSS: I think -- I just want to say, I		
12	think the record was clear, but I want it to be		
13	crystal clear that you guys were talking apples to		
14	apples and that's the only reason I said that.		
15	Thanks.	11:38:34	
16	BY MS. CARUSO:		
17	Q. Is there anything about the content of the		
18	links that you think can increase net confusion?		
19	A. Well, just to be clear, when you say "net		
20	confusion," you're talking about the difference	11:39:02	
21	between confusion measured here (indicating) and		
22	confusion measured here (indicating).		
23	Q. Right.		
24	A. And certainly there are -- the way in which		
25	organic or natural listings are rendered is slightly	11:39:11	
99		101	
1	different than the way in which sponsored links are	11:39:16	
2	rendered, which is part of the way in which Google's		
3	ad system works.		
4	Q. Right.		
5	A. But there is no difference between the way	11:39:24	
6	they are rendered in the test versus the way they're		
7	rendered in the control. So I'm not -- again, I		
8	don't -- it's kind of a design of the experiment		
9	issue. I'm lost at really what it is I'd be trying		
10	to figure out from your question.	11:39:40	
11	Q. Leave aside the issue of net confusion. Do		
12	you believe that the content of the links affects		
13	consumer confusion?		
14	A. Which links?		
15	Q. Any link.	11:39:59	
16	A. Well, I certainly think the content is one		
17	of the contributing factors, as we've talked about,		
18	in the way in which the sponsored links are written.		
19	Q. Before the break we were talking about your		
20	understanding of the word "endorsed."	11:40:23	
21	By the way, why was it important to you to		
22	ask the question about endorsement of consumers?		
23	A. Well, as a general matter, in trademark		
24	infringement cases we're frequently asked to both		
25	look at source confusion and sponsorship or	11:40:47	
1	endorsement confusion. And that was true in this	11:40:51	
2	case as well, that in part the complaint was --		
3	included both, so that's why we asked it.		
4	Q. Okay. Do you believe that consumers have a		
5	general understanding that companies that sell	11:41:17	
6	particular trademark owner's products are affiliated		
7	with that company in some way?		
8	A. First of all, when you say "consumers," I		
9	just want to be careful. Sometimes that's		
10	understood to mean all consumers, when in fact -- I	11:41:55	
11	mean, our whole business is to figure out that		
12	different consumers think differently. So I'd want		
13	to be careful not to say anything I said was		
14	about -- was necessarily meant to mean all consumers		
15	are that way.	11:42:07	
16	Q. Okay.		
17	A. So now, what is it about consumers you were		
18	asking again?		
19	I just want to make clear that maybe some		
20	consumers think that, doesn't mean that all	11:42:17	
21	consumers do. I just want to make sure we're clear		
22	on that.		
23	Q. Whether they think that there is an		
24	affiliation between a trademark owner and a company		
25	that sells the trademark owner's products.	11:42:28	
1	A. I think some consumers would think that if	11:42:32	
2	a company sells another company's products, that		
3	there was -- that that company had approved that in		
4	some sense, yes.		
5	Q. Do you have a sense of how many people	11:42:45	
6	think that?		
7	A. As a general matter, I don't have a		
8	specific that 80 percent of people or 70 percent of		
9	people believe that. I don't have a specific number		
10	in mind.	11:42:59	
11	Q. Is there any data that you've collected in		
12	connection with this report from which you could		
13	draw a conclusion as to whether the consumer		
14	universe, as you've defined them for this		
15	experiment, believes there is an affiliation between	11:43:21	
16	products or companies that sell a trademark owner's		
17	products and the trademark owner?		
18	A. I think this data might give hints of that,		
19	but it would not be reliable for estimating that		
20	percent.	11:43:46	
21	Q. Why so?		
22	A. Well, I'm imagining that what you're		
23	thinking is that the verbatims could be analyzed and		
24	looked at to see, well, what was the nature of the		
25	reasons for the endorsement.	11:43:52	

26 (Pages 98 to 101)

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102	<p>1 But the reason -- one of the reasons we 11:43:53 2 don't rely on those here is because the way in which 3 this experiment is structured, because it's a kind 4 of complicated exercise to first identify all the 5 links that you think sell the product and then the 11:44:07 6 links of those which ones you think are Rosetta 7 Stone and then of those -- of that group, which ones 8 you think are endorsed, we don't ask after each link 9 why did you say that, why did you say that. It 10 would just become such a burdensome exercise for the 11:44:21 11 respondent. 12 So we rely on the careful design of the 13 control and the test to make that net conclusion. 14 The whys are in there, as I've said before, but 15 because the respondents had time to look at the 11:44:37 16 website, they've studied it now for their selling 17 question, for each of the pieces of it, you would 18 want to be careful. They have thought more about it 19 than would be in a normal test where you immediately 20 ask it right after their answer. 11:44:53 21 And, secondly, in a case like this, there 22 are a number of elements of the way in which the 23 sponsoredness works that they might not think to 24 articulate that they themselves are unconsciously, 25 essentially, responding to that's affecting them but 11:45:09</p>	104	<p>1 A. I don't think -- I don't know the average 11:46:22 2 time, but I don't understand it to be more than, you 3 know, a few -- a few minutes, you know, like three- 4 to eight-minute type of an interview, but I'd have 5 to check and get the exact understanding of the 11:46:34 6 time. 7 Q. How would you check to determine that? 8 -A. I guess I would just have to ask Sarah to 9 check with the malls and see what they were telling 10 us it was taking, roughly, per interview. I mean, 11:46:46 11 they have a general understanding of how long 12 recruiters are in there because they're out 13 recruiting and trying to fill their lab, but I don't 14 know the exact number. 15 Q. You didn't observe any of the interviews? 11:46:58 16 A. In this case, I did not watch any of these 17 personally. 18 Q. Did Sarah? 19 A. I don't know. 20 Q. Do you know if there were field supervisors 11:47:08 21 who observed the interviews? 22 A. And by that you mean people who work for 23 the facilities? 24 Q. Anyone really other than the interviewer 25 and the respondent. 11:47:23</p>
103	<p>1 they wouldn't know to say that to you. 11:45:13 2 So, for example, the color yellow, that 3 color yellow may actually be influencing people, we 4 don't know. The -- but the respondent themselves 5 may never articulate, oh, because it was in the 11:45:27 6 color yellow. 7 Q. Mm-hmm. 8 A. And we do know that many people do say 9 because it was the first listing. 10 Q. How many people say that? 11:45:38 11 A. I don't remember. But a number say that. 12 But that isn't to say, then, that those that didn't 13 mention it weren't also influenced by the order. 14 So in this case, we're very careful not to 15 over rely on the verbatims. And, certainly, if you 11:45:50 16 were to code them, as you've described, I probably 17 would -- well, I don't want to offer an opinion 18 without looking at such an analysis, but my guess is 19 I wouldn't necessarily conceive of it as reliable 20 because of this issue of when the whys were asked 11:46:09 21 and the fact that people aren't articulating 22 everything. 23 Q. You talked about people studying the page a 24 number of times. How long did the interviews take 25 to complete? 11:46:22</p>	105	<p>1 A. Yeah, I don't know if it's the specific 11:47:25 2 policy at the malls. I mean, each interviewer had 3 to do practice interviews, so those were observed by 4 a supervisor. And I -- but I don't know the extent 5 to which supervisors then watched them do interviews 11:47:37 6 past those first training interviews. 7 Q. How were the respondents validated for 8 participation in the study? 9 A. We just used standard procedures. So once 10 you finish screening, you go in do the exercise. At 11:48:07 11 the end of the exercise, assuming you've completed 12 it and stayed in through the exercise, then you're 13 asked for your name and your phone number. You have 14 to provide that to get the incentive. And then all 15 those numbers are called, and then with some number 11:48:23 16 of attempts, I think we used 10, within, you know, a 17 few days of when the interview was done. And these 18 are pretty standard procedures. 19 Q. How many people were screened -- 20 A. I don't know. 11:48:44 21 Q. -- to participate? 22 Do you know whether anyone knows if that 23 information is available? 24 A. I don't know if anyone knows. I doubt that 25 they do because normally they just reuse those 11:49:02</p>

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1 screening sheets, so I don't know. 11:49:05
 2 Q. But they weren't asked to keep track of
 3 that information?
 4 A. I'm sorry?
 5 Q. They weren't asked to keep track of how 11:49:12
 6 many people they were screening?
 7 A. Not by us.
 8 Q. The data in Exhibit E, it appears at one
 9 time 529 unique respondents. Was that your
 10 understanding? 11:49:44
 11 A. No. The ID numbers -- I don't have an
 12 understanding that the ID numbers are completely
 13 sequential. You know, you're acting as though they
 14 are counted from one to a number.
 15 Q. Mm-hmm. 11:50:04
 16 A. But, you know, it might have been that
 17 facility in Denver starts here and so on. They are
 18 also assigned a number when they do the practice
 19 interviews. So that affects the count. There is
 20 also people who screen out in -- after they are 11:50:17
 21 screened in the mall, they are reasked the screening
 22 questions in the interview, and there are some
 23 people that go out that way.
 24 So I forget exactly how those numbers work,
 25 but I think it would be incorrect to understand that 11:50:31

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1 we had 529 completed interviews and then somehow a 11:50:34
 2 hundred or something went away.
 3 Q. Right.
 4 A. That's not my understanding.
 5 Q. All right. So I'd like to figure out as 11:50:41
 6 best I can where they went to along the way. And
 7 you've identified the numbers might not have been
 8 sequential from facility to facility. People were
 9 rescreened after the initial screening, some might
 10 have not passed that successive screening. 11:51:00
 11 Is there any other way you can think of
 12 that --
 13 A. If they -- if they in the validation calls
 14 they didn't exist, you know, they didn't validate.
 15 Q. Right. 11:51:15
 16 A. Those immediately come to mind. There
 17 might be other reasons, but I would have to ask
 18 about that.
 19 Q. Are you aware of many instances of people
 20 not completing the survey, leaving during the 11:51:28
 21 proceeding?
 22 A. No, I don't think we had any where they
 23 just got up and left because they didn't like it.
 24 It would be if they -- when they were rescreened, if
 25 they now did not qualify, then essentially the 11:51:38

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1 interview was terminated. 11:51:42
 2 Q. Right.
 3 A. But I don't have an understanding that we
 4 had people, you know, stop in the middle of the
 5 actual survey. 11:51:48
 6 Q. Going back to the time you spoke about the
 7 average period of three to eight minutes, do you
 8 have any understanding of the longest time it took
 9 anyone to complete an interview?
 10 A. No, I don't. 11:52:03
 11 Q. The laptops that were used to conduct the
 12 survey, did they have timestamps on them by which
 13 you could recreate the time?
 14 A. I don't know.
 15 Q. Were there instructions to the interviewers 11:52:21
 16 that if a respondent went too fast or too slow, to
 17 terminate or to not count the response?
 18 A. No.
 19 Q. So there weren't any time limits on --
 20 A. Not that I understand. 11:52:42
 21 Q. Did you design your survey to test dilution
 22 in any way?
 23 A. I was not asked to address the dilution
 24 question.
 25 Q. Do you have an opinion about dilution? 11:53:14

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1 A. As I currently understand my assignment, 11:53:17
 2 I'm not being asked to provide opinions specifically
 3 on dilution.
 4 Q. Do you think that the data in your report
 5 would support an opinion about dilution? 11:53:26
 6 A. I haven't looked at the data with that
 7 objective in mind, so I don't want to say that it
 8 does or does not. I wasn't asked to do it. I
 9 haven't thought about it.
 10 Q. But you didn't design the study with the 11:53:42
 11 purpose of it serving as a basis for making a
 12 dilution opinion?
 13 A. I wasn't asked to design a dilution survey.
 14 I don't want to say that the survey as it was done
 15 wouldn't provide evidence of dilution because I 11:54:04
 16 haven't looked at it that way yet.
 17 Q. But you weren't thinking about dilution
 18 when you designed the survey?
 19 A. Not in any specific way.
 20 Q. Have you done dilution surveys before? 11:54:17
 21 A. I don't recall a specific dilution case
 22 that I -- in which I've been disclosed as an expert.
 23 Q. Do you have an understanding of how you
 24 would go about conducting a dilution survey?
 25 A. I have a general understanding of dilution. 11:54:48

110	<p>1 Q. What's that understanding? 11:54:53</p> <p>2 A. Establishing the extent to which the use of</p> <p>3 the mark is harming or otherwise tarnishing the</p> <p>4 mark. And so a survey would be designed to examine</p> <p>5 the extent to which the use -- in whatever context 11:55:24</p> <p>6 it was, the use of the mark was causing some sort of</p> <p>7 tarnishment to the -- whatever the senior mark -- or</p> <p>8 whatever the mark was at issue. I have that as a</p> <p>9 general understanding.</p> <p>10 Q. Your survey didn't ask any questions about 11:55:46</p> <p>11 tarnishment, did it?</p> <p>12 A. No.</p> <p>13 Q. Why did you choose to do a mall-intercept</p> <p>14 study as opposed to some other methodology for</p> <p>15 testing confusion? 11:56:18</p> <p>16 A. Well, I think in this case, the primary</p> <p>17 reason is because that facilitates getting the</p> <p>18 consumer in front of a laptop. And since the search</p> <p>19 exercise was intended to be -- you know, was done on</p> <p>20 a computer, that was the most reasonable way. And 11:56:33</p> <p>21 mall research is widely accepted by the court, so</p> <p>22 there wasn't an issue about it being unique or</p> <p>23 nonstandard.</p> <p>24 Q. Do you have an understanding of how many</p> <p>25 people use the internet -- how many people who use 11:56:48</p>	112	<p>1 It depends on which internet panel you're using, it 11:58:32</p> <p>2 depends on the nature of the way people were</p> <p>3 screened. I mean, there is a whole series of</p> <p>4 methodological things that have to be attended to in</p> <p>5 those surveys. 11:58:44</p> <p>6 Q. Do you understand what a probability sample</p> <p>7 is?</p> <p>8 A. Yes.</p> <p>9 Q. What is it?</p> <p>10 A. Well, the term is generally used to refer 11:58:51</p> <p>11 to situations where you are drawing a random sample</p> <p>12 from a population, and, as a consequence, you are</p> <p>13 using probability sampling techniques. And it's</p> <p>14 often contrasted with nonprobability samples.</p> <p>15 Q. Was the experiment conducted here a 11:59:10</p> <p>16 probability sample?</p> <p>17 A. Under the general rules and guidelines of</p> <p>18 this kind of research, this would be considered a</p> <p>19 nonprobability sample, as is all mall research</p> <p>20 generally. If there happens to be -- sometimes you 11:59:24</p> <p>21 do it in a mall when you have a list and you can</p> <p>22 draw a random sample, but in these cases you are</p> <p>23 essentially using quota sampling.</p> <p>24 Q. What were the quotas here?</p> <p>25 A. I'd have to look at the documentation in 11:59:39</p>
111	<p>1 the internet to do searches use laptops? 11:56:54</p> <p>2 A. I don't have a specific understanding of</p> <p>3 that.</p> <p>4 Q. Were you interested in having people use</p> <p>5 laptops as opposed to other types of computers for a 11:57:07</p> <p>6 particular reason?</p> <p>7 A. Primarily because the computers are</p> <p>8 programmed centrally and then we send them out to</p> <p>9 the malls. So it is somewhat simpler to use a</p> <p>10 laptop for that than a desktop. 11:57:26</p> <p>11 Q. In an internet survey, someone could just</p> <p>12 use whatever computer they usually look at, right?</p> <p>13 A. Yes.</p> <p>14 Q. Did you consider doing an internet survey?</p> <p>15 A. I don't recall for this case that we 11:57:49</p> <p>16 debated using -- doing it on the internet. So I</p> <p>17 don't recall that we did consider it here. I have</p> <p>18 in the past considered it, but not here.</p> <p>19 Q. Have you done it in the past?</p> <p>20 A. I don't want to comment on any work that's 11:58:13</p> <p>21 confidential, but I haven't put any internet surveys</p> <p>22 in as reports.</p> <p>23 Q. Do you believe that internet surveys are</p> <p>24 inherently invalid?</p> <p>25 A. As with any survey procedure, it depends. 11:58:28</p>	113	<p>1 the report, but basically it was fifty-fifty, men, 11:59:41</p> <p>2 women. And then I believe it was -- well, let's</p> <p>3 just look, if that's all right.</p> <p>4 Q. Sure.</p> <p>5 A. I think the report says the percents in 11:59:56</p> <p>6 each the age categories.</p> <p>7 So I'm referring to page 6 of my report,</p> <p>8 where it notes that 50 percent of the quota was</p> <p>9 asked to be between 18 and 35 years of age, 20</p> <p>10 percent between 35 and 44 years of age, and 30 12:00:27</p> <p>11 percent for those 45 years and older.</p> <p>12 So that was the basic quotas that were</p> <p>13 offered to each of the facilities.</p> <p>14 Q. How did you determine those?</p> <p>15 A. Again, in the early stages of the -- that 12:00:42</p> <p>16 first call or two, we simply said we would have to</p> <p>17 have some understanding of the distribution of</p> <p>18 people in this market. And it's my understanding</p> <p>19 that Sarah had discussions with somebody at Rosetta,</p> <p>20 and Rosetta provided her with information on the 12:00:59</p> <p>21 demographic distributions and that's what we relied</p> <p>22 upon.</p> <p>23 Q. The demographic distributions in that</p> <p>24 market?</p> <p>25 A. Yes. 12:01:10</p>

114		116	
1	Q. And how is the market defined? 12:01:11	1	A. Yes. 12:04:34
2	A. Basically, as I've described it in the	2	Q. Is that important to you?
3	report. I don't recall specifically if what they	3	A. Yes.
4	gave us was the demographics for Rosetta buyers or	4	Q. Why is that?
5	the demographics as described here. So I want to be 12:01:26	5	A. Well, when you do this research generally, 12:04:40
6	careful not to be unclear about that, but roughly	6	a concern arises that if the consumer or the
7	that age distribution fit that market.	7	interviewer -- and when you are using
8	Q. Do you think that the -- you drew a	8	interviewers -- understands the purpose of the study
9	distinction between the Rosetta Stone buyers' age	9	in too much detail, that somehow they may bias or
10	distribution and the distribution of the universe we 12:01:54	10	skew the result. So that's the reason 12:05:00
11	talked about earlier.	11	double-blindness is generally a desired
12	Which of those universes did you think was	12	characteristic in the study, is because then, you
13	appropriate for this experiment?	13	know, neither the interviewer nor the respondent --
14	A. Well, the universe that we've defined for	14	and that's what "double-blind" means, that neither
15	this experiment is the relevant market as I've 12:02:17	15	the interviewer nor the respondent understands the 12:05:16
16	defined it for this experiment. The only caveat I'm	16	basic purpose of the stuff.
17	adding about the age demographics is I don't know	17	Q. In this case, you view the basic purpose of
18	the extent to which the age categories that were	18	the study as being what?
19	provided to us were specific to the relevant market	19	A. Testing for the likelihood of confusion
20	as we've defined it. So I'd have to find out. 12:02:33	20	with regard to those sponsored links versus the 12:05:34
21	I don't have any reason to believe it's not	21	control condition.
22	basically the same distribution.	22	Q. Because it was pretty clear to the
23	Q. Right. But you're not sure about that.	23	interviewers that it was a survey about Rosetta
24	Did you discuss with Rosetta Stone at all	24	Stone; right?
25	why just not using the market of Rosetta Stone 12:02:49	25	MR. ROSS: The question -- the question, 12:05:50
115		117	
1	buyers? 12:02:56	1	sorry. Getting close to lunchtime. Objection. 12:05:51
2	A. I don't remember specifically that we	2	THE WITNESS: The specific interviewer who
3	discussed that, other than I would have described to	3	is asked to do the Rosetta Stone test will
4	them in terms of how I would do this work, what I	4	understand that that interview is being done by
5	would likely view as the relevant market, which 12:03:11	5	Rosetta Stone. Doesn't mean that they are certain 12:06:09
6	would have been roughly as I've defined it here.	6	it is Rosetta Stone. That's why, for example, we
7	Q. So there was the age quotas, men and women.	7	ask what all the brands you're familiar with are in
8	Did you talk to Rosetta Stone about the	8	the screening and so on, because to them it leads to
9	distribution of men and women interested in learning	9	an understanding that maybe we're testing a whole
10	another language? 12:03:33	10	language of software products; they just happened to 12:06:22
11	A. Yes. It was my understanding that both the	11	have gotten a Rosetta Stone as part of their work.
12	fifty-fifty on men/women and the age distributions	12	So there is ways in which we intend to hide the
13	came from Rosetta Stone.	13	intent to the interviewer as well.
14	Q. Do you recall who at Rosetta Stone, you or	14	BY MS. CARUSO:
15	anyone from your team, was talking to? 12:03:51	15	Q. Okay. 12:06:35
16	A. I don't remember any names of specific	16	A. And this study has several of those things
17	people that we were on.	17	in it.
18	Q. Do you remember their titles?	18	Q. When asking respondents which language
19	A. I don't.	19	programs or language trademarks they are aware of,
20	Q. The roles they played in the company? 12:04:04	20	did you consider asking that as an open-ended 12:06:47
21	A. I don't remember if they were from the	21	question?
22	market research department, general counsel's	22	A. I don't recall that we did. Our primary
23	office; I don't remember any of that.	23	goal there was not to figure out whether any given
24	Q. In your report, you emphasize that your	24	brand was top-of-mind. We simply wanted to know if
25	study was double-blind; is that right? 12:04:30	25	they were aware of the brand we were going to ask 12:07:06

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1 them to search on. 12:07:09

2 Q. And if they said yes, you assumed that they

3 were in fact aware of the brand?

4 A. I'd have to look at the exact wording of

5 the question; but, yes, we generally assumed that 12:07:18

6 whatever answer they gave us, they were telling us

7 the truth.

8 Q. Have you ever in your experience doing

9 these studies had any reason to believe that when

10 presented with a list of possible choices, people 12:07:33

11 may sometimes say that they are familiar with them

12 even though they may not know exactly what they are?

13 A. Well, from time to time there are, you

14 know, concerns about the way in which the study has

15 created a form of that as demand characteristics, 12:07:51

16 that is, they think a certain answer is appropriate.

17 But, again, remember, in this experiment,

18 to whatever extent those exist, once a person is in

19 the room, they are randomly assigned to the test or

20 the control condition. So the extent to which 12:08:11

21 demand characteristics -- you know, people saying

22 they were aware of the brand when really they

23 weren't or things like that, they are equally

24 influencing both the control condition and the

25 experimental condition; thus, they are netted out, 12:08:22

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1 which is the purpose of those controls. But, yes, 12:08:26

2 I'm generally aware that these are issues.

3 MS. CARUSO: Terry, I had said 12:30 for

4 lunch, but this might be a good time to break.

5 MR. ROSS: Whatever is good for you. Agree 12:09:35

6 to go off the record, whatever time it is.

7 THE VIDEOGRAPHER: Off the record at 12:09

8 p.m.

9 (Lunch recess taken)

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1 AFTERNOON SESSION

2

3 THE VIDEOGRAPHER: We are back on the

4 record at 1:20 p.m.

5 BY MS. CARUSO: 13:20:49

6 Q. Good afternoon.

7 Back to the Exhibit D, Test and Control

8 Conditions. During the survey, these were displayed

9 on the screen the entire time after the respondent

10 had entered in the Rosetta Stone query and pressed 13:21:15

11 enter, right?

12 A. That's correct.

13 Q. So there wasn't any memory-test portion;

14 they were always looking at the results when

15 answering the questions? 13:21:30

16 A. I don't know that they were always looking

17 at, but they were there to be looked at.

18 Q. Do you think that that affected the results

19 in any way?

20 A. I think in this instance I don't have 13:21:44

21 any -- I don't have any reason to believe it

22 substantially altered the confusion in a way that

23 could change my conclusion, because, essentially,

24 again, the control and the test have the same

25 protocol. So if it raised it a little or lowered it 13:22:02

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1 as an effect of the way the study was conducted, it 13:22:07

2 would have done it to both. So I don't believe it

3 has any impact on my conclusions.

4 Q. All right. Your conclusions are based on

5 the entry of "Rosetta Stone" as the search query; 13:22:31

6 right?

7 A. The test on which my conclusion is based

8 used "Rosetta Stone" as the test word in the search,

9 yes.

10 Q. Does your conclusion extend to other 13:22:47

11 trademarks?

12 A. Well, first, let me clarify. Other Rosetta

13 Stone trademarks --

14 Q. Yes.

15 A. -- or other trademarks generally or -- 13:23:07

16 Q. Does it extend to other Rosetta Stone

17 trademarks?

18 A. I don't have any reason to believe that if

19 the search results were similar to the search

20 results as they would come out for this trademark 13:23:19

21 search, that the results would have been any

22 different. But the result -- but the -- we tested

23 "Rosetta Stone," the word.

24 Q. When you say if the search results had been

25 any different, what do you mean by that? 13:23:35

122	<p>1 A. Well, to the extent that if you entered in 13:23:39</p> <p>2 some other Rosetta Stone trademark and you got</p> <p>3 basically these same -- this is the kind of organic</p> <p>4 listings and the kind of sponsored links, then the</p> <p>5 test would likely have produced the same basic 13:23:53</p> <p>6 conclusion.</p> <p>7 Q. When you say this kind of listing, what do</p> <p>8 you mean by that? What are the various types of</p> <p>9 listings that you categorize as this type?</p> <p>10 A. Well, as a general rule, you know, these 13:24:10</p> <p>11 same companies or URLs, these same types of</p> <p>12 companies and same rough look and feel of them</p> <p>13 that's in the sponsored links, that sort of thing.</p> <p>14 Q. All right. Do you have any reason to</p> <p>15 believe that if you entered as a query "SharedTalk" 13:24:31</p> <p>16 you would get similar organic listings.</p> <p>17 A. I don't have any specific reason to believe</p> <p>18 that you would or you would not; I don't know.</p> <p>19 Q. Do you have an understanding of how organic</p> <p>20 search results are returned? 13:25:00</p> <p>21 A. By that, I'm going to understand you to</p> <p>22 mean, you know, what's the underlying algorithm that</p> <p>23 causes the first one that appears, the second, the</p> <p>24 third and the fourth, and what's on the next page</p> <p>25 and the next page and next page. That's what you 13:25:19</p>	124	<p>1 think that your conclusion would apply to those as 13:26:42</p> <p>2 well?</p> <p>3 A. I don't know. I have never ever been asked</p> <p>4 to do exactly that exercise, so I don't know. I</p> <p>5 would have to see what it looked like and see if I 13:27:01</p> <p>6 felt there was a reason why I could make that</p> <p>7 conclusion or not.</p> <p>8 Q. Does your conclusion extend to the use of</p> <p>9 "Rosetta Stone" as a search query in combination of</p> <p>10 other words; for example, if someone were to enter 13:27:21</p> <p>11 as a search query "Amazon Rosetta Stone"?</p> <p>12 A. I want to make sure I understand your</p> <p>13 question. I found a certain degree of net confusion</p> <p>14 when you search on "Rosetta Stone." You're asking</p> <p>15 me does that confusion extrapolate to the situation 13:27:57</p> <p>16 where they would have entered "Amazon Rosetta</p> <p>17 Stone"?</p> <p>18 Q. Right.</p> <p>19 A. I've not been asked to form that opinion</p> <p>20 and I haven't thought about it, so I don't know as I 13:28:20</p> <p>21 sit here today whether there would be reasons why</p> <p>22 that would be a natural conclusion or why that would</p> <p>23 just not make sense. It would likely depend, in</p> <p>24 part, again, on, you know, to what extent the search</p> <p>25 results that come back look in some sense similar to 13:28:36</p>
123	<p>1 mean? 13:25:22</p> <p>2 Q. You can answer it that way.</p> <p>3 A. That's not what you meant?</p> <p>4 Q. We can start there.</p> <p>5 A. I don't want to say that I have any 13:25:29</p> <p>6 specific understanding of the details of how the</p> <p>7 organic listing page-rank system works. I just</p> <p>8 generally understand that, you know, it has to do</p> <p>9 with the extent to which the words in the pages that</p> <p>10 it links to and how many other linked pages all is 13:25:47</p> <p>11 calculated together in a way that causes them to</p> <p>12 come up in this order. I just have that general</p> <p>13 understanding.</p> <p>14 Q. So with that general understanding, do you</p> <p>15 expect that a search for "dynamic immersion" would 13:26:00</p> <p>16 produce similar natural/organic results?</p> <p>17 A. I would just say -- I don't want to say</p> <p>18 that I know because I don't know. I mean, I don't</p> <p>19 know to the extent that these pages are here because</p> <p>20 they had "Rosetta" in them would also show up 13:26:23</p> <p>21 because they had "dynamic immersion" or whatever you</p> <p>22 said in them. I don't know. So I wouldn't know for</p> <p>23 certain.</p> <p>24 Q. If I presented you with those search</p> <p>25 results, could you then determine whether or not you 13:26:36</p>	125	<p>1 the search results that have been tested. 13:28:40</p> <p>2 Q. The conditions of your experiment were</p> <p>3 designed to replicate the condition of a person</p> <p>4 who's looking for information about the Rosetta</p> <p>5 Stone software; is that correct? 13:28:59</p> <p>6 THE WITNESS: Can you just read it back?</p> <p>7 (Whereupon the reporter read the record as</p> <p>8 follows:</p> <p>9 "Question: The conditions of your</p> <p>10 experiment were designed to replicate the 13:29:19</p> <p>11 condition of a person who's looking for</p> <p>12 information about the Rosetta Stone</p> <p>13 software; is that correct?")</p> <p>14 THE WITNESS: Generally, yes. I just want</p> <p>15 to say that the software sounds like it's 13:29:27</p> <p>16 specifically a single product, but it could be the</p> <p>17 services Rosetta would offer, something like that.</p> <p>18 But, in general, yes, there -- the way it</p> <p>19 is set up, they're searching for "Rosetta Stone."</p> <p>20 BY MS. CARUSO: 13:29:51</p> <p>21 Q. Rosetta Stone the plaintiff?</p> <p>22 A. The plaintiff, exactly.</p> <p>23 Q. Do you have an understanding of how many</p> <p>24 people who entered the term "Rosetta Stone" were</p> <p>25 actually looking for the plaintiff? 13:30:03</p>

32 (Pages 122 to 125)

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126	<p>1 A. They all are, in the sense that the first 13:30:26 2 question they're asked is which link or links, if 3 any, do they think sells the Rosetta Stone products. 4 So in that sense, they've all been -- I believe 5 every respondent would have in their mind that we 13:30:42 6 are now talking about Rosetta Stone products and 7 services. 8 Q. Right. 9 I'm stepping away from the experiment for a 10 moment and focusing on your conclusion as it exists 13:30:53 11 aside from just the experiment, and saying when 12 users of Google search engine type in the word 13 "Rosetta Stone," the words "Rosetta Stone," do you 14 have an understanding of how many of them are 15 looking for Rosetta Stone the plaintiff? 13:31:17 16 A. In the population of consumers who search 17 on the term "Rosetta Stone," I don't have any 18 specific knowledge of how often they entered that 19 because they were querying for the company. I don't 20 have that number. 13:31:42 21 Q. Would it affect your conclusion if the 22 number of people who are querying "Rosetta Stone" 23 for the actual Rosetta Stone -- 24 A. The artifact. 25 Q. Exactly. 13:32:06</p>	128	<p>1 "Rosetta Stone" or just those who are looking for 13:33:29 2 Rosetta Stone the company? 3 MR. ROSS: I'm going to object in that that 4 calls for a legal conclusion and this witness is not 5 a lawyer. 13:33:40 6 THE WITNESS: Yeah, as you've asked the 7 question, it sounds like that's a legal issue and I 8 don't know how I would respond to that. 9 BY MS. CARUSO: 10 Q. Very experienced expert. 13:33:51 11 On the test condition, the majority of the 12 sponsored links are commercial sites. In the 13 organic results, they are not. Commercial in the 14 sense of offering products. Does that affect the 15 survey in any way? 13:34:59 16 MR. ROSS: I'm going to have to object to 17 that because it states a fact that's not in 18 evidence. What you have just stated is an incorrect 19 characterization. 20 You may answer the question. 13:35:12 21 THE WITNESS: Sorry, now I've forgot the 22 question. 23 (Whereupon the reporter read the record as 24 follows: 25 "Question: On the test condition, the 13:35:13</p>
127	<p>1 -- significantly outnumbered the number of 13:32:07 2 people who are searching for "Rosetta Stone" the 3 company? 4 A. I don't think, as you've described the 5 situation, that that would alter my conclusion in 13:32:23 6 this case. 7 Q. Why is that? 8 A. The conclusion is that there is significant 9 confusion over source and endorsement of the 10 sponsored links in the relevant market or relevant 13:32:37 11 population as I've defined it. And I've defined it 12 as people who were interested in learning a foreign 13 language who would look for information on learning 14 that in the future, who had used Google in the past 15 year, or would use Google in the future, and are 13:32:55 16 aware of Rosetta Stone, which is admittedly a 17 subaudience of the population you described: all 18 searchers for Rosetta Stone. 19 Q. Right. 20 A. But the study was done to address the 13:33:06 21 subpart of that market that has the characteristics 22 I've defined, and in that sub -- in that market, the 23 conclusion applies to that market. So... 24 Q. Do you think that a finding of infringement 25 should be based on all Google users who enter 13:33:25</p>	129	<p>1 majority of the sponsored links are 13:35:13 2 commercial sites. In the organic results, 3 they are not. Commercial in the sense of 4 offering products. Does that affect the 5 survey in any way?" 13:35:13 6 THE WITNESS: As you've phrased it, it 7 doesn't affect the basic measurements and the 8 conclusion from those measurements because, you 9 know, one is the world in which the allegedly 10 infringing sponsored links appear and one is the 13:35:51 11 world in which -- the noninfringing world, and that 12 is the character of those two, whatever that ratio 13 of commercial to -- and if this was a different 14 trademark, then maybe a different balance of those 15 things would show up in the organic listings. This 13:36:09 16 is just how this one works. 17 BY MS. CARUSO: 18 Q. Do you expect that if the trademark was -- 19 that was being searched for was not one that had a 20 separate, independent meaning, you would have a 13:36:29 21 different balance of commercial and noncommercial 22 sites? 23 A. I don't know specifically that. I was 24 actually -- when I said I was thinking back to the 25 American Airlines case, where when you searched on 13:36:49</p>

130	<p>1 "American Airlines," because American Airlines has 13:36:51</p> <p>2 so many other kinds of links - baggage links and</p> <p>3 Red Carpet Club links and so on - their page was</p> <p>4 filled with a bunch of stuff that has a somewhat</p> <p>5 different character than the page for this case. 13:37:08</p> <p>6 So that's just simply what I meant, that</p> <p>7 depending on the mark that's being searched on, you</p> <p>8 might get a different mix of these things. But I</p> <p>9 don't have any specific kind of rule of what causes</p> <p>10 that or doesn't, so... 13:37:22</p> <p>11 Q. Okay. Many of the results, the organic</p> <p>12 results here, appear to refer to Rosetta Stone the</p> <p>13 artifact, as you've identified it, such as, "Ancient</p> <p>14 Egyptian Culture" site, talking about this stone was</p> <p>15 called the Rosetta Stone; "Pharaohs Exhibition," 13:37:49</p> <p>16 finding of the Rosetta Stone; "Mr. Dowling's Rosetta</p> <p>17 Stone Page," talking about French soldiers</p> <p>18 unearthing a great stone; the "Rosetta Stone";</p> <p>19 "RosettaStone.com," which says, "The key that</p> <p>20 unlocked the mysteries that unlocked Egyptian 13:38:06</p> <p>21 hieroglyphic."</p> <p>22 If Rosetta Stone - never mind that</p> <p>23 question.</p> <p>24 If your search was for "Kodak," do you</p> <p>25 expect that you would have a different mix of 13:38:27</p>	132	<p>1 I mean, both of them might be slightly lower or 13:40:27</p> <p>2 slightly higher, you would end up with the same net.</p> <p>3 That's what I was trying to think through, and I</p> <p>4 don't know if you would end up with the same net</p> <p>5 higher or lower, I don't know. 13:40:39</p> <p>6 MS. CARUSO: The questioning thus far has</p> <p>7 led me to think it would be use full to bring a</p> <p>8 computer up and have you look at some search-result</p> <p>9 pages. That will take me a few minutes to put</p> <p>10 together. 13:41:09</p> <p>11 So if you want to take a break. I don't</p> <p>12 want to have you sitting around waiting. So I</p> <p>13 think -</p> <p>14 MR. ROSS: We're happy to do this, but I</p> <p>15 want you to know it comes out of the seven hours. 13:41:21</p> <p>16 MS. CARUSO: I understand.</p> <p>17 MR. ROSS: Very good.</p> <p>18 MS. CARUSO: It could be between 20 to 30</p> <p>19 minutes.</p> <p>20 MR. ROSS: Okay. 13:41:30</p> <p>21 THE WITNESS: I'm sorry, we're going to do</p> <p>22 it here or I'm going to do it somewhere else?</p> <p>23 MS. CARUSO: You're going to do it here.</p> <p>24 THE WITNESS: Okay. I understand</p> <p>25 THE VIDEOGRAPHER: Off the record at 1:41 13:41:39</p>
131	<p>1 organic links versus sponsored links than you do in 13:38:29</p> <p>2 this Rosetta Stone search?</p> <p>3 A. I really don't know. I don't know what</p> <p>4 would happen if we searched "Kodak."</p> <p>5 Q. You can't say with any certainty that it 13:38:47</p> <p>6 would be the same type of balance as we have here?</p> <p>7 A. I don't know that it would or it would not,</p> <p>8 I just don't know.</p> <p>9 Q. Do you think it would affect the results in</p> <p>10 this case if more of the organic results were 13:39:13</p> <p>11 commercial sellers of Rosetta Stone products?</p> <p>12 A. I don't really have a basis to say with</p> <p>13 certainty whether it would or it would not have</p> <p>14 affected these results.</p> <p>15 Q. What causes you to hesitate about that 13:39:52</p> <p>16 question?</p> <p>17 A. Well, I think what I was thinking about is</p> <p>18 that essentially the study is about net confusion.</p> <p>19 Q. Mm-hmm.</p> <p>20 A. And if you change the mix on the test of 13:40:06</p> <p>21 the organic listings, it would change them on the</p> <p>22 control as well. So you would - essentially,</p> <p>23 whatever rate of causing issues in here and here</p> <p>24 would be netted out, whether you would end up with</p> <p>25 the same net difference even though one might be - 13:40:24</p>	133	<p>1 p.m. 13:41:41</p> <p>2 (Pause in the proceedings)</p> <p>3 THE VIDEOGRAPHER: This is the end of Tape</p> <p>4 No. 2 in the deposition of Mr. Kent Van Liere. We</p> <p>5 have been on the record for 1 hour and 20 minutes on 13:42:34</p> <p>6 this tape. The time is 1:42 p.m. and we are off the</p> <p>7 record.</p> <p>8 (Recess taken)</p> <p>9 THE VIDEOGRAPHER: This is the beginning of</p> <p>10 Disc No. 3 in the deposition of Mr. Kent Van Liere. 14:13:43</p> <p>11 The time is 2:13 p.m. and we are back on the record.</p> <p>12 BY MS. CARUSO:</p> <p>13 Q. This morning we talked about other surveys</p> <p>14 that you had done. Are you aware of any judicial</p> <p>15 criticism of any of those surveys? 14:14:03</p> <p>16 A. Is there a specific case you're interested</p> <p>17 in or -</p> <p>18 Q. Just generally to start with.</p> <p>19 A. If you don't mind, I'm just going to look</p> <p>20 up the cases on my CV. 14:14:18</p> <p>21 Q. Absolutely, help refresh yourself.</p> <p>22 A. There are a number of cases. There is only</p> <p>23 two places where I can think of that the judge has</p> <p>24 specifically referred to my work in an order.</p> <p>25 Q. Okay. Which are those? 14:14:58</p>

134	<p>1 A. In the Federal Trade Commission versus 14:15:02 2 Whole Foods Market case, I was asked to rebut a 3 survey and the judge ultimately agreed with my 4 arguments and said he would give no weight to the 5 survey that the other side had put in. 14:15:19 6 And then in the Mary Kay case, the judge 7 used the survey as part of his summary for -- his 8 ruling on a motion for summary judgment, but in that 9 case he noted a fine distinction in his 10 understanding of "confusion," and, as a consequence, 14:15:43 11 I had to submit a second report. 12 And those are the only two places that I 13 know of where a judge has specifically commented on 14 my report in a order and in neither case would I 15 describe them as "criticism" -- 14:16:00 16 Q. Okay. 17 A. -- which I think is the word you used. 18 Q. The issue that the judge in Mary Kay 19 identified with confusion, what was that? 20 A. Without reviewing the order, I don't 14:16:17 21 remember exactly, but my general understanding, as I 22 recall, was this: In that case, one of the defenses 23 was that under the First Sale Doctrine the defendant 24 had the right to show the product. And the judge, 25 in responding to that argument, made a distinction 14:16:41</p>	136	<p>1 sufficient people confused by the way in which the 14:18:34 2 product was sold that there was above the 10 to 15 3 percent typical judicial limit on actual confusion 4 that was actionable. 5 I'm just saying that generally. I don't 14:18:54 6 remember that exactly, but that's my general 7 recollection. 8 Q. Did you agree with the court that some 9 people's confusion seemed to arise just from the 10 presence of the product? 14:19:12 11 A. I don't recall that I offered any opinion 12 in which I either agreed or disagreed with the court 13 on that issue. 14 Q. But sitting here today, what is your view? 15 A. Well, I did what they asked me to do in 14:19:29 16 light of the judge's order, and then I turned in a 17 report that said: Based on my understanding of what 18 the judge's order is, here is what the result would 19 be. 20 And I didn't at that time, and I don't 14:19:45 21 think I have since, formulated an opinion on whether 22 the judge was right to make that fine distinction or 23 not. We just did what he asked. 24 Q. In this experiment, in this survey, did you 25 attempt to distinguish in any way between the 14:19:57</p>
135	<p>1 between confusion caused by the simple presence of 14:16:48 2 the product on the site versus confusion caused by 3 the way in which the product was sold. And he -- 4 that was the basic issue. 5 Q. Okay. How did your second report address 14:17:08 6 that? 7 A. Well, in that particular case the judge 8 said as part of the order, that because the verbatim 9 responses were included, that he could see that some 10 respondents appeared to him to be confused by the 14:17:33 11 way in which the product was sold, while others, in 12 his opinion, were -- their verbatim response had 13 suggested it was more the simple presence of the 14 product. 15 So he simply -- well, I don't remember that 14:17:56 16 he requested a revised report, but he -- the way in 17 which it came forward, we were allowed to submit a 18 report in which we said, well, okay, based on the 19 verbatims, we've grouped people into these two 20 categories that you, the judge, have identified. 14:18:18 21 Q. And what did that grouping show? 22 A. I don't recall the specific like percent -- 23 Q. Right. 24 A. -- but, as I generally recall it, even 25 after you made this distinction, there was still 14:18:31</p>	137	<p>1 presence of the product on a website versus how it 14:20:00 2 is presented? 3 A. By "this," you meant the Rosetta Stone 4 case? 5 Q. Rosetta Stone, yes. 14:20:11 6 A. The issue that was in that case is not an 7 issue in this case, so I didn't have -- I didn't 8 have an understanding that that was a relevant 9 issue. 10 Q. When you say that "issue," you mean the 14:20:23 11 First Sale Doctrine? 12 A. Yes, the First Sale Doctrine is -- I'm just 13 going to -- I'm going to correct that a little bit. 14 There was two issues in that case related to the 15 survey: the First Sale Doctrine and nominative fair 14:20:39 16 use, or something like that. I don't exactly 17 remember how the judge reflected the distinction 18 between these two, whether it was associated only 19 with the First Sale Doctrine or with both of those 20 two. So I want to be careful. I'm not a lawyer and 14:20:56 21 I don't recall exactly how the judge talked about 22 the two. 23 But I didn't understand here in this case 24 that there was an issue of presenting a product 25 under a First Sale Doctrine right, which is what 14:21:11</p>

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138	<p>1 that case was about 14:21:14</p> <p>2 Q. What do you understand the First Sale</p> <p>3 Doctrine to mean?</p> <p>4 MR. ROSS: As a layman, correct?</p> <p>5 MS. CARUSO: Yes, as he's sitting here and 14:21:27</p> <p>6 as someone who responded to the court's concern</p> <p>7 about that topic.</p> <p>8 THE WITNESS: Well, in that case, my</p> <p>9 general understanding was that once someone sells a</p> <p>10 branded product to someone else, that person has the 14:21:43</p> <p>11 right to resell that product and use the brand when</p> <p>12 they resell it; that is, you can't tell them they</p> <p>13 can't use the brand. They already paid you for the</p> <p>14 product with the brand on it. So you have the right</p> <p>15 to resell it and use the brand. 14:22:06</p> <p>16 But -- I don't remember the exact language,</p> <p>17 but under the First Sale Doctrine, you have the</p> <p>18 right to only use enough of the brand to identify</p> <p>19 the product, and that you cannot use the brand in</p> <p>20 any way that creates a likelihood of confusion that 14:22:24</p> <p>21 the original brand owner somehow endorses your</p> <p>22 resale.</p> <p>23 So in the Mary Kay case, the issue was they</p> <p>24 were reselling Mary Kay's products, and so there was</p> <p>25 a question about whether the way in which they were 14:22:43</p>	140	<p>1 rates of confusion? 14:24:11</p> <p>2 A. In several instances you've asked me about</p> <p>3 single attributes, and this attribute happens to be</p> <p>4 whether they are a reseller of the product or not --</p> <p>5 Q. Right. 14:24:36</p> <p>6 A. -- but other times we've talked about the</p> <p>7 words that are in it and so on.</p> <p>8 And I guess my general answer has to be I</p> <p>9 don't know with certainty what would happen with one</p> <p>10 of those individual things -- 14:24:42</p> <p>11 Q. Right.</p> <p>12 A. -- unless all the other things were</p> <p>13 controlled.</p> <p>14 And, in fact, they might all change at</p> <p>15 once. So I don't have any specific hypothesis 14:24:51</p> <p>16 about -- or specific opinion about what each one of</p> <p>17 the individual pieces would have done. I tested the</p> <p>18 sponsored-link area against a noninfringing control.</p> <p>19 Q. That's what Rosetta Stone had asked you to</p> <p>20 look at? 14:25:10</p> <p>21 A. That's correct.</p> <p>22 Q. And that's what you did in American</p> <p>23 Airlines?</p> <p>24 A. If by -- just be clear. What is it you</p> <p>25 think I did in American Airlines that I'm agreeing 14:25:21</p>
139	<p>1 reselling it was causing confusion that there was an 14:22:45</p> <p>2 affiliation which would work against the First Sale</p> <p>3 Doctrine. So that's my understanding.</p> <p>4 BY MS. CARUSO:</p> <p>5 Q. Do you have an understanding whether in 14:23:00</p> <p>6 this case there are resellers of Rosetta Stone's</p> <p>7 products who are advertising on Google?</p> <p>8 A. I understand from the complaint that there</p> <p>9 are -- that the sponsored links may include</p> <p>10 companies that are resellers, that are resellers of 14:23:17</p> <p>11 their product, plus competitors, that are strictly</p> <p>12 competitors, and that are unrelated to the whole</p> <p>13 industry. I understood all those to be potentially</p> <p>14 parties to the case.</p> <p>15 Q. And in this experiment you didn't try to 14:23:34</p> <p>16 distinguish among confusion related to any</p> <p>17 category of those?</p> <p>18 A. If by "category of those" you mean those</p> <p>19 four kinds of entities --</p> <p>20 Q. Yes. 14:23:55</p> <p>21 A. -- that were in the complaint, no; the</p> <p>22 experiment was not set up to test each of those</p> <p>23 types independently, or something like that.</p> <p>24 Q. Do you believe that if you tested each of</p> <p>25 those types independently, they would have differing 14:24:06</p>	141	<p>1 to? 14:25:25</p> <p>2 Q. That you tested sponsored links generally</p> <p>3 against a noninfringing control that did not include</p> <p>4 sponsored links.</p> <p>5 A. That's correct. 14:25:35</p> <p>6 Q. In preparation for this deposition, did you</p> <p>7 talk to anyone about the deposition?</p> <p>8 A. Yes. I met with Terry for a little while</p> <p>9 yesterday afternoon.</p> <p>10 Q. And what did you all talk about? 14:25:52</p> <p>11 A. Just generally, you know, my report,</p> <p>12 basically.</p> <p>13 Q. I asked you this at the outset this</p> <p>14 morning. I'll ask you again. Is there anything in</p> <p>15 your report that you believe needs to be corrected 14:26:09</p> <p>16 as you sit there right now?</p> <p>17 A. I'm going to just take a minute to skim</p> <p>18 through it and remind myself.</p> <p>19 Q. Sure, absolutely.</p> <p>20 A. I don't believe so. But let me just see if 14:26:27</p> <p>21 in light of your questions anything comes to my</p> <p>22 mind.</p> <p>23 (Witness reviewing document.)</p> <p>24 I believe everything that's in the report</p> <p>25 is what it is and I believe it's -- I've represented 14:27:23</p>

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1 it correctly. 14:27:29
 2 MS. CARUSO: Thank you very much for your
 3 time in coming here.
 4 MR. ROSS: I don't have any questions.
 5 The witness reserves the right to review 14:27:42
 6 and sign the deposition transcript.
 7 THE VIDEOGRAPHER: This is the end of the
 8 deposition of Mr. Kent Van Liere.
 9 We have been on the record for 50 minutes
 10 on this tape. The time is 2:27 p.m. and we are off 14:27:53
 11 the record.
 12 (Time noted: 2:27 p.m.)
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1 STATE OF CALIFORNIA)
 2 :ss
 3 COUNTY OF SAN MATEO)
 4 I, CYNTHIA MANNING, CSR No. 7645, a
 5 Certified Shorthand Reporter of the State of
 6 California, do hereby certify:
 7 That the foregoing proceedings were taken
 8 before me at the time and place herein set forth;
 9 that any witnesses in the foregoing proceedings,
 10 prior to testifying, were placed under oath; that a
 11 verbatim record of the proceedings was made by me
 12 using machine shorthand which was thereafter
 13 transcribed under my direction; further, that the
 14 foregoing is an accurate transcription thereof.
 15 I further certify that I am neither
 16 financially interested in the action, nor a relative
 17 or employee of any attorney of any of the parties.
 18 IN WITNESS WHEREOF, I have this date
 19 subscribed my name.
 20
 21 DATED:
 22
 23
 24 CYNTHIA MANNING, CSR No. 7645
 25

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1 DECLARATION UNDER PENALTY OF PERJURY
 2
 3 I, KENT. D. VAN LIERE, Ph.D., do hereby
 4 certify under penalty of perjury that I have read
 5 the foregoing transcript of my deposition taken on
 6 January 13, 2010; that I have made such corrections
 7 as appear noted herein in ink, initialed by me; that
 8 my testimony as contained herein, as corrected, is
 9 true and correct.
 10
 11 DATED this day of
 12 2010, at , California.
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 14
 15 KENT. D. VAN LIERE, Ph.D.
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