IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TIMELINES, INC.	)	
	)	
Plaintiff/Counter-Defendant	)	Civil Action No.: 11 CV 6867
	)	
v.	)	HONORABLE JOHN W. DARRAH
	)	
FACEBOOK, INC.	)	Jury Trial Demanded
	)	
Defendant/Counter-Plaintiff.	)	

TIMELINES' MEMORANDUM IN SUPPORT OF ITS MOTION *IN LIMINE* NO. 1 TO EXCLUDE THE SURVEY AND TESTIMONY OF DR. DEBORAH JAY AT TRIAL

Plaintiff/Counter-Defendant Timelines, Inc. ("Timelines"), through its attorneys, Reed Smith LLP, moves this Court *in limine* pursuant to Federal Rule of Evidence 702, to exclude Defendant/Counter-Plaintiff Facebook, Inc.'s ("Facebook") expert witness Dr. Deborah Jay's ("Jay") survey and related testimony at trial. In support of its Motion *In Limine* No. 1, Timelines states as follows:

INTRODUCTION

As evidence that Timelines' TIMELINES marks are generic, Timelines expects Facebook to call its proposed expert witness, Jay. Timelines expects Jay to testify consistent with her expert report (the "Jay Report" (attached hereto as Exhibit A)) summarizing the purported findings of a survey (the "Survey") that she conducted. According to Jay, the Survey supposedly demonstrates that 68% of respondents believe the term "Timelines" is generic. Jay's Survey, however, is an extreme departure from generally-accepted principles of survey research. The result is a survey plagued with so many flaws and biases that its results are neither relevant nor reliable.

Specifically, Jay's Survey suffers from the flaws listed and categorized in the table below:

Methodology Bias	Analysis Bias
A phone survey was the wrong methodology to collect data because it failed to properly replicate real-life market conditions.	*Jay's Survey fails to consider one of the most fundamental principles in survey marketing theory—i.e., the Product Life Cycle. This flaw results in an incomplete view of the "brand" and leads to misinterpretation of the results.*
The Survey failed to properly randomize its questions, resulting in order biases.	
The Survey improperly bundled together certain questions.	

Given these glaring and irresoluble biases, Jay's Survey and related testimony do not meet the test for admissibility of expert testimony under Federal Rule of Evidence 702 or under the United States Supreme Court's "gatekeeping" standards set forth in *Daubert v. Merrell Dow Pharm., Inc*., 509 U.S. 579, 589 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999). For these reasons, which are explained in detail below, this Court should exclude Jay's Survey from consideration at trial as well as any related testimony pursuant to Federal Rule of Evidence 702.

BACKGROUND

Facebook challenges the validity of the TIMELINES marks, claiming that the term "Timelines" is generic. As evidence of genericness, Facebook offers the results of Jay's Survey, which Jay claims tested for the primary significance of the terms "Timelines" and "Timeline" to relevant consumers. Jay's Survey consists of two phone surveys—one for "Timelines" and one for "Timeline"—that were designed to test whether relevant consumers thought the terms "Timelines" and "Timeline" are common or brand names. (*See* Jay Report at p. 7.) In both phone surveys, respondents were read *over the phone* a list of seven names or terms and asked,

after being read each name or term, whether they thought that particular name or term was either a common name or a brand name. (*See id*. at p. 11.) The list of seven names included six control names or terms, which always randomly rotated to each survey respondent. (*See id.*) In each phone survey, however, the experimental term—either "Timelines" or "Timeline"—did not randomly rotate and, instead, always appeared last. (*See id.* at pp. 11-12.) Jay reported that her Survey demonstrates that 68% of respondents in the survey using "Timelines" and 69% of respondents in the survey using "Timeline" expressed their belief that those terms are common names. (*See id*. at pp. 17, 20.) Based on these results, Jay concludes that the primary significance of the terms "Timelines" and "Timeline" to consumers is generic. (*See id*. at pp. 24-25.)

ARGUMENT

Under *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 589 (1993), courts must act as "gatekeepers" to ensure that expert testimony satisfies the admissibility requirements of Federal Rule of Evidence 702. Reliability is the touchstone for admission of expert testimony based on scientific, technical or other specialized knowledge. *See Daubert*, 509 U.S. at 599. *Daubert* identified a list of factors that apply to the reliability determination, which factors *Kumho* Tire subsequently explained "neither necessarily nor exclusively appl[y] to all experts or in every case." *Kumho Tire*, 526 U.S. at 141-42; *see also Daubert*, 509 U.S. at 593-94. These factors include:

> (1) whether the theory or technique 'can be (and has been) tested'; (2) 'whether the theory or technique has been subjected to peer review and publication'; (3) 'the known or potential rate of error'; and (4) whether the theory has been generally accepted.

Bielskis v. Louisville Ladder, Inc., 663 F.3d 887, 894 (7th Cir. 2011) (citing *Daubert*, 509 U.S. at 593) (affirming exclusion of expert testimony)). In addition to applying the factors listed above, Courts have generally found consumer survey evidence admissible under *Daubert* if a qualified expert testifies that the survey was conducted according to generally-accepted principles of survey research. *See Menasha Corp. v. News Am. Mktg. In-Store, Inc*., 238 F. Supp. 2d 1024, 1030 (N.D. Ill. 2003), *aff'd*, 354 F.3d 661 (7th Cir. 2004); Shari Seidman Diamond, *Reference Guide on Survey Research*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 233, 233 (2d ed. 2000).

Jay's Survey deviated from several important principles of survey research. Under these cases, therefore, the Survey as well as related testimony are neither relevant nor reliable, and accordingly this Court should exclude both from consideration at trial. *See, e.g.*, *DeKoven v. Plaza Associates*, 599 F.3d 578, 583 (7th Cir. 2010) (affirming district court decision excluding improper expert report); *Chapman v. Maytag Corp*., 297 F.3d 682, 688 (7th Cir. 2002) (ordering new trial where expert report was improperly admitted); *Jackson v. Nat'l Action Fin. Services, Inc*., 441 F. Supp. 2d 877, 882 (N.D. Ill. 2006) (excluding consumer survey that was unreliable under Rule 702).

I. JAY'S SURVEY WAS NOT CONDUCTED ACCORDING TO GENERALLY-ACCEPTED PRINCIPLES OF SURVEY RESEARCH

A. A Phone Survey Was the Wrong Methodology.

The most prominent problem with Jay's Survey is that by conducting her Survey over the telephone, Jay completely failed to replicate market conditions or real-life-consumer experience. Thus, Jay violated a fundamental requirement for conducting surveys. *See Competitive Edge, Inc. v. Staples, Inc*., 763 F. Supp. 2d 997, 1010 (N.D. Ill. 2010) ("[A] survey . . . must attempt to replicate the thought processes of consumers encountering the disputed mark

or marks as they would in the marketplace."); *Sears, Roebuck & Co. v. Menard, Inc*., No 01-cv-9843, 2003 WL 168642, at *2 (N.D. Ill. Jan. 24, 2003) (rejecting s survey where "survey distorted marketplace conditions by taking the advertisements out of context."); *see also* 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:163, at 32-237 (4th ed. 1999) ("[T]he closer the survey methods mirror the situation in which the ordinary person would encounter the trademark, the greater the evidentiary weight of the survey results.").

Phone surveys "can be used *only* when it is unnecessary to show the respondent any visual materials." Diamond, *supra*, at 399–400 (emphasis added). In this case, a phone survey was the wrong methodology. (*See* Seggev Rebuttal Report ¶¶ 5-10 (attached hereto as Exhibit B); Seggev Depo. at pp. 218-20, 222-23 (attached hereto as Exhibit C).) Because Jay's survey was conducted over the phone, survey respondents did not encounter the mark at issue as they would under real market conditions, which in this case is purely visual and consists of consumers viewing the TIMELINES mark online and in the context of a webpage. (*See* Jay Report at pp. 7-13; Seggev Rebuttal Report ¶¶ 5-6; Seggev Dep. at p 218-20, 222-23.) The result then was "auditory bias" meaning that the survey respondents were prevented from reading and subvocalizing the term TIMELINES in their own minds and instead were forced to rely solely on the interviewer's enunciation of the term, TIMELINES. (*See* Seggev Rebuttal Report ¶¶ 7-10; Seggev Depo. at pp. 218-22.)

This manner of exposure is a complete departure from how a consumer would encounter the TIMELINES mark and "introduce[ed] an unknown bias." (Seggev Depo. at p. 222.) The Seventh Circuit and this Court have been critical of phone surveys for this very reason. *See, e.g.*, *Spraying Sys. Co. v. Delavan, Inc*., 975 F.2d 387, 396 (7th Cir. 1992) (holding that a phone

survey "failed to replicate market conditions and was of minimal probative value for purposes of the trade dress claim."); *Quill Natural Spring Water, Ltd. v. Quill Corp*., No. 91-cv-8071, 1994 WL 559237, at *9 (N.D. Ill. Oct. 7, 1994) ("[T]elephone surveys may not accurately reflect the market conditions in which consumers would confront the parties' marks."). Likewise, research marketing authority is clear that phone surveys "can be used *only* when it is unnecessary to show the respondent any visual materials." Diamond, *supra*, at 399–400 (emphasis added). Jay knows this and, in a publication, has stated that "visual stimuli may be appropriate in a genericness survey." *See* E. Deborah Jay, *Genericness Surveys in Trademark Disputes: Evolution of Species*, 99 TRADEMARK R. 1118, 1158 (2009). Where, as here, a consumer would only encounter the mark by reading it on a webpage, visual stimuli was necessary to replicate the real life exposure conditions. (*See* Jay Report at pp. 7-13; Seggev Rebuttal Report ¶¶ 5-6; Seggev Depo. 218-20, 222-23.)

Because the Survey's methodology—i.e., a phone survey—fails to approximate market conditions, it wholly ignores a fundamental survey principle. Jay's Survey, therefore, fails to satisfy the requirements of Federal Rule of Evidence 702 and should be excluded from trial. *See Menard, Inc*., 2003 WL 168642, at *2-3 (N.D. Ill. Jan. 24, 2003) (granting motion *in limine* to exclude survey evidence because survey was unreliable for failing to replicate market conditions).

B. Jay's Survey Suffers From Order Bias.

Another problem with Jay's survey is that it did not properly randomize the order of the questions. (*See* Jay Report at Appendix B; Seggev Rebuttal Report 11-12; Seggev Dep. at pp. 226-27.) Instead, the questions concerning the term "Timelines" were always asked in the same position—last—while the six other masking names were randomly rotated for each respondent.

(*See id*.) There is no justification for why the noncritical names were randomized and "Timelines" and "Timeline" were not. (*See id.*) As a result, Jay's survey failed to control for "order bias." (*See id.*); *see also Rust Env't & Infrastructure, Inc. v. Teunissen*, 131 F.3d 1210, 1218 (7th Cir. 1997) (affirming district court's rejection of a survey that failed to incorporate random rotation of questionnaire options); *Atlanta Allergy & Asthma Clinic, P.A. v. Allergy & Asthma of Atlanta, LLC*, 685 F.Supp. 2d 1360, 1372 (N.D. Ga. 2010); *In Re Stouffer Foods Corp.*, 118 F.T.C. 746, 806 (1994) (stating that order of survey questions should be rotated to avoid "order bias."). The survey's "order bias" was potentially amplified by use of the phone survey and questions regarding the term "Timelines" were always asked last. *See* Diamond, *supra*, at 396 (noting that in oral telephone surveys "respondents are more likely to choose the last choice offered"). Jay provides no explanation, much less a justification, for why "Timelines" and "Timeline" were not included in the random rotation. Indeed, there is none. Because Jay's Survey ignores yet another key requirement of survey research, her Survey and related testimony are rendered unreliable and this Court should exclude them from consideration at trial.

C. Jay's Survey Improperly Bundles Certain Questions.

Yet another flaw in the Survey's methodology is the bundling together of two key questions. For instance, the questionnaire informs the respondent "If you have not heard of a name or term or if you don't know what it refers to, please say so." (Jay Report at Appx. B, p. 3.) Because this questions bundles "I don't know" with "have not heard" the Survey cannot distinguish between respondents who chose one or the other of the two options given them. When removing the respondents who answered "haven't heard/I don't know" the percentage of respondents who believed that "Timelines" is a common name jumps from 69% to 74%. (*See*

Jay Report at pp. 24-25.) Thus, the larger number is nothing more than an inflated result. This, too, contributes to the Survey's overall unreliability and provides another basis on which to exclude the Survey from consideration at trial. (Seggev Rebuttal Report ¶¶ 13-12; Seggev Depo. at 227-29.).

D. Jay's Survey Fails to Take into Account the Product Life Cycle.

The final problem with Jay's Survey is that it provides an incomplete view of the "brand" construct which leads to misinterpretations of the survey's results. The central question in Jay's Survey asked respondents whether the term "Timelines" is a common name or a brand name. (*See* Jay Report at pp. 11-12.) This question, however, and the Survey's results, therefore, do not take into account the Product Life Cycle. As Timelines expert Dr. Seggev explained, "Timelines" is in the beginning stage of the Product Life Cycle. (Seggev Rebuttal Report ¶ 17.) And because sales and awareness of a product climb slowly at the beginning of the cycle, consumers may not yet recognize a brand name. (*See id*.) This of course would have no bearing on whether that term is generic, but instead, just means that consumers do not yet have familiarity with, or appreciate the benefits of, that brand and so they treat it as a common name. (*See id*.) On top of that, somewhere in the middle of the Product Life Cycle, once it grows enough, the relevant consumers may recognize Timelines as a brand name. (*See* Seggev Depo. at 233.) Thus, the Survey's failure to recognize the Product Life Cycle results in a severe analysis bias, rendering the Survey unreliable. This is yet another reason why Jay's Survey and related testimony should be excluded from consideration at trial.

CONCLUSION

In short, Jay's Survey ignores several fundamental principles of survey research, including approximating market conditions, randomizing survey questions, and taking into

account the Consumer Product Life Cycle. Because the jury will likely rely on Jay's opinions, which do not meet the threshold test for admissibility, the "gatekeeping" standards under *Daubert* and *Kumho*, therefore, demand that Jay's Survey and related testimony be excluded from consideration at trial. For these reasons, and the reasons set out above, Timelines Inc. respectfully request the Court to grant this Motion *In Limine* Number 1 and such other relief as the Court deems just.

DATED: April 8, 2013

Respectfully submitted,

TIMELINES, INC.,
Plaintiff/Counter-Defendant

By: /s/ Douglas A. Albritton

James T. Hultquist (SBN 6204320)
Douglas A. Albritton (SBN 6228734)
Michael L. DeMarino (SBN 6298337)
Bruce R. Van Baren (SBN 6310375)
REED SMITH LLP
10 South Wacker Drive
Chicago, IL 60606-7507
Telephone: +1 312 207 1000
Facsimile: +1 312 207 6400
Counsel for Plaintiff/Counter-Defendant Timelines, Inc.

CERTIFICATE OF SERVICE

I, the undersigned attorney, certify that I electronically filed **TIMELINES' MEMORANDUM IN SUPPORT OF ITS MOTION *IN LIMINE* NO. 1 TO EXCLUDE THE SURVEY AND TESTIMONY OF DR. DEBORAH JAY AT TRIAL**. Pursuant to Rule 5(b)(3) of the Federal Rules of Civil Procedure and Local Rule 5.9, I have thereby electronically served all Filing Users.

DATED: April 8, 2013

Respectfully submitted,

TIMELINES, INC.,
Plaintiff/Counter-Defendant

By: /s/ Douglas A. Albritton
James T. Hultquist (SBN 6204320)
Douglas A. Albritton (SBN 6228734)
Michael L. DeMarino (SBN 6298337)
Bruce R. Van Baren (SBN 6310375)
REED SMITH LLP
10 South Wacker Drive
Chicago, IL 60606-7507
Telephone: +1 312 207 1000
Facsimile: +1 312 207 6400
Counsel for Plaintiff/Counter-Defendant Timelines, Inc.