

EXHIBIT

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

-----X

TIMELINES, INC.,

PLAINTIFF,

-against-

FACEBOOK, INC.,

DEFENDANT.

-----X

DEPOSITION OF DR. ELI SEGGEV
New York, New York
Thursday, December 6, 2012

Reported by:
Rebecca Schaumloffel, RPR, CLR
Job 56153

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2 seeing the term online, the term "timeline"
3 online versus hearing it over the phone
4 change the results of the survey?

5 A. Well, as I mentioned in the
6 report, there are two elements to the answer
7 to that question. One is that since the
8 respondents -- sorry, since the consumers in
9 the marketplace would have encountered this
10 stimulus only online, I thought that by not
11 researching it online, one violated the rule
12 of conducting a survey that replicates market
13 offering circumstances as closely as
14 possible.

15 And the second is that the
16 presence of this stimulus being limited to
17 only online forces -- forces consumers to
18 read the name and to -- as I mentioned, to
19 subvocalize it in their own minds, to read it
20 out loud without reading aloud but in their
21 minds, and that's why it is called
22 subvocalization.

23 So that the reading of each
24 individual is their own idiosyncratic
25 reading. And by doing it on the phone, two

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2 problems arose. One is that each individual
3 was not allowed to read it as they would
4 individually. And secondly, that in
5 telephone interviewing, we have no way to
6 control how the name was enunciated, cadence,
7 completeness and so on, and I call that the
8 auditory bias.

9 So those two together I think
10 argue strongly against a telephone data
11 collection method for this kind of survey.

12 Q. You are aware, aren't you, that
13 the interviewers not only stated the terms
14 that they were using but also spelled them
15 out?

16 A. Yes, I am aware.

17 Q. And you -- will you concede that
18 that counteracted any of the effects that you
19 just described?

20 A. No. Because there is still the
21 interviewer's voice rather than the
22 respondent's, quote/unquote, inner voice or
23 the subvocalization. I am frankly very
24 surprised, and I don't know why anyone would
25 do that, would use the telephone interview in

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2 a situation like this.

3 Q. Wouldn't that -- the
4 subvocalization and auditory bias issues that
5 you just mentioned, wouldn't they potentially
6 exist in any survey, any genericness survey
7 that's done over the phone, regardless of the
8 context of the goods and services at issue?

9 A. If the respondent has a chance to
10 be exposed to the -- to the term, the word,
11 the mark, in speech, then I would think that
12 that would be proper to do a telephone
13 interview.

14 My point is that these elements
15 or these marks that are being studied here
16 would never be exposed -- would be exposed
17 only online, visually, and so I think that
18 using -- forcing of -- on it the telephone
19 interviewing method is a grave mistake.

20 Q. But if you were to go the online
21 route for such a survey, you should not
22 incorporate elements that skew the results
23 one way or the other, would you agree, visual
24 elements?

25 A. Sorry, I didn't understand.

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2 Q. For example, to take one extreme,
3 if someone did a survey, genericness survey
4 for the term "timelines" and in the visual
5 display put a little R, trademark
6 registration symbol after the word
7 "timelines," that would skew the results,
8 right? So there are things that you would
9 have to not do when you present it to make
10 sure that people aren't led one way or the
11 other.

12 A. Well, obviously, yes, obviously.
13 With the R, it is obvious.

14 Q. What would you propose that the
15 visual presentation of the term "timelines"
16 in a genericness survey look like in an
17 online survey?

18 A. Block letters.

19 Q. Anything else on the page?

20 A. No.

21 Q. Why does a determination of the
22 term's genericness depend upon creating a
23 marketplace situation? I think that is a
24 point you made in the rebuttal report.

25 A. It is the method of exposure of

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2 the consumer in the market to the name that
3 matters here. And as I said before, if the
4 only way in which consumers would encounter
5 the word "timelines" would be on a page, then
6 I submit that modifying the method of
7 communication to auditory, from visual to
8 auditory, introduces an unknown bias.

9 Q. Do you think that consumers'
10 experience with a term like "timelines" in a
11 non-marketplace condition, such as a school,
12 homework, would have a bearing on whether the
13 term "timelines" has become generic?

14 A. I have no idea what the question
15 is, I must confess.

16 Q. I will rephrase.

17 Your point, correct me if I am
18 wrong, is that you think a marketplace
19 condition should be recreated when assessing
20 the genericness of the term "timelines,"
21 correct?

22 A. I think they should -- as
23 McCarthy and others would say, one of the
24 principles of trademark research is to come
25 as close as possible to the marketing

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2 exposure conditions. Yes. That's an
3 important principle of survey research
4 conducted for litigation purposes.

5 Q. Do you believe that consumers
6 only encounter the term "timelines" online?

7 A. I believe that the litigated area
8 here is the timeline -- the exposure, which
9 can occur only online. It is, after all, a
10 website.

11 Q. But wouldn't you concede that the
12 more one encounters an arguably generic term
13 in a non-marketplace context, the more
14 difficult it will be for that person to view
15 that term when encountered in a marketplace
16 context as non-generic?

17 A. No, I don't think there is any
18 basis for that assertion.

19 Q. So from earlier answers, you are
20 familiar with Teflon surveys?

21 A. Yes, I am.

22 Q. What's your understanding as to
23 how a Teflon survey works?

24 A. It asks people, respondents to
25 distinguish between common names and brand

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2 your contention that the order of the testing
3 control questions as used by Dr. Jay
4 invalidates or biases the results of the
5 survey? I know you believe that, but can you
6 point to any empirical evidence that that's
7 the case or surveys that have been attacked
8 by courts?

9 A. Not in the legal context, no. It
10 is a matter of the principles of marketing
11 research, and it goes back to Diamond and --
12 particularly to Diamond, which is the
13 authority in this case, that order bias has
14 to be handled in survey research, and if it's
15 not handled, then -- if it's not handled
16 properly, then it's -- it brings into
17 question the results.

18 Q. Why do you assert that the stated
19 results would have been more accurate if the
20 "don't know" and "I haven't heard of" answer
21 options were separate?

22 A. Well, because these are two very
23 different categories of answers. The Jay
24 report asks people to not -- permits people
25 to not answer the question if they have never

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2 heard of it. Now, what we are -- typically
3 in a genericness report, one is interested in
4 the opinion of the person, and I don't think
5 that a precondition of that is awareness of
6 it. The moment you do that, these two,
7 "don't know" is -- are two very different
8 categories. So "don't know" is the inability
9 to make a decision. "Haven't heard of it" is
10 a definitive statement about -- that says
11 since I haven't heard of it and since you
12 allowed me not to answer because I haven't
13 heard of it, which are very different
14 answers, and when we combine answers, we are
15 allowed to combine only those that come from
16 the same roots, the same family. Here they
17 are two separate, totally separate contexts.

18 Q. And had those answers been
19 separated, can you give me an example of how
20 the -- how and to the extent the overall
21 results of this survey would have differed?

22 A. That's precisely the problem. We
23 don't know.

24 Q. Do you think those two answers
25 are mutually exclusive, "I don't know" and "I

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2 haven't heard of"?

3 A. Yeah. I think anybody can agree
4 that they are from two different contexts,
5 and therefore, they -- I don't know if the
6 right term is "mutually exclusive," but it
7 belongs -- and that -- yeah, they are
8 mutually exclusive, either "I don't know" or
9 "I haven't heard of it."

10 Q. If we look at the -- in your
11 rebuttal report, the section on analysis
12 bias.

13 A. Yes, sir.

14 Q. Do you have an understanding of
15 the concept of acquired distinctiveness in --
16 under trademark law?

17 A. Yes, I do.

18 Q. What do you understand that to
19 mean?

20 A. That people are able to
21 differentiate this trademark -- the trademark
22 in question from other trademarks in the
23 course of time.

24 Q. From a trademark law perspective,
25 do you understand the difference between a

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2 distinctiveness and function as a source
3 identifier?

4 A. If you are ready to accept that
5 you measure genericness in your sense, that
6 it's a generic word, as being measured by
7 whether it is a common word or not -- common
8 name, I should say. There is a disconnect
9 here, my point being, between what research
10 does, using common name versus brand name,
11 and what -- what the law implies or looks at.

12 My contention -- the reason I
13 introduced the product life cycle is that
14 somewhere in the middle of the product life
15 cycle, when it grew enough, then Timelines or
16 any other name, 50% of the population may say
17 that's a brand name. But early on in the
18 life cycle, there is not sufficient
19 familiarity of it, with it as a brand name,
20 so it treats it as a common name.

21 Q. Now, in your rebuttal report, you
22 concluded that or you stated the conclusion
23 that the Jay, Deborah Jay genericness survey
24 didn't provide its respondents with a frame
25 of reference. I believe I saw that reference

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C E R T I F I C A T E

STATE OF NEW YORK)

: SS.:

COUNTY OF NASSAU)

I, REBECCA SCHAUMLOFFEL, a Notary Public for and within the State of New York, do hereby certify:

That the witness whose examination is hereinbefore set forth was duly sworn and that such examination is a true record of the testimony given by that witness.

I further certify that I am not related to any of the parties to this action by blood or by marriage and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 11th day of December, 2012.

Rebecca Schaumloffel

REBECCA SCHAUMLOFFEL