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 MOTION *IN LIMINE* NO. 6 TO BAR DR. SIMONSON FROM INTRODUCING EVIDENCE OR ARGUMENTS THAT THE TERM "TIMELINE" IS GENERIC

Plaintiff/Counter-Defendant Timelines, Inc. ("Timelines"), through its attorneys, Reed Smith LLP, moves this Court, pursuant to Federal Rules of Evidence 403 and 702, to enter an order *in limine* barring Dr. Itamar Simonson ("Dr. Simonson") from introducing evidence or arguments that the term "timeline" is generic. In support of its Motion *In Limine* No. 6, Timelines state as follows:

INTRODUCTION

As evidence that the TIMELINES marks are generic, and to rebut the survey that Dr. Eli Seggev ("Dr. Seggev") conducted on behalf of Timelines, Timelines expects Facebook to call its expert witness, Dr. Itamar Simonson ("Dr. Simonson"), to testify consistent with his rebuttal report. According to Dr. Simonson, there is allegedly "no dispute that the word "timeline" is generic, or at a minimum, merely descriptive." However, Dr. Simonson's opinion is unhelpful and unreliable since it fails all the reliability requirements set forth in Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). Dr. Simonson's opinion also constitutes improper rebuttal evidence since Facebook retained Dr. Simonson for the sole

purpose of rebutting Dr. Seggev's survey, which neither addresses nor contains an opinion about the strength or validity or the term "timeline." For these reasons, which are discussed in detail below, the Court should bar Dr. Simonson from introducing evidence or arguments that the term "timeline" is generic.

ARGUMENT

A. Dr. Simonson's Opinion that the Term "Timeline" is Generic is not Sufficient Reliable Under Fed. R. Evid. 401, and Therefore, not Admissible at Trial.

Federal Rule of Evidence 702, as interpreted by *Daubert v. Merrell Dow Pharms. Inc.,* 509 U.S. 579 (1993), and its progeny, governs the admissibility of expert testimony. In particular, *Daubert* requires that expert testimony only be admitted if (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is reliable; and (3) the testimony assists the trier of fact—through the application of scientific, technical, or specialized expertise—to understand the evidence or to determine a fact in issue. *Daubert*, 509 U.S. at 579–80; *see also Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999) (expert testimony must be sufficiently reliable to be admissible). Further, the Supreme Court has reiterated that a district court is not required to "admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).[1]

Dr. Simonson's opinion testimony that the term "timeline" is generic is both unreliable and unhelpful because it fails all of *Daubert's* requirements. Although Dr. Simonson's field of expertise is consumer behavior and trademark infringement from the consumer's perspective, Dr. Simonson admitted during his deposition that: (1) he was not asked to render an opinion on whether "timelines" or "timeline" was a generic term; (2) he did not conduct a study to

[1] "*Ipse dixit"* is defined as "[s]omething asserted but not proved." BLACK'S LAW DICTIONARY 833 (7th ed. 1999).

determine whether "timelines" or "timeline" was a generic term; (3) he is not an expert as to the legal definition of "generic;" and (4) his opinion is based solely on his everyday experience. (*See* Simonson Expert Report, pg. 1, ¶ 3, attached hereto as Exhibit A; Simonson Dep., Jan. 7, 2013, pgs. 67:14–16; 71:1–72:7; 73:2–7, attached hereto as Exhibit B.) Since "reliability is the touchstone for the admission of expert testimony," *Daubert*, 509 U.S. at 599, and Dr. Simonson's opinion is purely speculative in nature, it would be wholly improper and highly prejudicial to allow him to introduce at trial, arguments or evidence that "timeline" is a generic term.

B. Dr. Simonson's Opinion that the Term "Timeline" is Generic Constitutes Improper Rebuttal Evidence Under Fed. R. Civ. P. 26(a)(2), and Therefore, is not Admissible at Trial.

Dr. Simonson should also be prohibited from testifying that the term "timeline" is generic since his opinion constitutes improper rebuttal evidence. Rule 26(a)(2) of the Federal Rules of Civil Procedure describes a proper rebuttal as "evidence intended solely to contradict or rebut evidence on the same subject matter" identified by another party in its expert disclosures. FED. R. CIV. P. 26(a)(2); *see also Peals v. Terre Haute Police Dept.*, 535 F.3d 621, 629 (7th Cir. 2008) ("[T]he proper function of rebuttal evidence is to contradict, impeach, or defuse the impact of the evidence offered by an adverse party.") In other words, a party may not offer testimony under the guise of "rebuttal" only to provide additional support his case in chief. *Peals*, 535 F.3d at 630; *see also Noffsinger v. The Valspar Corp.*, No. 09 C 916, 2011 WL 9795, at *6–7 (N.D. Ill. Jan. 3, 2011) (limiting a rebuttal expert's opinion to his critique of defendants' experts opinions and striking parts of the expert's report that went beyond the scope of a proper rebuttal witness).

In the present case, Dr. Simonson was retained by Defendant/Counter-Plaintiff Facebook, Inc. ("Facebook") for the sole purpose of evaluating the survey that Dr. Eli Seggev ("Dr. Seggev") conducted on behalf of Timelines. *See* Simonson Expert Report, pg. 4, ¶ 10.

The purpose of Dr. Seggev's survey, as noted in his report, was to determine the extent to which Facebook's "use of the name "Timeline" on its website and elsewhere results in a likelihood of confusion among consumers between . . . [the] "Timelines" [trademarks], as used on [the] Timelines.com website, and Facebook." (*See* Seggev Expert Report, ¶ 1, attached hereto as Exhibit C.) Dr. Seggev was not asked to render an opinion, and did not in fact offer any opinions as to whether the term "timelines" or "timeline" are generic.

Nevertheless, Dr. Simonson improperly opines, without any foundation, that "there is probably no dispute that the word "timeline" is generic, or at a minimum, merely descriptive." (*See* Simonson Expert Report, pg. 13, ¶ 35.) Not only is this opinion squarely outside the scope of Dr. Seggev's report, and thus, improper rebuttal evidence, but it constitutes an improper attempt to bolster Facebook's positions and introduce cumulative evidence.[2] *Sunstar, Inc. v. Alberto Culver Co., Inc.*, Nos. 01 C 0736 and 01 C 5825, 2004 WL 189927, at *25 (N.D. Ill. Aug. 23, 2004) ("Multiple expert witnesses expressing the same opinion on a subject is a waste of time and needlessly cumulative. It also raises the unfair possibility that jurors will resolve competing expert testimony by 'counting heads' rather than evaluating the quality and credibility of the testimony.") Allowing Dr. Simonson to introduce this duplicative and unreliable evidence would unfairly prejudice Timelines and is likely to mislead the jury into falsely believing that Timelines' trademarks are invalid.

[2] As evidence of genericness, Facebook offers the results of Dr. Deborah Jay's survey, which claims to have to have tested for the primary significance of the terms Timelines and timeline to relevant consumers. *See* Jay Expert Report, pg. 7. Jay's Expert Report is Exhibit A to Timelines' Memorandum in Support of Its Motion *In Limine* No. 1 to Exclude the Expert Testimony of Dr. Deborah Jay at Trial. To save paper, it is not attached as an exhibit hereto.

CONCLUSION

For the foregoing reasons, Plaintiff/Counter-Defendant Timelines, Inc., respectfully requests that this Court grant this motion in its entirety, and enter an order *in limine* barring Dr. Itamar Simonson from introducing evidence or arguments that the term "timeline" is generic.

DATED: April 8, 2013

Respectfully submitted,

TIMELINES, INC.,
Plaintiff/Counter-Defendant

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CERTIFICATE OF SERVICE

I, the undersigned attorney, certify that I electronically filed **TIMELINES' MEMORANDUM IN SUPPORT OF MOTION *IN LIMINE* NO. 6 TO BAR DR. SIMONSON FROM INTRODUCING EVIDENCE OR ARGUMENTS THAT THE TERM "TIMELINE" IS GENERIC**. 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

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