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

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| TIMELINES, INC. | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Civil Action No.: 11 CV 6867 |
| | ) | |
| FACEBOOK, INC. | ) | HONORABLE JOHN W. DARRAH |
| | ) | |
| Defendant. | ) | |

**DEFENDANT FACEBOOK, INC.'S OPPOSITION TO PLAINTIFF'S MOTION *IN LIMINE* NO. 6 TO BAR DR. SIMONSON FROM INTRODUCING EVIDENCE OR ARGUMENTS THAT THE TERM "TIMELINE" IS GENERIC**

## I. INTRODUCTION

In its Motion *in Limine* No. 6 ("Motion"), Plaintiff seeks to prohibit Dr. Itamar Simonson from testifying that the noun "timeline(s)" is "generic." Plaintiff claims that (1) Dr. Simonson's opinion is unreliable under Federal Rule of Evidence 702 because he is not an expert on the "legal definition" of the term "generic"; and (2) his opinion constitutes improper rebuttal testimony because it is outside the scope of Plaintiff's expert's report.

Plaintiff's argument is fatally flawed, as Plaintiff misstates Dr. Simonson's testimony and, more significantly, the purpose for which Facebook will use it. Dr. Simonson will offer (1) expert opinion testimony under Rule 702 directed only to rebutting Plaintiff's expert; and (2) lay opinion testimony under Rule 701 that the word "timeline(s)" is generic in the non-legal sense, in that it is a commonly used word in the English language, which is a critical component of his challenge to Plaintiff's expert's report and is necessary for the jury to understand his expert opinion. Contrary to the central argument in Plaintiff's Motion, Dr. Simonson ***will not offer expert or lay opinion that "timeline(s)" is legally a generic trademark***. For these reasons, the Court should deny Plaintiff's Motion.

## II. BACKGROUND

Plaintiff intends to support its claims with a legally defective survey on consumer "confusion" conducted by its expert witness, Dr. Eli Seggev. Dr. Seggev conducted the survey "to determine whether there is a likelihood of confusion among consumers between the plaintiff's Timelines trademark and Facebook's use of the name Timeline." (Pl.'s Br., Ex. C, Dkt. No. 138-3, Expert Report of Dr. Eli Seggev ("Seggev Report"), p. 3.) Dr. Seggev's survey employed a "Test vs. Control design," in which a Test Group was shown a webpage displaying the name "Timelines" and a Control Group was shown a similar webpage displaying the name "Timescapes." (*Id.*, pp. 3-4.) Participants were then asked to identify companies, from a list provided by Dr. Seggev that included Facebook, with which they most associate the name "Timelines" or "Timescapes," respectively. (*Id.*, p. 7.)

Facebook designated a rebuttal expert witness, Dr. Simonson, who is an expert in "consumer behavior and trademark infringement from the consumer's perspective." (Pl.'s Br., Dkt. No. 138, p. 2.) In particular, he focuses on "the specific issue of the survey methods used to assess confusion." (Declaration of Brendan J. Hughes ("Hughes Decl."), Ex. A, Excerpts from Transcript of Deposition of Itamar Simonson ("Simonson Dep.") at 25:9-10.) Dr. Simonson examined Dr. Seggev's report and survey and concluded that, among the many reasons that Dr. Seggev's methodology was flawed, the survey "failed to include a proper control." (Pl.'s Br., Dkt. No. 138-1, Rebuttal Report of Dr. Itamar Simonson ("Simonson Rebuttal") ¶¶ 33-35.) Dr. Simonson's report explains that, if the word to be tested in a survey is "generic or commonly used," then the control word "must include that element." (*Id.* ¶ 34) In other words, because Dr. Seggev's survey was designed to measure confusion of the word "timelines," but did not use a control word that contained the element "timelines," his method is flawed. Dr. Simonson

concludes that, "had a proper control been used," there likely would have been *no* measurable confusion. (*Id.* ¶ 35.)

Plaintiff now contends that Dr. Simonson should not be permitted to explain that Dr. Seggev's methodology and control were flawed because "timeline(s)" is a generic word that is commonly used in the English language.

## III. ARGUMENT

### A. Dr. Simonson's Testimony Rebutting Dr. Seggev's Survey and Report Is Proper Under Federal Rule of Evidence 702.

Plaintiff asserts that Dr. Simonson's testimony that the word "timeline(s)" is "generic" constitutes an improper expert opinion under Rule 702 and is outside of scope of rebutting the opinion of Dr. Seggev. Plaintiff is wrong.

"A motion in limine to exclude evidence may be granted only if the evidence sought to be excluded is clearly inadmissible for ***any purpose***." *Plair v. E.J. Brach & Sons, Inc.*, 864 F. Supp. 67, 69 (N.D. Ill. 1994) (emphasis added). Evidence may be admissible for one purpose even if not admissible for another. "[T]here is no rule of evidence that provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible." *United States v. Abel*, 469 U.S. 45, 46 (1984).

Expert witness testimony must comply with Rule 702 of the Federal Rules of Evidence, which permits qualified experts to testify in the form of an opinion if (1) the expert's scientific technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (2) the testimony is based on sufficient facts or data; (3) the testimony is the product of reliable principles and methods; and (4) the expert has reliably applied the principles and methods to the facts of the case. Fed. R. Evid. 702.

Dr. Simonson will not offer an expert opinion on the legal issue of whether "timelines" should be considered generic and therefore unprotectable under trademark law. Rather, his

expert opinion under Rule 702 will be limited to testifying that Dr. Seggev's survey and report are flawed because, among other reasons, when a survey is designed to measure the confusion of a commonly used word, the survey must also include a control word that contains that commonly used element – and Dr. Seggev's survey did not.

Dr. Simonson's credentials as an expert are beyond repute. His critique of Dr. Seggev's survey methodology will help the jury understand the profound problems with that methodology. Dr. Simonson carefully reviewed and considered Dr. Survey's survey and report, and has applied well-established and reliable principles of consumer survey research in reaching his conclusion that Dr. Seggev's survey was fundamentally flawed due, in part, to improper methodology. This is proper expert opinion offered directly in rebuttal of Dr. Seggev's opinion.

**B. Dr. Simonson's Testimony that "Timelines" is a Generic and Commonly Used Word is Proper Under Federal Rule of Evidence 701.**

To assist the jury in understanding Dr. Simonson's expert opinion, Rule 701 permits him to give lay opinion testimony that the word "timeline" is "generic" in the non-legal sense, meaning that it is a commonly used word in the English language and was likely to be recognized, and its ordinary meaning easily understood, by the participants in Dr. Seggev's survey. He will not testify that "timeline" is a legally generic term.

Lay opinion evidence is permissible under Rule 701 of the Federal Rules of Evidence, which permits a witness to give lay opinion testimony that is (1) rationally based on the witness' perception; (2) helpful to clearly understanding the witnesses' testimony; and (3) not based on specialized knowledge. Fed. R. Evid. 701. This means that a witness can testify to a lay opinion if it "results from a process of reasoning familiar in everyday life." *Id.*, Advisory Committee note. A witness can provide both expert opinion under Rule 702 and lay opinion testimony under Rule 701. *See id.* Dr. Simonson's testimony satisfies each element of Rule 701.

First, the question of whether "timeline(s)" is generic and commonly understood is

rationally based on Dr. Simonson's perception. When Plaintiff's counsel specifically asked Dr. Simonson "on what do you base your statement" that "timeline" is "generic," he responded: "Well, 'timeline' is just a word that I've used generically many times" and that his statement was based on being "a person who's using this word, who has encountered the word in various contexts, just everyday experience." (Simonson Dep. at 67:18-25, 69:10-15.)

Second, Dr. Simonson's lay opinion is helpful and necessary to understand his expert testimony. His expert opinion that Dr. Seggev's methodology is flawed is partly based on his lay opinion that "timeline(s)" is a commonly used word. It is therefore critically important that the jury hear his lay opinion in order to understand and put into context his expert opinion.

Finally, Dr. Simonson's opinion on the common usage of the word "timeline" is not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. The portion of Dr. Simonson's report that criticizes Dr. Seggev's control word uses the word "generic" only in the non-legal meaning of "applicable or referring to a whole class or group." COLLINS ENGLISH DICTIONARY (10th Ed. 2009). Indeed, during his deposition, Dr. Simonson confirmed that he was ***not*** using "generic" in a legal sense, but rather recognized it as a common word because he has used it many times and encountered the word in various contexts. (Simonson Dep. at 67:22-25, 69:13-15.) In fact, Dr. Simonson repeatedly used the word "generic" in this non-legal sense throughout the deposition. (*E.g., Id.* at 28:4-6 (referring to "a generic blanket statement").)

Moreover, Plaintiff does not dispute that "timelines" is "generic" in the sense described by Dr. Simonson. Plaintiff admitted in response to Facebook's summary judgment papers that the word "timeline" is commonly used generically. (Pl.'s Resp. to Def.'s Statement of Material Facts, Dkt. No. 92, p. 9. ("The attached newspaper articles admittedly are ***generic*** uses of the term 'timeline' . . . ." (emphasis added)).) Plaintiff also admits that "Timeline" is "defined in

numerous dictionaries, such as the American Heritage Dictionary, Merriam Webster's Collegiate Dictionary, and Wikipedia." (*Id*.)

In short, there is no basis for Plaintiff to contend that Dr. Simonson cannot explain that Dr. Seggev's survey failed to use a proper control word because "timeline(s)" is a "generic or commonly used" term. Dr. Simonson is an expert in consumer behavior and "the specific issue of the survey methods used to assess confusion." (Simonson Dep. at 25: 9-10.) He will testify that the word "timelines" is generic only in the sense it is commonly used. Plaintiff itself admits that the word "timelines" is "generic" in the sense that it is part of the English language, is defined in numerous dictionaries, and is commonly used. Dr. Simonson will then explain the implications of that fact when analyzing Dr. Seggev's survey methodology.

The fact that Dr. Simonson's expert opinion is partly based on the underlying lay opinion that the word "timeline(s)" is a commonly used word (which is not disputed by Plaintiff) cannot result in the exclusion of his testimony. The Court should thus deny Plaintiff's Motion.

## IV. CONCLUSION

For the reasons stated above, Facebook respectfully requests that the Court deny Plaintiff's Motion *in Limine* No. 6 to Bar Dr. Simonson From Introducing Evidence or Arguments that the Term "Timeline" is Generic.

Dated: April 15, 2013

Respectfully submitted,

COOLEY LLP

By: */s/ Peter J. Willsey*

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## CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he served the foregoing **DEFENDANT FACEBOOK, INC.'S OPPOSITION TO PLAINTIFF'S MOTION *IN LIMINE* NO. 6 TO BAR DR. SIMONSON FROM INTRODUCING EVIDENCE OR ARGUMENTS THAT THE TERM "TIMELINE" IS GENERIC** by means of the Court's CM/ECF System, which causes a true and correct copy of the same to be served electronically on all CM/ECF registered counsel of record, on April 15, 2013.

Dated: April 15, 2013

*/s/ Brendan J. Hughes*

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