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' RESPONSE BRIEF IN OPPOSITION TO FACEBOOK'S MOTION *IN LIMINE* NO. 1: TO EXCLUDE TIMELINES' EXPERT DR. SEGGEV

Plaintiff/Counter-Defendant Timelines, Inc. ("Timelines" or "Plaintiff") submits this response brief in opposition to Defendant/Counter-Plaintiff Facebook, Inc.'s ("Facebook") Motion *In Limine* No. 1: To Exclude D. Eli Seggev's Survey and Related Expert Report and Testimony ("Motion").

INTRODUCTION

Unhappy with the results and preferring a different methodology—presumably, one that does not show a likelihood of confusion—Facebook fashions together a misguided attack on the admissibility of Dr. Seggev's likelihood-of-confusion survey (the "Survey"). After erroneously arguing that the TIMELINES marks are somehow generic (a summary judgment argument that this Court already has rejected), Facebook throws everything it can think of into its attack—distorted descriptions of the Survey, out-of-context excerpts of deposition testimony, and a laundry list of standard methodology critiques ranging from the baseless to the nonsensical. Facebook even goes so far as to create rules and standards that do not exist.

Dr. Seggev is an eminently qualified survey expert,[1] and he conducted his Survey according to well-established principles and methodologies, which are documented in his report. In his deposition, Dr. Seggev explained in detail the sound reasons why he conducted his Survey as he did. If Facebook, (which conducted no confusion survey of its own), wishes to challenge Dr. Seggev's work, it can do so at trial. There is no legitimate basis for challenging the threshold admissibility of his Survey.

[1] Facebook does not challenge Dr. Seggev's qualifications. (*See* Mtn. at p.5.) Although Facebook claims it has not conceded this challenge, Facebook has made no attempt to develop an argument as to Dr. Seggev's qualifications and, therefore, waives the same. *See United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir.1991) ([P]erfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived"). Timelines reserves the right to argue that Dr. Seggev is qualified in the event Facebook raises an untimely challenge to his qualifications.

ARGUMENT

Dr. Seggev designed his Survey based on proper survey methodologies, which included replicating consumer market conditions and formatting his survey according to accepted principles in *Squirt*, *Eveready* and their progeny. Dr. Seggev, moreover, took all the necessary and customary precautions in designing the Survey's universe, stimuli, control, and questions, to ensure reliable results. Based on the Survey's results, Dr. Seggev concluded that there is "a significant level of likelihood of confusion among consumers between the Timelines trademark (as used on the Timelines.com website) and Facebook." (Expert Report of Dr. Eli Seggev ("Expert Report") ¶ 3, attached hereto as Exhibit A.) Facebook's attack on the Survey is meritless. To the extent the Survey has any flaws, Facebook can point them out to the jury, but they are not appropriate grounds for the drastic step of excluding the Survey.

I. The Seventh Circuit Is Clear That Surveys Are Inadmissible Only In "Rare" Situations.

The admissibility of scientific expert testimony, such as Dr. Seggev's Survey, is governed by Federal Rule of Evidence 702 and the Supreme Court's holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993). *See LG Electronics U.S.A., Inc. v. Whirlpool Corp*., 661 F. Supp. 2d 940, 951 (N.D. Ill. 2009). An expert's testimony will be admissible if (a) the expert is qualified "'as an expert by knowledge, skill, experience, training, or education,' (b) the expert's reasoning or methodologies underlying the testimony are scientifically reliable, (c) and the expert's testimony is relevant, that is, it must assist the trier of fact to understand the evidence or to determine a fact in issue." *Ervin v. Johnson & Johnson, Inc*., 492 F.3d 901, 904 (7th Cir. 2007) (quoting FED. R. EVID. 702). A court has great discretion in determining whether expert testimony is admissible. *See LG Electronics U.S.A., Inc*., 661 F. Supp. 2d at 951.

Survey evidence need not be perfect to be admissible. *See Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club*, 34 F.3d 410, 416 (7th Cir. 1994). In fact, the Seventh Circuit has made it clear that only in "rare" situations will a proffered survey be "so flawed as to be completely unhelpful to the trier of fact and therefore inadmissible." *AHP Subsidiary Holding Co. v. Stuart Hale Co*., 1 F.3d 611, 618 (7th Cir. 1983). Instead, "any shortcomings in the survey results go to the proper weight of the survey and should be evaluated by the trier of fact." *Id*.; *see also Piper Aircraft Corp. v. Wag-Aero, Inc*., 741 F.2d 925, 930–31 (7th Cir. 1984) (noting criticisms directed at likelihood of confusion survey go to weight given to survey, but not its admissibility); 6 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION ("5 MCCARTHY") § 32:170 (4th ed. 2012) ("The majority rule is that while technical deficiencies can reduce a survey's weight, they will not prevent the survey from being admitted into evidence.").

II. Facebook Misrepresents the Survey's Results Despite Dr. Seggev's Clear Explanation.

Facebook loses all credibility when it misrepresents that "Dr. Seggev reported that the Survey demonstrated that 11% of the Survey's respondents were 'confused.'" (Mtn. at p. 4.) Dr. Seggev actually concluded that 19% of respondents were confused. Facebook arrived at the wrong figure by improperly "netting" the results of Dr. Seggev's test and control results (19% and 8%). This is wrong, and Facebook knows that it is wrong. Dr. Seggev stated in his report and in his deposition that "the finding of likelihood of confusion is not determined by the absolute value of the percent of consumers who associate the two marks." (Expert Report ¶ 36; *see also* Deposition of Dr. Eli Seggev ("Seggev Depo.") at 164:1-9, attached hereto as Exhibit B.) In other words, Dr. Seggev explained that the measurement of likelihood of confusion is "not the netting of test minus control," which is the calculation Facebook performed and then

improperly attributed to Dr. Seggev. (*See* Mtn at p. 4; Seggev Depo. at 164:1-9.) This is the first of several distortions that Facebook makes in its attempt invalidate Dr. Seggev's Survey.

III. Dr. Seggev Conducted His Survey According to Well-Established Methodologies, and His Survey is Not, as Facebook Opines, Merely a "Word Association Test."

Facebook mistakenly contends that Dr. Seggev's Survey is not relevant because it did not test for "confusion actionable under the law." (*See* Mtn. at pp. 5-6.) The basis for this argument is Facebook's opinion that the Survey is merely a "word association test." (*See id.*) The Survey, however, is nothing like a word association test, and Facebook's mischaracterization that it is, is both misleading and at odds with relevant authority. A typical word association survey simply asks what is the first thing that comes to mind and does not—as Dr. Seggev's Survey did—approximate market conditions. *WE Media, Inc. v. Gen. Elec. Co*., 218 F. Supp. 2d 463, 474 (S.D.N.Y. 2002), *aff'd sub nom*. *WE Media, Inc. v. Cablevision Sys. Corp*., 94 F. App'x 29 (2d Cir. 2004) (rejecting a survey for not approximating market conditions where respondents were given word lists to associate "devoid of context"); *Componentone, L.L.C. v. Componentart, Inc*., No. 05-cv-1122, 2008 WL 4790661, at *24 (W.D. Pa. Oct. 27, 2008) (rejecting survey as a word association for failing to present the marks at issue in the manner potential purchasers are likely to encounter the marks—e.g., "on parties' websites, in Google search results or on the websites of resellers") (this decision, along with all unpublished decision cited herein is attached as Exhibit C.)

A. Unlike a "Word Association" Test, Dr. Seggev's Survey Properly Replicated Market Conditions.

Unlike the word association tests in the cases above, Dr. Seggev's Survey did not merely measure the associative probability of one word calling to mind another word "devoid of context." Survey respondents were not simply shown the word "Timelines" in the abstract and then asked to play a word game in which the respondents associate that word with the first word

that comes to mind. Instead, respondents were shown Plaintiff's mark, TIMELINES, in the context of Plaintiff's website—as it exists in the marketplace—and then, in a second question, asked to associate a particular "company," not merely another *word*, with Plaintiff's mark. (*See* Expert Report, ¶¶ 26-30 and Ex. 5.)

This method was consistent with the way a consumer would likely encounter the TIMELINES mark in the internet marketplace, which is, as Dr. Seggev explained, consumers "go online, and they wander around just the way they did in a mall, and they may fall upon" one or more websites. (*See* Seggev Depo. at 114:24-25; 115:2-4.) Because the Survey replicated market conditions, it satisfies one of the fundamental requirements of likelihood-of-confusion surveys. *See Competitive Edge, Inc. v. Staples, Inc*., 763 F. Supp. 2d 997, 1010 (N.D. Ill. 2010) ("[A] survey to test likelihood of confusion must attempt to replicate the thought processes of consumers encountering the disputed mark or marks as they would in the marketplace."); *see also* 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION ("5 MCCARTHY") § 32:163 (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.").

B. Dr. Seggev's Survey Used Standard Consumer Research Tools and Accepted Principles and Methodologies Based on *Squirt* and *Eveready*.

In addition to properly approximating market conditions, Dr. Seggev selected a method that he concluded would best fit the particular market conditions and circumstances of this case, while at the same time borrowing accepted principles and methodologies from relevant likelihood-of-confusion cases. This method, he explained, included an "aided association measurement" that asked respondents—after exposing respondents to the stimuli in real market conditions—which "company" they "associated with" the TIMELINES mark. (*See* Expert

Report ¶ 29, Ex. 5.) Facebook, however, myopically seizes on the word "association" to argue that the Survey measured word "association" rather than confusion. (*See* Mtn. at p. 7.) Facebook never explains *why* it maintains that a consumer's association of a registered trademark with another company that does not own the trademark is not relevant to an assessment of confusion. (*See* Mtn. at p. 7.)

Facebook's argument has no support and completely ignores Dr. Seggev's explanation of his method. Dr. Seggev explained that an "aided association measurement" is a standard research tool used in consumer market research, (Expert Report ¶ 29), and that "association" is a component properly used to measure the likelihood of confusion. (*See* Seggev Depo. at 127:21-25; 134:8-12.) On top of that, under the Lanham Act, "association" is one of the ways that confusion is measured. (*See* Seggev Depo. at 48:13-25; 49:10-25.); *AutoZone, Inc. v. Strick*, 543 F.3d 923, 930 (7th Cir. 2008) ("'[T]he test is not whether the public would confuse the marks, but whether the viewer of an accused mark would be likely to **associate** the product or service with which it is connected with the source of products or services with which an earlier mark is connected.'" (quoting *James Burrough Ltd. v. Sign of Beefeater, Inc.*, 540 F.2d 266, 275 (7th Cir.1976) (emphasis added).).[2] Dr. Seggev thoroughly explained that given the unique

[2] *See also Johnny Blastoff, Inc. v. Los Angeles Rams Football Co.*, 188 F.3d 427, 437 (7th Cir. 1999) ("Blastoff's own statement, that the public **associated** the plaintiff's apparel and sundries with the St. Louis Rams football club, compels the conclusion that the district court did not err in finding that a likelihood of confusion of the parties' marks exists." (emphasis added)); *Platinum Home Mortg. Corp. v. Platinum Fin. Group, Inc.*, 149 F.3d 722, 733 (7th Cir. 1998) ("[I]f buyers are confused, then this also means that they must have recognized plaintiff's word as a trademark and **associated** it only with the plaintiff." (emphasis added)); *Illinois High Sch. Ass'n v. GTE Vantage Inc.*, 99 F.3d 244, 246-47 (7th Cir. 1996) ("Were NCAA responsible for blotting out the exclusive **association** of "March Madness" with the Illinois high school basketball tournament, IHSA might have a remedy on a theory of reverse confusion. . . ." (emphasis added)); *Blue Ribbon Feed Co., Inc. v. Farmers Union Cent. Exch., Inc.*, 731 F.2d 415, 419 (7th Cir. 1984) ("Had the case gone to trial, it would have been necessary for BRF to show that members of the relevant consuming public **associated** the name Blue Ribbon with the Sathers' Blue Ribbon Feed Company." (emphasis added)); *Union Carbide Corp. v. Ever-Ready Inc.*, 531 F.2d 366, 387 (7th Cir. 1976) ("The test … is whether they **associate** the products either with Carbide or with the single, though anonymous, source which manufactures EVEREADY products. Those who indicated that they believed other Carbide products were manufactured by the same company that produced the bulbs or lamps shown must be considered cases of confusion." (emphasis added)); *Morningware, Inc. v. Hearthware Home Products, Inc.*, 673 F. Supp. 2d 630, 634

characteristics of internet "browsing behavior" and the "particular circumstances of the cases, which is, one is a website, the other is a word that is very similar to the website but is not the name of the website . . . **association** . . . rather than all the others, was the best, the most fitting measurement to apply." (Seggev Depo. at 128:3-13 (emphasis added).) That is his expert opinion, and there is no reason to exclude it.

Facebook apparently would have preferred that the Survey measure the "association between the Timelines.com website and the Facebook website" themselves as opposed to an association between the TIMELINES mark and Facebook. (*See* Mtn. at pp. 6–7.) The problem with that argument is that there is no authority that requires Dr. Seggev to conduct his Survey in the precise manner Facebook desires. There is not, as Facebook suggests, just one way to conduct a likelihood of confusion survey. In fact, courts have recognized numerous formats and methodology. *See THOIP v. Walt Disney Co*., 690 F. Supp. 2d 218, 241 n.165 (S.D.N.Y. 2010) ("More than one survey format may sufficiently reflect marketplace conditions so as to meet the standard for admissibility."). Simply because Facebook may prefer one way of conducting the Survey does not render Dr. Seggev's method flawed, and it certainly does not make the Survey inadmissible.

Another problem with Facebook's argument is that it focuses only on the "aided association" component of the Survey and completely ignores that the Survey also contained an open-ended question that asked respondents to *explain why* they made their particular choice. (Expert Report at ¶ 31.) Open-ended questions are a hallmark of likelihood of confusion

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(N.D. Ill. 2009) ("[L]ikelihood of confusion exists when consumers 'are likely to assume that a product or service is **associated** with a source other than its actual source because of similarities between the two sources' marks or marketing techniques.'" (quoting *Int'l Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 825 (9th Cir. 1993) (emphasis added)); *Learning Curve Toys, L.P. v. Playwood Toys, Inc.*, No. 94-cv-6884, 2000 WL 343497, at *3 (N.D. Ill. Mar. 31, 2000) ("The Act predicates liability upon either (1) false representations concerning the origin, **association** or endorsement of goods or services through the wrongful use of another's distinctive mark . . . ." (emphasis added)).

surveys and Dr. Seggev explained that the one he used is "in line with likelihood-of-confusion procedures" used in "*Eveready* or *Squirt*." (*See* Seggev Depo. at 137:24-25; 138:1-4.) Facebook, however, never acknowledges that the Survey—like other likelihood-of-confusion surveys—used an open-ended question, much less addresses any of the responses to those questions. Had it done either, Facebook would have concluded that when respondents were asked *why* they associate the TIMELINES mark with Facebook, most respondents identified the Timeline product on Facebook. (Expert Report ¶ 38.) To give but a few examples:

- "Cause (sic) they [Facebook] just made everyone switch their home page to a time line function"
- "There is a timeline on facebook"
- "Because Facebook has a prominent feature known as the Timeline, wherein it collects all of your activity on the website in a historical format."
- "FB has a timeline feature (sic) . . . ."
- "Facebook has made a big deal out of transferring their format to timelines."
- "The only place I've seen timelines on a WEB page"

(Expert Report at Ex. 8.)

Notably, these responses explain the Survey respondents' thought processes in coming to their answers and demonstrate that the Survey's respondents were not merely engaging in a word association test. *See* MCCARTHY 32:178 ("Sometimes, the most illuminating and probative parts of a survey are not the numbers and percentages generated by the responses, but the verbatim accounts of the responses. The respondents' verbatim responses to [a] "why" question may provide a window into consumer thought processes in a way that mere statistical data cannot.")

Moreover, Dr. Seggev's Survey is similar to a survey that the Fifth Circuit found scientifically reliable. In *Exxon Corp. v. Texas Motor Exch. of Houston, Inc*., 628 F.2d 500, 507 (5th Cir. 1980), the Fifth Circuit drew a distinction between a pure-word-association test in which the survey does nothing more than show an individual a trademark and then ask if it brings anything else to mind and the survey in its case, which showed a photograph of the

defendant's Texon sign and then asked an open-ended-follow-up question about the respondent's answer. *Id.* Thus, crucial to the Court's approval of the survey was the fact that the survey, like Dr. Seggev's Survey, "*also* probed what there was about the sign that elicited the response." *Id*. (emphasis added).

In summary, Dr. Seggev's Survey is not a word association test because it properly measured the likelihood of confusion under accepted survey methodologies. The mere fact that Facebook may prefer a different methodology does not render Dr. Seggev's Survey inadmissible.

D. Facebook's Argument that the Survey Targeted the Wrong Universe Fails Because the Proper Universe, Here, is Internet Users At Large.

Dr. Seggev's Survey targeted the proper universe of consumers given the unique circumstances of this particular case. "A 'universe' is that segment of the population whose perceptions and state of mind are relevant to the issues in the case." *Citizens Fin. Group. Inc. v. Citizens Nat'l Bank*, 383 F.3d 110, 118-19 (3rd Cir. 2004). The legal inquiry as to whether an allegedly infringing product has caused consumer confusion "centers on the confusion of consumers in the market for the particular products at issue." *Dorr-Oliver, Inc. v. Fluid-Quip, Inc*., 94 F.3d 376, 382 (7th Cir. 1996). Here, as Dr. Seggev concluded, those consumers are internet users at large.

Facebook argues that the Survey should have specifically targeted *only* either Facebook's potential consumers or the potential users of Timelines' website. (Mtn. at p. 9.) But the test for determining whether a survey had a proper universe is not that rigid. Instead, the Seventh Circuit has made clear that the proper universe consists of those "consumers in the market for the particular products at issue." *See Dorr-Oliver, Inc.*, 94 F.3d at 382. As Dr. Seggev explained, both Timelines' and Facebook's consumers are one in the same: internet users at large. (*See* Seggev Depo. at 179:1-7.) This, Dr. Seggev explained, is because both of the websites—

Timelines.com and Facebook.com—are general social media websites with general appeal to potentially all internet users and there is no limiting factor as to which segment of the population of internet users would potentially use either website. (*See id*. at 183:12-25; 184:16-25; 185:1-4.) When, as here, the product or service has a wide appeal to consumers at large, it is appropriate for the universe to account for that characteristic. *See*, *e.g., Union Carbide Corp. v. Ever-Ready, Inc*., 531 F.2d 366, 388 (7th Cir. 1976), *cert. denied*, 429 U.S. 830 (1976), *superseded by statute on other grounds as stated in Scandia Down Corp. v. Euroquilt, Inc*., 772 F.2d 1423, 1429 (7th Cir. 1985) ("The survey was directed to the relevant universe. Almost anyone would be likely to have purchased bulbs, lamps, batteries or flashlights. Thus a survey of the general population was appropriate.").

Moreover, Dr. Seggev specifically rejected the notion that the Survey should have used a screening question that would have limited the universe of respondents to Facebook's or Timelines' consumers:

> I don't think it would be appropriate to limit the population for this study or for a study such as this to either people who used social media or people who have an interest in . . . . I don't believe that people should be asked that question with regard to a website that's of general interest . . . . I considered it very carefully. It was one of the pieces on which I spent quite some time. And I came to this conclusion that this is a very unique set of circumstance, with these kinds of websites that don't sell a product, don't sell a service that has---or a service that has a unique benefit and falls in the repertoire of behaviors or consumption patterns that people are accustomed to.

(Seggev Depo. at 186:23-25; 187: 2-3; 17-25; 188:2-8.)

In any event, even if Dr. Seggev's Survey targeted too broad of a universe, this goes to the weight of the survey, not its admissibility. *See Piper Aircraft Corp. v. Wag-Aero, Inc*., 741 F.2d 925, 930-31 (7th Cir. 1984) (stating that problems with the universe making the survey "less probative on the issue of confusion" go "to the weight to be given the survey results, not

the admissibility of the survey"); *Georgia-Pacific Consumer Products LP v. Kimberly-Clark Corp*., No. 09-cv-2263, 2010 WL 1334714, at *3 (N.D. Ill. Mar. 31, 2010) ("[A]ny flaw in [the expert's] definition of the relevant universe of survey-takers does not render his report inadmissible, but merely go to the survey's probative value and the weight that the jury should accord to that survey.").

E. Facebook's Attack on Dr. Seggev's Control Fails For the Threshold Reason that Facebook Assumes that the TIMELINES Marks Are Generic.

As a threshold matter, this Court should reject Facebook's attack on Dr. Seggev's control because it is based on the flawed assumption that the TIMELINES marks are generic. (*See* Mtn. at p. 10.) Because the TIMELINES marks are federally registered, they are presumed protected, and Facebook bears the burden of proving that they are not entitled to protection. *See Specialized Seating, Inc. v. Greenwich Industries, L.P*., 472 F. Supp. 2d 999, 1011 (N.D. Ill. 2007). In fact, this Court stated twice in its Summary Judgment Opinion, that Facebook did not rebut the presumption of the mark's validity, concluding that summary judgment on the issue of genericness was inappropriate. (*See* Summary Judgment Opinion at p. 18, Dkt. No. 116.) Therefore, Facebook's attack on Dr. Seggev's choice of control fails in its entirety because it rests on the improper assumption that the TIMELINES marks are generic. (*See* Mtn. at p. 10.)

F. Facebook's Criticism of Dr. Seggev's Control Fails Because it is Based on A Rigid Rule That Facebook Fashioned Out of Thin Air.

Facebook's criticism of the control also fails for the simple reason that Facebook makes up its own unworkable standard. Facebook misunderstands the purpose of a control and argues illogically that the Survey's control was flawed because it did not contain the entire word "Timelines." Here, again, Facebook fashions a rule that simply does not exist. "The control question or questions should use a mark **similar enough** to the actual mark that it provides an

accurate measure of confusion created by the accused mark, not by some other similarity." 5 MCCARTHY § 32:187 (emphasis added). Notably, the requirement here is that the mark in the control should be "similar enough" to the actual mark, as opposed to what Facebook argues, which is that the entire actual mark appear in the control. *See id*. Put differently, there is no requirement—anywhere—that mandates the control to contain all of the words that make up the actual mark. Yet this is exactly what Facebook argues as a result of incorrectly reading two cases that it offers as support. (*See* Mtn. at pp. 12–14.)

The first case that Facebook misreads is *Simon Prop. Group L.P. v. MySimon, Inc*., 104 F. Supp. 2d 1033, 1036 (S.D. Ind. 2000). Here, Facebook incorrectly refers to *Simon* as a case from this Court, which it is not, and then Facebook gets the holding wrong. The district court, which was the Southern District of Indiana, did not hold, as Facebook argues, that as a general rule "where a mark is generic or commonly used, the control must include that element." (Mtn. at pp. 12–14.) Indeed, common sense dictates that such a requirement could lead to ridiculous results. Equally important, the survey in that case, unlike here, did not use a control at all. *Simon Prop. Group L.P.*, 104 F. Supp. 2d at 1045. And because there was no control, the district court held that the survey "fails to use the most basic control by failing to compare potential confusion with respect to other 'Simon' web sites not related to either of these parties . . . ." *Id*. The district court, therefore, suggested that a control that used the name "Simon" would have been useful in showing that the confusion is a result of the similarity of the services offered by the two sites, as opposed to the similarity of their names—i.e., "mySimon" and "Simon." *See id*. at 1046–47.

The second case that Facebook misreads is *24 Hour Fitness USA, Inc. v. 24/7 Tribeca Fitness*, *LLC*., 447 F. Supp. 2d 266, 279 (S.D.N.Y. 2006). In that case, in which Dr. Seggev was

the defendant's rebuttal expert, the mark at issue was "24/7 FITNESS." *Id*. In contrast to our case, however, the control in *24 Hour Fitness* made no attempt whatsoever to share characteristics with that mark. *Id*. Instead, the control stimulus used the mark "LIFETIME FITNESS," which was completely different from the mark that was at issue. *Id*. Dr. Seggev, therefore, explained that the control should have been another fitness facility that was open 24 hours a day. *Id.* Notably, Dr. Seggev did not recommend that the control stimulus contain the entire "24/7 FITNESS" mark within the control stimulus mark, as Facebook argues here. *See id.*

The rule Facebook fashions from these cases simply does not exist. Nor could it. Instead, "a proper control should be similar to the test group and 'share[ ] as many characteristics with the experimental stimulus as possible, with the key exception of the characteristic whose influence is being assessed.'" *LG Electronics U.S.A., Inc. v. Whirlpool Corp*., 661 F. Supp. 2d 940, 955 (N.D. Ill. 2009) (citation omitted). Dr. Seggev toed a fine line in designing the control, explaining that "Timescapes is a fabricated name which is sufficiently similar to the contested mark (e.g., both names contain the word 'time') and yet different enough to provide a standard against which one can judge the effect of the name Timelines on consumers." (Expert Report ¶ 18.) Here, the test stimuli and the control stimuli were identical in every respect, except that in the control, the word "Timelines," which is the element being tested, was replaced with "Timescapes." (*See id*.)

Facebook forgets—or does not understand—that the control cannot contain the word "Timelines" because that is the characteristic being tested in Dr. Seggev's Survey. *See* Shari Seidman Diamond, *Reference Guide on Survey Research*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 359, 399–400 (Fed. Judicial Ctr. 3d ed. 2011) ("Nor should the control stimulus share with the experimental stimulus the feature whose impact is being assessed."). Facebook's

argument here is nonsensical. Indeed, to include the word "Timelines," the specific variable being tested, would render the Survey a complete waste. *See Western Publ'g Co. v. Publications Int'l, Ltd.*, No. 94-cv-6803, 1995 WL 1684082, at *15 (N.D. Ill. 1995) (noting the control product was "arguably more infringing than" defendant's product).

As with Facebook's other critiques of Dr. Seggev's Survey, even if Facebook's criticism had merit, which, as explained above it does not, this would go only to the weight given to the survey, not its admissibility. *See Whirlpool*, 661 F. Supp. 2d at 955 (stating that defendant's criticism addresses the weight of the study, rather than its admissibility); *see also Indianapolis Colts, Inc.*, 34 F.3d at 415-16 ("[The] survey was not perfect, and this is not news. Trials would be very short if only perfect evidence were admissible.")

G. Facebook's Remaining Arguments that the Survey (i) Included Confusing and Biased Questions; (ii) was Leading; and (iii) Did Not Prevent Respondents from Guessing or Looking Up Answers, Fail Because Those Characteristics Were Present in Both the Experimental Survey and the Control Survey and, Nevertheless, Do Not Warrant Exclusion.

Facebook's remaining arguments, an array of standard survey challenges, fail because the deficiencies Facebook complains of—to the extent that they in fact exist—were present in both the control and experimental stimuli. Facebook argues that the Survey questions were confusing, biased, and did not prevent respondents from guessing or looking up answers. These type of flaws, however, are exactly what a control is designed to prevent. *See Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 129 F. Supp. 2d 351, 365 n.10 (D. N.J. 2000) ("[B]ias that may have resulted from any leading questions was eliminated by use of the control group."); *Volkswagen Astiengesellschaft v. Uptown Motors*, No. 91-cv-3447, 1995 WL 605605, at *4-*5 (S.D.N.Y. May 11, 1995) ("[S]ince the same question was used with . . . the control group . . . any distorting effect from the question was cancelled out . . . ."); *Bobak Sausage Co. v. A & J Seven Bridges, Inc.*, No 07-cv-4718, 2010 WL 1687883, at

*7 (N.D. Ill. Apr. 26, 2010) ("[T]he control group design [is] particularly useful in assessing responses to closed-ended questions, providing an additional safeguard against poorly worded questions."); *THOIP v. Walt Disney Co*., 788 F. Supp. 2d 168, 183 (S.D.N.Y. 2011) ("[A]ny spurious confusion would have been caused [in the control]as well, and eliminated when the control group positives were subtracted out of the final results"). Thus, any effects that the Survey's flaws might have had on the results were canceled out by the control. The effects of guessing and looking up answers were also diffused by the safeguards built into the Survey. For instance, the Survey instructions explicitly asked respondents not to guess and respondents were presented with a "don't know" or "no opinion" answer option. (Expert Report at ¶ 16 and Ex. 5.) These safeguards were specifically designed to reduce guessing and looking up answers. (*See id*.)

CONCLUSION

For the reasons stated above, Plaintiff/Counter-Defendant Timelines, Inc. requests that the Court deny Defendant/Counter-Plaintiff Facebook's Motion to Exclude Dr. Eli Seggev's Survey and Related Expert Report and Testimony and grant other such relief as this Court deems just and proper.

Dated: April 15, 2013

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, the undersigned attorney, certify that I electronically filed foregoing document. 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 15, 2013

Respectfully submitted,

TIMELINES, INC.,
Plaintiff/Counter-Defendant

By: /s/ Douglas A. Albritton

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