

EXHIBIT

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

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TIMELINES, INC.,

PLAINTIFF,

-against-

FACEBOOK, INC.,

DEFENDANT.
-----X

CERTIFIED COPY

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

Reported by:
Rebecca Schaumlöffel, RPR, CLR
Job 56153

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2 dilution, secondary meaning, the terminology,
3 and not only the terminology, the likelihood
4 of confusion. Not only the terminology, but
5 what is behind it, what is the intent. What
6 are the ideas, which I learned by myself.

7 Q. So based on your review of the
8 literature in your work in this field, do you
9 have an understanding of what federal
10 trademark law prevents when it comes to
11 confusion, or what it is meant to prevent?

12 A. Yes.

13 Q. That includes confusion as to the
14 source of a product or a service, correct?

15 A. Not only.

16 Q. What else?

17 A. The Lanham Act -- let me put it
18 in my terms. Well, let me answer it
19 directly, and then I will ask to elaborate on
20 that.

21 What the Act says is the
22 likelihood of confusion can happen by
23 affiliation, association, by permission.
24 There are five or six different ways in
25 which --

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2 Q. Sponsorship?

3 A. Sponsorship.

4 Q. Endorsement?

5 A. Thank you. Endorsement. And I
6 think I am missing one. Affiliation.
7 Connection, I think, is one of them. And
8 association. So that is the -- and origin,
9 of course, as you mentioned.

10 And so those five or six actually
11 are what the researcher would call the
12 operational definition of the variables that
13 constitute likelihood of confusion. What I
14 wanted to elaborate on is that likelihood of
15 confusion represents a state of mind, the
16 mind of the consumer, just like gravity
17 represents a state of nature, or
18 acceleration, a state of engineering -- of
19 mechanics. In and of themselves, they are
20 concepts.

21 What we do in marketing research
22 is to translate those into measurable
23 variables, variables that we can measure.
24 Fortunately, the Lanham Act gives us six, so
25 it already defined them for ourselves. And,

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2 say, well, there might have been a likelihood
3 of confusion for whatever the reason was.

4 The behavior that we are -- that
5 has become very, very popular and widespread
6 in the last ten years, less than that,
7 actually, seven years, is slightly different.
8 We are not dealing in that case with a
9 need-based scenario. We are dealing with
10 what some of us call browsing-based scenario.

11 Remember when -- I don't know if
12 it happened in your family, but when you were
13 a kid, we used to say, let's go to the mall,
14 when you had nothing to do. Let's go to the
15 mall. There was browsing in a physical
16 sense. You get in the car, you drive, you
17 get someplace. And the mall was so organized
18 to allow you to browse. There was a
19 restaurant. There was a place for kids.
20 There was this, there was that, to satisfy
21 many interests.

22 Well, the counterpart of that in
23 the modern world is the web. So what people
24 are doing now is, they go online, and they
25 wander around just the way that they did in

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2 the mall, and they may fall upon one, and
3 then -- website and use links to go to the
4 other or in some way move around.

5 That kind of behavior is
6 different from a -- from what would happen
7 when you purchase something. So the nature
8 of forward and reverse confusion, in my mind,
9 is not as clear now in this new world, in
10 this environment, in the online environment,
11 as it is in the physical environment, which
12 you go to a store, you see two products, or
13 you go to two stores, and you see two
14 products, and you are confused, and you make
15 a decision that harms you and -- harms the
16 company, and that you get a call, and there
17 is the Lanham Act, gets activated, and the
18 rest happens in the courtroom.

19 So this is a little different
20 than who makes this product, which is the way
21 I think you looked at it, you presented it.
22 And for that reason, I think the forward or
23 reverse has to be reexamined by people in our
24 profession, and people in your profession,
25 too.

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2 they may think that they are in the same
3 beverage category?

4 A. First of all, in my profession, I
5 cannot -- you are asking a hypothetical
6 question whose answer is only possible in an
7 empirical way. So I cannot address that, I
8 am sorry. Not because it is hypothetical,
9 but because the answer is I don't know.

10 It is all -- if you follow it up
11 with a question, why did you do that, and 99%
12 of the people say because they are both
13 beverages, then I grant you, you would be
14 entitled to draw that conclusion. But that's
15 so far from reality, I don't know even know
16 how to deal with that.

17 Q. Did you consider testing for
18 confusion as to source of the websites that
19 are offered by the parties in this case?

20 A. As I mentioned earlier, in a
21 slightly different discussion, when it comes
22 to the measurement of likelihood of
23 confusion, there are six ways in which
24 likelihood of confusion can occur. I thought
25 that the most appropriate way to do that --

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2 to measure it in this case, given the
3 particular circumstances of the case, which
4 is, one is a website, the other is a word
5 that is very similar to the website but is
6 not the name of the website, considering the
7 factors that I described before, that we are
8 dealing with browsing behavior,
9 non-purposeful behavior in terms of purchase,
10 I thought that the -- what I chose finally to
11 do, association rather than affiliation,
12 connection, origin and all the others, was
13 the best, the most fitting measurement to
14 apply.

15 Q. And would you not say that was
16 the approach most likely to generate results
17 that were favorable for Timelines?

18 A. I think I would overlook the fact
19 that it is insulting, that I consider your
20 question to be insulting. Never did it cross
21 my mind that I am in the business of doing
22 research in order to produce results that
23 favor anybody. Never in my lifetime and my
24 professional lifetime, and I can assure you
25 that never in the future, would that be the

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2 Q. How does an aided association
3 measurement measure likelihood of confusion?

4 A. How does -- sorry?

5 Q. How does an aided association
6 measurement measure a likelihood of
7 confusion?

8 A. Since association is one of the
9 measuring components of likelihood of
10 confusion, as defined in the statute, then I
11 consider that to be the rationale for, or the
12 reason for its being.

13 Q. But -- I will grant you the word
14 "association" appears in the Lanham Act. But
15 isn't it used in that statute in the context
16 of an association between persons or
17 entities, not just words?

18 A. That's why I spent quite a bit of
19 time before lunch describing the new
20 environment of browsing, which, I think, here
21 is another example of where it requires more
22 attention on our part and your part, your
23 profession's part.

24 A trademark is a word, and in the
25 world of browsing, the mechanism for search

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2 Depends on the question.

3 Q. Are you aware of a single case in
4 which a survey that asks respondents only one
5 question about what or who they associate the
6 presented mark with has been accepted by a
7 court?

8 A. I don't know what you mean by
9 that, only one question.

10 Q. Well, a survey similar to the one
11 that you conducted here, where, you know, the
12 question, the key question, I think you would
13 agree, is, "Which of the following companies,
14 if any, do you most associate this name
15 with?"

16 Are you aware of any case where a
17 survey that rested significantly on a single
18 question as to an association between a word
19 and other companies was relied upon to find
20 trademark infringement?

21 A. If you flip that page, you will
22 see there is a second question that belongs
23 to the same sequence, I would argue, that
24 asks for the reasons for so doing. This is
25 in line with likelihood of confusion

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2 procedures that -- whether it is Eveready or
3 Squirt, that ask for the reasons, and so does
4 this survey.

5 So it is really two questions,
6 first of all, and those two questions are --
7 in my view, form a complete set for the
8 purposes of this study.

9 Q. But are there any cases in which
10 an Eveready or Squirt survey relied upon a
11 central question that focused on association
12 between a word and other companies?

13 A. Oh, that's -- sorry, that's a
14 different question. No. This is the first
15 time that I encountered it, and this is --
16 this has been my solution to it.

17 Q. I apologize, I --

18 MR. ALBRITTON: You need a copy
19 of something?

20 MR. WILLSEY: No. I was looking
21 for a different exhibit, but I will
22 find that on a break and circle back
23 to the issue.

24 Q. Did you consider doing -- using
25 any other approaches to this survey? When

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2 Dr. Simonson, continue to stick to the
3 impossible position that the measurement of
4 likelihood of confusion is the netting of
5 test minus control, leaving the result to the
6 judgment of the individual, the researcher,
7 the judge, or God Almighty, to decide whether
8 to declare it to be likelihood of confusion
9 or not.

10 And as you know, the history of
11 this in the courts has been that some courts
12 said, 11 percent -- at one time, 11% is okay,
13 another time 12% is not okay, and so on.
14 Those of us who are trained in marketing
15 research and quantification of marketing
16 research, of which Dr. Simonson is one of,
17 and I deplore the fact that he does not
18 include that in his consideration, know how
19 to apply statistics to it.

20 And in all my work that I have
21 done over the last four years or ten so far,
22 I have always used the test of significant
23 difference, statistical significant
24 difference, at a 95% level of confidence,
25 which is the same as what you have seen

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2 target market for Facebook?

3 A. I think the target market for
4 Facebook is each and every online user.

5 Q. And do you have a belief as to
6 the target market for Timelines?

7 A. I think it is the same.

8 Q. Based on your knowledge of the
9 Timelines.com website, you don't think that
10 there is a historical event focus to the
11 services offered by Timelines.com?

12 A. There may be, if you look at it
13 ex post. But I strongly believe that anyone
14 who comes in contact with a website for the
15 first time would be likely to decide on the
16 spot whether or not that is part of their
17 world of interests.

18 So I don't think that people
19 search out Timelines to satisfy the need for
20 a historical-based website. I think they
21 learn about it if they happen to come upon
22 it, as is with most websites that are not
23 heavily advertised elsewhere, and then decide
24 whether to sign up or not.

25 Q. So you don't think there is one

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2 type of person that's more likely to sign up
3 for and use Timelines.com than another?

4 A. I think that ex post you might
5 classify the population into users and
6 non-users and deduce from it that the users,
7 presuming that the non-users have all been
8 exposed to it and rejected it, are two
9 different populations.

10 But until and unless we know that
11 about an individual, I cannot make a
12 statement about who the likely user of
13 Timelines is or who, actually, the current
14 user might be.

15 Q. But wouldn't the non-user of
16 Timelines, someone who arrived at
17 Timelines.com and decided this doesn't
18 interest me, I am not going to use it,
19 wouldn't they be less relevant for trademark
20 infringement analysis purposes?

21 A. I don't know. Because -- I don't
22 think so. I would not agree with that
23 statement, simply because the transaction
24 cost is minimal, if any, and so today, I may
25 decide this. Tomorrow I may decide, yeah,

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2 A. Well, not necessarily. If you
3 take Facebook as an example, with a large
4 number of members that they have, I don't
5 know that they have a segmentation scheme
6 that says these people will never be members
7 of Facebook. I don't think it works that
8 way. I am sure, in fact, it does not work.

9 If I were the manager, I would
10 say, don't do that. That's not a way to
11 approach the Internet market.

12 Q. Do you believe that Timelines,
13 the plaintiff, could look at its existing
14 subscription base and draw some
15 determinations as to, assuming the site stays
16 the same, who is more likely to sign up for
17 them in the future?

18 A. Let me rephrase my answer. It is
19 the same answer.

20 I don't think that has predictive
21 value for any business that is in the social
22 media or related businesses on the Internet
23 that have a wide appeal, and I think that the
24 Timelines website has potentially a wide
25 appeal.

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2 Q. Well, are you familiar with
3 Pinterest?

4 A. Yes.

5 Q. Pinterest, I think a lot of
6 people believe, has a particular appeal to
7 females. There is that perception out there.

8 I will give you another example.
9 Busymoms.com, probably not a website that
10 you've heard of, but as you might --

11 A. But it is not a good example, I
12 would argue, because in the name itself, the
13 definition is exclusionary. Or confining.

14 Busy moms of the future -- I'm
15 kidding. That's the difference, though.

16 Q. But couldn't you come up with a
17 social media site, call it, to go back to my
18 made-up term, Xenon, and supply it with
19 content that is directed towards males of a
20 certain age group and expect reasonably that
21 you are going to draw primarily from that
22 target group in the future?

23 A. Excellent point, sir, but you
24 have just made an assumption that the purpose
25 of the website is to create a segment in

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2 which it has a differential unique and
3 competitive appeal. From what I know about
4 Timelines, it does not meet those conditions.

5 Q. You didn't --

6 A. In other words --

7 Q. You didn't subscribe to
8 Timelines, so this is based on your one- to
9 two-hour review of the website?

10 A. Oh, but I learned it. I studied
11 it. I know what it does. The fact that I
12 did not subscribe has to do with -- with a
13 different set of considerations that have to
14 do with this particular case.

15 Q. But, wouldn't you agree that an
16 interest in historical events is one defining
17 feature of Timelines.com?

18 A. And I -- yes, and I do not know
19 what proportion of the population shares that
20 interest.

21 Q. But conceivably, you could
22 construct a screening question at the
23 beginning of a survey that asks people
24 whether they are interested in, and then you
25 compare language from Timelines.com, or

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2 whether they have used a site like that or
3 they think they may in the next six months?

4 A. No, I would not do that. That
5 would limit the population. One is because
6 you have got to -- this is one of those
7 websites, just like Facebook in essence, that
8 you -- or LinkedIn -- that you have to
9 experience to live with in order to
10 understand what it can do for you. It is a
11 learning process.

12 Secondly, as I mentioned early on
13 today, Internet browsing behavior, as the
14 name implies, is the hopping-around behavior,
15 very much in a random fashion, at least the
16 entry is many times random, and where it
17 leads one cannot very well predict because of
18 the nature of the search. The search is --
19 allows -- gives the user a great deal of
20 independence. The force of the moment, the
21 whim of the moment may dictate it or what you
22 had for lunch.

23 So I wouldn't -- I don't think it
24 would be appropriate to limit the population
25 for this study or for a study such as this to

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2 either people who used social media or people
3 who have an interest in -- today, have an
4 interest or can predict today that they have
5 a likelihood of purchasing something in the
6 future.

7 Remember that in the typical
8 cases of survey research that's used in
9 trademark litigation, we are asking how
10 likely are you to purchase, and notice that
11 most, if not all, of the products to which
12 that question apply, there is something
13 that's in the repertoire of people, that they
14 understand, they know, it is known, they are
15 accustomed to, so they can give a considered
16 answer.

17 I don't believe that people
18 should be asked that question with regard to
19 a website that's of general interest, or a
20 particular interest, even as this one, that
21 focuses on historical events.

22 Q. But would you --

23 A. I considered it very carefully.
24 It was one of the pieces on which I spent
25 quite some time. And I came to this

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2 conclusion that this is a very unique set of
3 circumstances, with these kinds of websites
4 that don't sell a product, don't sell a
5 service that has -- or a service that has a
6 unique benefit and that falls in the
7 repertoire of behaviors or consumption
8 patterns that people are accustomed to.
9 People up to this generation.

10 Now, if we were to do this study
11 40 years from now or 30 years from now, it
12 may be very different.

13 Q. But correct me if I am wrong, but
14 it sounds like on the one hand you say you
15 don't think it is appropriate to limit the
16 universe for websites, social media websites,
17 because of this hopping behavior and because
18 it is hard to tell what somebody may do in
19 the future, yet on the other hand, you would
20 accept, though, that there could be, and
21 there probably are right now, social media
22 websites that are devoted to a certain theme
23 or topic that would attract and only be
24 relevant to one type of user.

25 For example, if one were to

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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