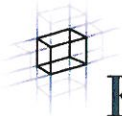


EXHIBIT

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

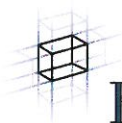
Timelines, Inc.,)
)
)
Plaintiff,)
)
v.)
)
Facebook, Inc.,)
)
)
Defendant.)
)

Case No.: 11 CV 6867

**Rebuttal Report of
Dr. Eli Seggev**

November 21, 2012

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Summary of Assignment & Opinion

1. I was asked by the attorneys for the plaintiff, Timelines, Inc. (“Timelines”), to evaluate and opine on the report submitted by Dr. E. Deborah Jay (“the Jay Report” or “the Jay Study”) on behalf of the defendant, Facebook, Inc. (“Facebook”), in the above-captioned matter. My complete curriculum vitae, listing of publications, and prior testimonial experience can be found as exhibits to the September 28, 2012 expert report I submitted in this case.¹ In preparing this rebuttal report, I have considered all materials disclosed in my First Report’s documents considered listing as well as all materials provided in the Jay Report.
2. I have undertaken a comprehensive review of the Jay Report and the opinions and conclusions therein. Based on my review of the Jay Report in conjunction with my education and 40 year career as a professor and practitioner in the discipline of consumer behavior, I have found that the Jay Report contains errors that render its results invalid.
3. Specifically, the Jay Report contains two types of irresolvable biases:
 - *Survey Methodology Bias*—bias arising from Dr. Jay’s choice of the data collection method, the form and presentation of the stimuli used in the study, questionnaire design, and the use of brand awareness as an internal “netting” mechanism; and
 - *Analysis Bias*—bias associated with the presentation of an incomplete view of the “brand” construct which leads to misinterpretation of the results of the Jay Study..

¹ Expert Report of Dr. Eli Seggev, 9/28/2012.

Analysis of the Jay Study

Survey Methodology Biases

4. In conducting any empirical study, the researcher has a certain degree of latitude in choosing the particular design elements and method of execution—i.e., the methodology—of the research. In this case, the Jay Study contains a variety of elements that extend beyond this latitude and result in data biases. Each of these methodological biases is addressed below.

Marketplace Context Bias

5. The Jay Study employed telephone surveying as its means of data collection. While telephone interviewing is an acceptable form of data collection in general, it is wholly inappropriate in this case. Specifically, by choosing to collect data by means of telephone interviewing, the Jay Study incorporates a fundamental error: completely removing the interview situation from the natural marketplace context—i.e., the Internet—in which both the plaintiff and the defendant operate.
6. It is important to recreate the purchase behavior situation that prevails in the marketplace as closely as possible during the interview, particularly with regard to respondents' exposure to the stimuli used to elicit opinions.² Yet, the Jay Study deviates from this standard practice and places respondents in an interviewing situation which is uncharacteristic of the environment in which they would encounter the names at issue in this case. Indeed, consumers encounter both Timelines.com and Timeline only while browsing the Internet. There can be no justification for employing a research protocol that does not replicate that marketplace reality. Of course, those two words can be encountered outside the Internet, such as in newspaper or magazine reporting, media advertising, etc.; however, none of those are “consumer choice” situations.

Auditory Bias

7. One of the outcomes of the Jay Study's inappropriate use of telephone interviewing is that it places the interviewer, rather than the respondent, in control of auditory delivery and perception of the survey instrument. That is, rather than being able to view the names on a

² See for example, Diamond, S. (2011). *Reference Guide on Survey Research* in Reference Manual on Scientific Evidence, Federal Judicial Center/National Academy of Sciences, 359-423, and McCarthy, J.T. (2004). *McCarthy On Trademarks*, Rel. 31, Thomson West.

computer screen (as they would under typical marketplace conditions), the respondents are instead exposed to the names via verbal delivery by the telephone interviewer. This verbal exposure further amplifies the negative impact of failing to replicate the marketplace exposure discussed above.

8. The shift in auditory control from the respondent to the interviewer is wholly inconsistent with the study of subvocalization, which is the internal speech made when reading a word, thus allowing the reader to imagine the sound of the word as it is read. The study of subvocalization focuses on the ways that the brain processes the written word, which is different from the ways that the brain processes the spoken word.
9. Telephone interviewing may have dramatically modified consumer perception of the sound of the word that is at the heart of this litigation, Timeline(s). For example, respondents could have been impacted, to an unknown degree, by the interviewer's cadence, the speed of delivery/exposure, or even the completeness of the word Timelines (vs. Timeline).
10. Furthermore, telephone interviewing disallows the visual context, the only one that is operational here judging from how consumers encounter Timelines and Timeline in the marketplace. Not only does that fail to capture the consumer experience; it is also inconsistent with the definition of a trademark, which covers all the senses and the brain processing mechanisms by which consumers capture the whole meaning of a mark, including sight, sound and meaning. By using telephone interviewing, the Jay Study changes the context of respondents' exposure to the names thus introducing an unknowable amount of bias into the results.

Questionnaire Biases

11. The Jay Study also contains a built in bias within its questionnaire. Specifically, Questions 6 through 12, which asked respondents whether they thought that a name that was read to them is a common name or a brand name, made incorrect use of randomization, thereby creating—rather than controlling for—an order bias within the questionnaire. Questions 6 through 12 presented respondents with the names of six masking items (i.e., non-litigated names associated with websites or website features) and one litigated name (Timelines in one version of the questionnaire and Timeline in the other version). The Jay Study specifically designed the questionnaire such that the six masking items (Questions 6 through 11) rotate

randomly for each respondent while leaving the critical item (Question 12, Timeline or Timelines) to always appear in the same position for all respondents.

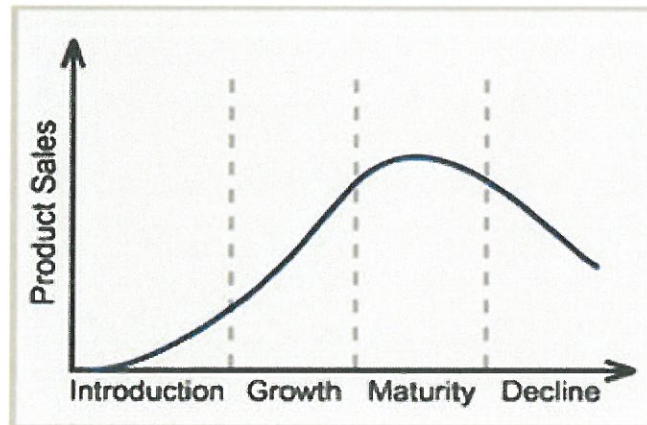
12. The purpose of randomly rotating items in a questionnaire is to control for position bias.³ The Jay Study fails to include the critical item in the rotation and instead, leaves it out of the rotating sequence, fixed in the last position. This defies any logical explanation. Critical measurement questions deserve and demand to be included in the rotation; it is their potential position bias that needs to be controlled and not only the position of the masking items.
13. Another limitation of the Jay Study's questionnaire is the bundling together of the "Haven't heard" and "Don't know" answers in Questions 6 through 12. Specifically, the questionnaire informs the respondent "If you have not heard of a name or term or if you don't know what it refers to, please say so." The bundled presentation of this response option is such that it is unknown whether respondents who select this answer (a) had not heard of the item; or (b) didn't know what the item referred to. In other words, the manner of recording the answers employed by the Jay Study does not permit the reader to distinguish between respondents who chose one or the other of the two options given them.
14. The Jay Report uses the results of this design flaw to show an inflated version of the alleged original genericness results. Including respondents who said "Haven't heard/don't know," the Jay Report reports that 68 percent of the sample believed the name Timelines to be a common name. Removing respondents who answered "Haven't heard/don't know," the percentage increases to 74 percent who believed Timelines to be a common name. Similarly, including "Haven't heard/don't know" respondents, 69 percent believed Timeline to be a common name, whereas the percentage increased to 74 percent upon removing those respondents. The larger numbers do not contribute anything substantive to the report except to show inflated results, which in and of themselves have no bearing on the conclusions.

³ According to ESOMAR, the leading global industry organization for research professionals, position bias occurs "when respondents tend to favour objects because of their position in a list or sequence. The objects at the beginning and at the end of a list can be remembered more than those occurring in the middle. Usual practice is to rotate a list to eliminate this type of bias." See http://www.esomar.org/index.php?mact=Glossary,cntnt01,show,0&cntnt01term_count=200&cntnt01start=&cntnt01cat=O&cntnt01tid=529&cntnt01returnid=243.

Analysis Bias

15. According to the Jay Report, both Timelines and Timeline show brand recognition of 24 percent. One plausible explanation for that figure is that both are relatively young. In contrast, the position promoted in the Jay Report that both are “common names” fails to consider one of the most fundamental principles of marketing theory.
16. Marketing practitioners recognize the importance of the “Product Life Cycle” (PLC) concept (see Figure 1 below) and follow its precepts according to which marketers are urged to use different strategies tailored to each of the PLC’s distinct stages.
17. During the Introduction stage of the Product Life Cycle, the emphasis is on gaining awareness for the brand and establishing the brand’s differentiating features (compared to competition) in order to encourage consumer trial and the incorporation of the brand into consumers’ routine purchasing behavior, or, in this case, browsing behavior. As the curve indicates, sales as well as awareness climb slowly at the beginning of the cycle because the amount of resources available to any company, or cause, are usually quite small relative to the size of the intended target population and also because it takes time for consumers to appreciate the benefits delivered by the new product or brand.

Figure 1. Product Life Cycle⁴



⁴ www.quickmba.com

18. And so it is with both Timelines and Timeline. Since both names are new to the market, it is quite remarkable that almost a quarter of Dr. Jay's sample already recognizes both as brands. What is even more remarkable is that both Timelines and Timeline garner the exact same amount of market recognition. Indeed, with both names coming in at the same level of recognition, this suggests—without conclusively establishing it—the possibility of likelihood of confusion resulting from the blatant similarity of Timeline to Timelines.

Conclusion

19. Based on my review and analysis of the Jay Report I conclude that the two major classes of bias I have identified undermine the validity of the findings reported therein.

I reserve the right to supplement and revise this report and the opinions expressed herein based on new information provided to me.



Dr. Eli Seggev

November 21, 2012

Date

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1
2 IN THE UNITED STATES DISTRICT COURT
3 FOR THE NORTHERN DISTRICT OF ILLINOIS
4 EASTERN DIVISION

-----X
5
6 TIMELINES, INC.,

PLAINTIFF,

7
8 -against-

CERTIFIED COPY

9
10 FACEBOOK, INC.,

11
12 DEFENDANT.
13
14 -----X

15
16 DEPOSITION OF DR. ELI SEGGEV
17 New York, New York
18 Thursday, December 6, 2012
19

20 Reported by:
21 Rebecca Schaumloffel, RPR, CLR
22 Job 56153
23
24
25

1 E. SEGGEV

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

1 E. SEGGEV

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

1 E. SEGGEV

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

1 E. SEGGEV

2 names, offering a list of brand names and
3 common names at the beginning of an interview
4 that constitutes a training part, and if
5 respondents seem to -- not seem to -- if the
6 respondent would distinguish properly between
7 common names and brand names, giving evidence
8 to their understanding of the distinction
9 between the two, thus giving evidence of
10 their understanding as to the distinction
11 between the two, continue the interview, and
12 then they are given a series of brand names

13 and a series of common names, and ask them in
14 each case, is this a brand name or is this a
15 common name.

16 And the results are a simple
17 table that shows the proportion of people who
18 identified each one of those as a common name
19 or a brand name.

20 Q. You take issue with the
21 randomization of the order of the questions
22 in Dr. Jay's genericness survey, don't you?

23 A. Yes. In this case, I -- again, I
24 don't understand, or there doesn't seem to be
25 any reason for randomizing the -- only a

1 E. SEGGEV

2 portion of a -- I believe seven out of eight
3 or six out of seven, only those that she
4 randomized and leave the critical measurement
5 always at the same position, the last
6 position.

7 The purpose of randomization is
8 to make sure that people are not given,
9 across the sample, are not given the
10 opportunity to associate a position with what
11 they may perceive to be the correct answer.
12 So when we -- that's why we randomize. And I

13 am baffled why in this case, the noncritical
14 names were randomized and the critical one
15 was not.

16 Q. Are you aware that courts over
17 the last ten years have accepted Teflon
18 surveys done in that exact same way, where
19 the test question was reserved for the final
20 position?

21 A. No, I am not. And I would
22 question why would they do that.

23 MR. WILLSEY: Let me have this
24 marked as Seggev Deposition Exhibit 4.
25 This is Dr. Jay's report.

1 E. SEGGEV

2 C E R T I F I C A T E

3
4 STATE OF NEW YORK)

5 : SS.:

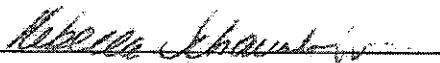
6
7 COUNTY OF NASSAU)

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

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

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

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

20 

21 REBECCA SCHAUMLOFFEL