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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91198355
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICES
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Application)
Serial No. 85056260) **ORIGINAL**
)
For the mark:)
FACEMAIL) Opposition No.: 91198355
)
Published in the Official Gazette)
(Trademarks))
Face book, Inc.,)
Opposer,)
v.)
Think Computer Corporation,)
Applicant.)

Deposition of DR. GERALD L. FORD, taken on
behalf of the Opposer, before Kathy L. Pa'u,
CSR No. 5684, a Certified Shorthand Reporter for the
State of California, with principal office in the County
of Orange, commencing on Monday, December 19, 2011,
10:00 a.m. at 16400 Pacific Coast Highway, Suite 211,
Huntington Beach, California.

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10
11 Also Present: Kathleen Johnston

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EXHIBIT LIST

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1 Monday, December 19, 2011; 10:00 a.m.

2 Huntington Beach, California

3 ooOoo

4 DR. GERALD L. FORD, was
5 called as a witness by and on behalf of the Opposer, and
6 having been first duly sworn by the Certified Shorthand
7 Reporter, was examined and testified as follows:

8
9 EXAMINATION

10
11 BY MR. NORBERG:

12 Q Good morning.

13 A Good morning.

14 Q Can you please state and spell your full name
15 for the record.

16 A Sure it's, Gerald Ford, F-O-R-D.

17 Q And by whom are you employed?

18 A I'm a partner in this firm Ford Bubala &
19 Associates located here in Huntington Beach, California.

20 Q What does Ford Bubala & Associates do?

21 A Marketing research and consulting firm. We
22 assist our clients in a variety of marketing areas. We
23 assist our clients in marketing strategy development
24 competitive position analysis and a variety of other
25 marketing areas. Oftentimes we assist our clients in

1 conjunction with the design and execution of consumer
2 surveys. The firm also does litigation related surveys.

3 Q How long has Ford Bubala & Associates been in
4 business?

5 A Since 1975 since about 35, 36 years now.

6 Q And you've been with the firm the entire time
7 it's been in existence?

8 A I have, yes.

9 Q At Ford Bubala & Associates, approximately how
10 many consumer surveys have you conducted?

11 A I've been responsible for the design of
12 something over 800 consumer surveys in general matters,
13 in general marketing matters and over 150 service
14 involving litigation matters.

15 Q Can you please give us a brief description of
16 your educational background?

17 A Sure. I have an undergraduate degree in
18 advertising from the California State University campus
19 in San Jose. I have an MBA from the University of
20 Southern California. And a doctoral degree in business
21 from the University of California.

22 Q Have you held any teaching positions?

23 A I did. For 25 years, I held I full-time
24 position in school of business at California State
25 University campus in Long Beach. I retired from my

1 teaching position in 1994.

2 Q What courses did you teach at the university?

3 A I taught a variety of courses, both graduate
4 and undergraduate courses. In the first half of my
5 teaching career, I primarily taught marketing courses.
6 And in the second half of my teaching career, I
7 primarily taught courses in business policy and
8 strategy. All of the courses that I taught had a
9 research component within them.

10 Q Have you given any speeches on the subject of
11 surveys involving Lanham Act matters?

12 A I have. I have spoken to a variety of groups,
13 including the American Bar Association, The American
14 Intellectual Property Laws Association, Practicing Law
15 Institute, The Intellectual Property Institute of
16 Canada, The American Marketing Association, The
17 Marketing Research Association. And most recently, the
18 European Trademark Association, Marques, that's
19 M-A-R-Q-U-E-S.

20 Q And have you written any papers on Lanham Act
21 matters?

22 A I've written 18 papers over the last 20 years
23 or so relating to surveys in Lanham Act matters. For
24 the last 10 years, I've written a yearly article that is
25 really a summary of federal reporting decisions in which

1 surveys have been used.

2 Q Have any of those papers been published?

3 A All of those papers have been published in the
4 same publications of the organizations I just gave you.

5 Q And are you engaged in any other professional
6 activities with respect to Lanham Act matters?

7 A Since 1998, if my memory serves me correctly,
8 I've served as a member of the editorial review board
9 for to the Trademark Reporter, the scholarly legal
10 journal on the subject of trademarks.

11 Q During the past 35 years or so you've been with
12 Ford Bubala & Associates, how many times have you been
13 qualified as an expert as to litigation related surveys
14 in Lanham Act matters in a U.S. federal court?

15 A Over 60 times.

16 Q During the past approximately 35 years that
17 you've been with Ford Bubala & Associates, how many
18 times have you offered survey evidence in a patent and
19 trademark office or trademark trial and appeal board
20 trademark matter?

21 A I've never kept on accurate count of that, but
22 it has been a number of times.

23 Q Dr. Ford, generally would you tell us what you
24 were asked to do in this matter?

25 A Sure. Initially I was asked to design a survey

1 to address the issue of fame with respect to the
2 Facebook mark. Specifically I was asked to design and
3 cause to be conducted a survey to measure the degree of
4 recognition of the Facebook mark with respect to social
5 networking site.

6 Subsequently, after that work was completed, I
7 was asked to design and cause to be conducted a survey
8 to address the issue of likelihood of confusion with
9 respect to the source authorization, approval or
10 business connection or affiliation of Facemail services
11 with the source Facebook.

12 Q And before we address the specifics of the
13 survey in general, were these two surveys designed to
14 meet any particular set of standards?

15 A They were as indicated in my Testimonial
16 Declaration. The surveys were designed to meet the
17 standards that are applied to commercial research. The
18 surveys were also designed to meet the standards or test
19 of trustworthiness outlined by the Federal Judicial
20 Center and the manual for complex litigation.

21 And finally the surveys done in this case were
22 patterned after the recommendations that can be found in
23 the Federal Judicial Center's of manual and scientific
24 evidence.

25 Q Are you familiar with the term double blind

1 protocol?

2 A I am.

3 Q What is a double blind protocol?

4 A It is a manner of executing a survey where the
5 respondents and/or the survey takers are not aware of
6 the purpose or the sponsor of the survey. Both of these
7 surveys were executed under a double blind protocol.

8 Q And how is that implemented with respect to the
9 fame survey?

10 A With respect to the fame survey, neither the
11 respondents nor the interviewers nor the supervisors
12 would be informed of the sponsor or the purpose.

13 With respect to the likelihood of confusion
14 survey, no one outside this office, the respondents or
15 the company who managed or maintains the internet panel
16 were informed of the sponsored purpose.

17 Q Okay. Great I'd like to have this marked
18 Exhibit~No. 1.

19 (Exhibit 1 was marked for
20 identification by the Certified Shorthand
21 Reporter and a copy is attached hereto.)

22 BY MR. NORBERG:

23 Q Dr. Ford, you have been handed what has been
24 marked as Exhibit~No. 1. Can you please describe what
25 Exhibit~No. 1 is?

1 A Exhibit one is my Testimonial Declaration and
2 attached Exhibits A through E.

3 Q And Exhibit~No. 1 represents your opinion as to
4 both the fame of the Facebook mark and the likelihood of
5 confusion of the Facebook mark with respect to the
6 Facemail mark; is that correct?

7 A That's correct. It represents the survey data
8 and my opinion as to what conclusions can be drawn from
9 this data.

10 Q Let's talk first about the fame survey which is
11 Exhibit A.

12 A Correct.

13 Q Would you please briefly explain the design of
14 the fame survey?

15 A The fame survey is an experimental survey
16 design, a traditional experimental design, with test
17 questions and an in-treatment control. The fame survey
18 is a traditional measure of recognition, both unaided
19 and aided recognition, of the Facebook mark.

20 Q Why did you use this particular design?

21 A This is a design that I have used in the past
22 and others have used. It's kind of really a marketing
23 textbook design. Because if you look up recognition
24 surveys and marketing research textbooks, you'll see
25 that they talk about asking questions unaided and aided

1 to measure the total degree of recognition of a
2 trademark.

3 This is the same survey design that I used and
4 offered in a TTAB opposition proceedings between Google
5 and Nicholas Gubernator.

6 Q Dr. Ford, what methodology did you employ in
7 the execution of the fame survey you conducted?

8 A The fame survey was a telephone survey that was
9 based upon what they called random digit telephone dial
10 in. So it's a telephone survey where telephone numbers
11 were created really by computer, using all working
12 telephone exchanges in the United States, both -- so you
13 would get both listed and unlisted telephone numbers for
14 both landlines and for cell phone numbers.

15 People were contacted on landlines. And they
16 were randomly surveyed from the household using the next
17 birthday method or they were contacted and interviewed
18 if they reported that -- contacted and interviewed via
19 cell phone if they reported they received most or all of
20 their telephone calls on cell phone.

21 Q And was there a particular demographic group
22 that was targeted for this survey?

23 A Well, because of the statute talking about
24 degree of recognition among the general consuming
25 public, there were quotas that were established so the

1 sample would be representative of all adults by age and
2 gender 13 years of age and older.

3 Q And what were those quotas based on?

4 A Based upon U.S. census.

5 Q Who were the survey respondents for the fame
6 survey?

7 A They were males and females 13 years of age or
8 older who were randomly selected from a household if
9 reached on a landline or were randomly selected from a
10 cell phone sample.

11 Q All right. Dr. Ford, let me next ask you about
12 the questionnaire in the fame survey.

13 A Okay.

14 Q Did the questionnaire have more than one part?

15 A Yes, a screening part and then a main
16 questionnaire.

17 Q All right. Let's look at the fame survey which
18 is Exhibit A to Exhibit~No. 1. And let's look
19 specifically at the screener for the fame survey which
20 is on pages five and six. And, I'm sorry, I think it
21 may be on the Testimonial Declaration. Let me take a
22 look here.

23 A It's page five.

24 Q All right. Let's look at pages five and six of
25 the fame survey. First of all, what is a screener?

1 A The screener is simply an instrument or a set
2 of questions upon which you identify a qualified survey
3 respondent who meets the survey universe definition.
4 This happens to be the screener for the landline.

5 This is the screener that was used to contact
6 people on landline phones and then randomly select from
7 within the household by using the next birthday method.

8 Q When you said "this" in your last response, you
9 are referring to pages five and six?

10 A The questions on pages five and six, yes.

11 Q All right. And what is the difference between
12 this screener on pagers five and six and the screener
13 that's on page 10?

14 A The screener on page 10 is the cell phone
15 screener. That is the difference. Here the respondent,
16 when contacted via cell phone, would have to report that
17 they received all or most of their personal calls on
18 this phone.

19 If they didn't, then that attempt to interview
20 was terminated. And otherwise you would have -- if you
21 didn't do it that way, you would have a chance of giving
22 one of the sample elements twice the opportunity to be
23 contacted.

24 Q All right. So the questionnaires for the fame
25 survey are on pages seven to nine and 11 to 13 of the

1 Exhibit A to your Testimonial Declaration; is that
2 correct?

3 A That's correct.

4 Q Are there any differences between the two
5 questionnaires?

6 A There are no differences at all.

7 Q And would you walk us through the introduction
8 of the fame questionnaire in Exhibit A on page seven?

9 A The interviewer, at the beginning of the
10 questionnaire after the screener, would have told the
11 respondent: In a moment, I'm going to ask you some
12 questions about social networking sites on the internet.
13 Please understand that we are only interested in your
14 opinions. If you don't have an opinion or don't know
15 the answer to a question, that's an acceptable
16 answer.

17 And at that juncture, the interviewer would ask
18 the respondent: Now, thinking about social networking
19 sites on the internet, would you please tell me the
20 names of the social networking sites that you can think
21 of.

22 That was followed by, assuming the person gave
23 a name and didn't say none, that was followed by: What
24 other names of social networking sites, if any, can you
25 think of.

1 Q Looking at question 4.0, what was this question
2 designed to address?

3 A This question was designed to address the
4 degree of unaided recognition of the Facebook mark.

5 Q And for question 4.1, what was this question
6 designed to address?

7 A It was designed to address other unaided
8 recognitions of, if you will, of social networking sites
9 on the internet.

10 Q Would you please read question 5.5 and 5.1 on
11 pages seven and eight of the report and explain the
12 reason for the questions.

13 A Sure. Question 5.0: Now, I'm going to read
14 you some additional names that may or may not be names
15 used for social networking sites on the internet.

16 At that point, the interviewer would have said:
17 Have you ever heard of, and then they would have read
18 the names that are on the list of question 5.0. And
19 question 5.0 was asked of respondents who gave an answer
20 either to question 4.0 or 4.1.

21 Question 5.1 was only read to respondents that
22 did not give any answers to question 4.0. And it's just
23 a similar wording: Now, I'm going to read you some
24 names that may or may not be used for social networking
25 sites on the internet. Have you ever heard of. And

1 they are were read the list.

2 They were not read names that they had already
3 given to the unaided question 4.0 and 4.1. It included
4 nine names, including a control name. Broadmore as a
5 measure of -- to measure agreement bias or
6 mismeasurement error in the test results.

7 Q And how were the names of the social networking
8 sites in questions 5.0 and 5.1 chosen.

9 A I believe that's detailed in my Testimonial
10 Declaration. But they were chosen from the names of the
11 -- first, we identified the top 20 social networking
12 sites based upon comp scores 12 month average of unique
13 visitors in the United States to the top 20 social
14 networking sites. We randomly selected two names from
15 each of the four quartiles. And then we created the
16 name Broadmore as a control.

17 Q Did the order of the list of the names of the
18 social networking sites remain the same for each
19 respondent?

20 A No. This interview was done in a process
21 that's called computer aided survey interviewing. And
22 so what happened was the interviewers actually would see
23 the survey questions on their computer terminals, would
24 ask the questions of the respondents and record the
25 responses directly onto their terminals. When it came

1 to the aided list, the computer actually randomly
2 ordered this list for each respondent.

3 Q And why did you ask about a fictitious
4 networking site Broadmore?

5 A Well, in every survey, there are what they call
6 survey artifacts, people try to be helpful, maybe people
7 guessing or thinking they've heard something when they
8 haven't. This is really intended to measure and to
9 eliminate from the survey data those inaccuracies, if
10 you will, or mismeasurement error.

11 Q Was agreement bias part of that analysis?

12 A Yes, because we were asking people if they've
13 heard of something. And there is a tendency sometimes
14 for people to report that they have heard something when
15 they haven't in fact heard something.

16 Q Were there any other questions in the
17 questionnaire?

18 A There were. As you know, the dilution statute
19 that talks about fame talks about the degree of
20 recognition among the general consuming public. So in
21 this survey, there is a measure of the degree of
22 recognition among the general public as well as these
23 questions at the end of the survey were intended to
24 provide a measure of the degree of recognition of the
25 general consuming public or sub universes of the general

1 public.

2 These questions were used to identify whether
3 or not an individual was a past or potential user of the
4 internet or a past or potential user of a social
5 networking site.

6 Q Let's now talk about the results of the fame
7 survey. Looking again at Exhibit A to your Testimonial
8 Declaration, let's look at table one on page 15.

9 A Right.

10 Q What were the results of the unaided
11 recognition of the Facebook mark?

12 A Respondents among the general public, 73 or
13 almost 74 percent of those respondents gave Facebook
14 unaided as name of a social networking site they could
15 think of. That number exceeds the number of unaided
16 recognition of every other social networking site that
17 was given unaided.

18 Q And looking at page 16, what were the results
19 of the combined unaided and aided recognition of the
20 Facebook mark?

21 A As you can see here, Facebook has aided and --
22 excuse me, unaided and aided recognition by
23 97.29 percent of the general public, higher than any
24 other aided or unaided mark, other than Twitter. That's
25 marginally higher than Twitter, but a statistical tie.

1 Q And did you do a mismeasurement adjustment for
2 this 97.29 percent based upon the fictitious
3 in-treatment control Broadmore?

4 A Yes. So what you do to do that, you take the
5 97.29 percent. And you would subtract from it the
6 percent of the respondents who indicated they had heard
7 of Broadmore as a social networking site when in fact
8 they couldn't have, because it doesn't exist as a social
9 networking site.

10 So 97.29 minus 2.71, which gives you
11 approximately 95 percent aided and unaided awareness,
12 which is controlled for by the in-treatment control.

13 Q Okay. Let's turn to pages 21 and 23 of Exhibit
14 A, the fame survey.

15 What was the degree of the recognition of the
16 Facebook mark among the sub universes of past and
17 potential internet users.

18 A It was 99.71 percent. For a net after
19 adjustment with Broadmore with a mismeasurement of error
20 with a net of 97 percent approximately awareness,
21 unaided and aided awareness.

22 Q And will you please look at pages 28 and 30 of
23 the same exhibit.

24 A You asked me about 21, I think, originally.

25 Q Indeed, yeah.

1 A Now, are you asking me about 23?

2 Q I'm sorry, let's go to 23. You're right.

3 A What 21 is, just so the record is clear, this
4 is unaided and aided recognition of social networking
5 marks among past internet users. And what you see in
6 table eight on page 23 is the unaided and aided
7 recognition of social networking marks among potential
8 internet users, those people that report that they are
9 likely to use the internet in some near future.

10 That particular -- in this particular case, it
11 was 99.16 percent awareness of the Facebook mark when
12 you adjust from any mismeasurement error, you are
13 subtracting a 2.8 percent for approximately an overall
14 recognition rate of 96 percent.

15 Q Okay. Let's now turn to page 28. And go
16 ahead.

17 A Page 28, these are past social networking site
18 users. The level of recognition of Facebook was
19 100 percent among past, both unaided and aided, among
20 past social networking site users. After adjustment for
21 mismeasurement error, you have an overall degree of
22 recognition among this group of approximately
23 98 percent.

24 Q Let's turn to page 30. What does page 30 tell
25 us?

1 A It gives you the same thing. It gives you the
2 level of unaided and aided awareness of social
3 networking sites or marks, if you will, among potential
4 social networking site users.

5 So this is the potential users. Here again,
6 the level of recognition was 100 percent for Facebook
7 both aided and unaided combined. With an adjustment for
8 mismanagement error, you are at about 98 percent level
9 of awareness.

10 Q Based upon the level of recognition of the
11 Facebook mark, what is the conclusion about the fame of
12 the Facebook mark?

13 A These data would clearly support a finding that
14 the Facebook mark is famous among the general public as
15 well as the general consuming public. It is widely
16 recognized among both its groups.

17 Q Thank you. Let's now talk about the likelihood
18 of confusion survey that you conducted which is Exhibit
19 B to what has been marked as Exhibit~No. 1 in this
20 deposition.

21 Dr. Ford, would you briefly please explain the
22 design of the likelihood of confusion survey?

23 A This again was an experimental survey design
24 with a test cell to measure likelihood of confusion as
25 the source authorization or approval, business

1 affiliation or connection and a control cell to measure
2 the degree in which there is mismeasurement area in the
3 test cell data.

4 The survey was designed much like you would
5 design a medical drug test where half the respondents
6 are exposed to, if you will, the drug with the active
7 ingredient and the other half are exposed to the
8 placebo. It has everything but the active ingredient.

9 So the test surveys were exposed to Facemail as
10 it appears on the applicant's trademark application
11 along with the description of services from the face of
12 that application.

13 In the control cell, they were exposed to a
14 mark that removed the active ingredient phase. They
15 were exposed to Thinkmail with the same description of
16 services and asked the same questions.

17 So that the difference between those group's
18 response to those groups, you could determine the nexus
19 or causality of any likelihood of confusion if there was
20 any.

21 Q And why did you use that particular survey
22 design?

23 A It's a pretty traditional design. The basic
24 design is formatted -- oftentimes referenced as ever
25 ready design, getting its names from Union Carbide

1 versus Ever Ready case. It's a design that Professor
2 McCarthy in his treatise on trademarks and unfair
3 competition has defined as kind of the standard survey
4 methodology.

5 It's a design that the TTAB has approved of in
6 the past. It's a design that I've used evolving
7 somewhat as Lanham involved over the last 30 years, but
8 that I've used for almost 30 years.

9 Q Have you used this survey design in other TTBA
10 matters?

11 A I have. In the past couple of years, I've used
12 it in two TTBA matters, one for Chanel and one for
13 Clinique.

14 Q What methodology did you employ in the
15 execution of the likelihood of confusion survey?

16 A The methodology used for likelihood of
17 confusion survey was one that used a non-volunteer
18 probability internet panel.

19 So respondents were qualified as email users or
20 instant message users. They were randomly selected from
21 panel members that were created to maintain by knowledge
22 of networks. A purveyor of, if you will, internet
23 samples or internet names.

24 These people were contacted by email. And they
25 were asked screening questions to determine whether they

1 fit the survey universe. And if they did, then they
2 were asked to complete the survey questionnaire that is
3 found in Exhibit B to Exhibit 1.

4 Q And you said that the respondents were members
5 of the Knowledge Network's panel; is that correct?

6 A Correct.

7 Q What is Knowledge Network?

8 A Knowledge Network is a company based in Palo
9 Alto. I think they have offices in New York, Chicago
10 and Palo Alto. They've just been purchased, actually, I
11 think two weeks ago by GFK, a very large market research
12 company out of Germany.

13 Knowledge Network's panel is a probability
14 panel which meant they use probability sample to
15 identify panel members. 30 percent of the panel members
16 that they identified did not have a computer access at
17 their home, did not access the internet.

18 And that matches kind of U.S. statistics of the
19 population, adults 18 years of age or older. Only about
20 30 percent of the U.S. population never accesses the
21 internet at any time.

22 So in order to fill that void, Knowledge
23 Network physically went to those respondents and gave
24 them internet access. Now, they are giving them
25 laptops. In the beginning, they gave them internet TV,

1 but that's how they created this panel.

2 Q Who were the survey respondents in the
3 likelihood of knowledge survey?

4 A Males and females 18 years of age and older who
5 reported that they used email or instant messaging who
6 agreed to fill out the survey questionnaire without the
7 help of anyone else and without doing any research, for
8 example, internet research.

9 And who agreed that, if they reported that they
10 used contact lenses or eye glasses and were looking at a
11 computer monitor, that they agreed to wear them during
12 the interview.

13 Q What happened after a respondent qualified to
14 take the survey?

15 A The respondent then was exposed to the survey
16 stimulus either in the test cell or the control cell.
17 And then asked survey questions that they inputted
18 answers to on their computer terminals.

19 Q Let's take a look at Exhibit B to your
20 Testimonial Declaration, Exhibit 1 in this deposition on
21 page six. What is on page six of Exhibit B?

22 A This is the survey stimulus for the test cell.
23 This was the stimulus that respondents were exposed to
24 in the test cell survey. This is the Facemail mark as
25 it appears on applicant's application along with the

1 description of services.

2 Q And this was -- this on page six was displayed
3 to each of the respondents who responded in the test
4 cell?

5 A Correct. And I don't know whether it's, let's
6 see --

7 Q Page 55?

8 A Actually what I was going to do is ultimately,
9 for the convenience of the board, one may want to look
10 at appendix C to Exhibit B to the deposition
11 Exhibit~No. 1. Those provide actual screen shots that
12 the respondent would have seen on their computer screen.

13 And you can see, on page C8, you can see the
14 test cell survey stimulus. And then on C9 and the
15 questions that follow, you can see a smaller version of
16 that stimulus along with the survey questions.

17 And then appendix D which follows, it gives you
18 the screen shots for the control cell. It's just a
19 little easier, I think, looking at the screen shots than
20 looking at the description of the survey on pages seven
21 through 10.

22 Q Sure. Okay. Let's look at page D8 of the
23 likelihood of confusion survey which is in appendix D.

24 A Okay.

25 Q What is this?

1 A So this is the survey stimulus used in the
2 control cell. Everything was held constant except for
3 the active ingredient was removed and replaced with the
4 word "think."

5 Q And what were respondents in the survey asked
6 to do?

7 A They were asked -- exact same questions they
8 were asked in the control cell, they were asked in the
9 test cell. They were asked questions with respect to
10 their state of mind with respect to the source of
11 services offered under this mark, the authorization or
12 approval or the business affiliation, business
13 connection.

14 Q Is it correct that the only difference in the
15 test cell screener and questionnaire and the control
16 cell screener and questionnaire is what exhibit the
17 respondent saw?

18 A Correct. Whether they saw the test cell
19 exhibit or the control cell exhibit.

20 Q Let's turn to pages starting with eight of the
21 Exhibit B, the likelihood of confusion survey.

22 A Okay.

23 Q Would you walk us through the test cell
24 questionnaire.

25 A Sure. You see where it says screen No. 7 at

1 the top of the page?

2 Q Yes.

3 A Okay. What that means is this is the seventh
4 screen computer screen that the respondent saw. And
5 they would have seen this wording: In this survey, you
6 are going to be shown a survey exhibit. And then you'll
7 be asked a few questions.

8 Please understand that we are only interested
9 in your opinions or belief. If you don't have an
10 opinion or belief or don't know the answer to a
11 question, that's an acceptable answer. Please feel free
12 to take as much time as you like looking at the survey
13 exhibit before moving onto the survey questions.

14 So the very next screen would have been either
15 the test cell or the control cell. Right now, we are
16 looking at the layout for the test cell. Because it
17 says survey Exhibit W.

18 Then on screen nine, they would have been shown
19 a reduced size of that exhibit which we saw earlier.
20 And they would have seen who or what company do you
21 believe is offering these services with this name.

22 And assuming they didn't say don't know, they
23 had an answer, then they were asked why do you say that.
24 And screen 13, they were asked a question that you see
25 here, question 5.5 that relates to whether or not --

1 well, I'll read it for the record:

2 Do you believe that the services with this
3 name, one, are being offered with the authorization or
4 approval of any other company or companies; two, are not
5 being offered with the authorization or approval of any
6 other company or companies; or, three, don't know or
7 have no opinion.

8 If the respondent answered, one, are being
9 offered with the authorization or approval, they were
10 asked with what other company or companies. And they
11 were also asked why they held that belief with a why do
12 you say that question.

13 And you see up above there, it says at the top
14 of that page, it says rotate Q6 and Q7. That's a
15 direction to the company Knowledge Networks that half to
16 respond to see question 6 first and half with see
17 question five first.

18 Q What is that done?

19 A To guard against any order bias that may be in
20 the data from the order of the questions. In addition
21 to that, you also probably saw the directions to the
22 programmers on question five that says rotate the first
23 two alternatives, which meant half the respondents
24 heard, one, are being put out with the authorization
25 offered first and half the respondents heard are not

1 being offered, the negative, first. The same thing
2 happened in question six.

3 Q Okay. Have we now covered all of the questions
4 in pages 8 through 10?

5 A I think we have. I didn't read question six
6 into the record, but it's a question that deals with
7 whether or not the company that offers the services on
8 the card has a business affiliation with any other
9 company or companies. And, if so, what company or
10 companies. And why do you say that.

11 Q Are the questions you asked standard accepted
12 questions for measuring likelihood of confusion?

13 A I believe so. As I indicated earlier, these
14 are questions that have their roots in the early Ever
15 Ready design. They've evolved to include questions
16 about authorization or approval and business affiliation
17 or business connection based upon the language of the
18 Lanham Act and the revisions of the Lanham Act over the
19 last 30 years or so.

20 Q All right. Let's now turn our attention to the
21 results of the likelihood of confusion survey. Let's
22 look at page 11 of Exhibit B, the likelihood of
23 confusion survey.

24 A Correct. This was the question that was
25 addressing likelihood of confusion, if any, as to the

1 source, who or what company do you believe is offering
2 the services with this name. Approximately 30 percent
3 of the respondents, in answer to that question, answered
4 Facebook.

5 Q Now, let's take a look at page 28.

6 A Actually, before we do that, it might be
7 instructive to look at page 13. For these respondents
8 who answered Facebook, they were asked: Why do you say
9 that.

10 And these pages 13 through 19 provide the
11 verbatim responses to the "why do you say that" for
12 Facebook responses to question 4.0.

13 Q Okay. Thank you.

14 A Uh-huh.

15 Q All right. Let's go to page 28. Page 28 of
16 Exhibit B, what is table two?

17 A Table two reports the results of question 5.0
18 series. And you see there are four columns there which
19 says number and percent and then unduplicated number and
20 percent.

21 Under Facebook, you see there are 16 people or
22 5.73 percent. Now, some of those people have given
23 Facebook to question 4.0 so that you didn't do any
24 double counting. That's the next column. It's the
25 unduplicated Facebook answers.

1 So a net of three additional people or
2 approximately 1 percent of the respondents gave
3 Facebook. An additional 1 percent gave Facebook to
4 question 5.5.

5 Q All right. Let's look at page 39 of Exhibit B.

6 A This is the question that deals with whether or
7 not the respondent believes that the company that offers
8 the services with this name has a business affiliation
9 or business connection with any other company or
10 companies. And, if so, who and why.

11 You can see that, in this case, there were 12
12 additional -- a net of 12 additional respondents that
13 gave a Facebook answer when exposed to the Facemail
14 stimulus.

15 Q All right. And then let's turn to page 60 of
16 Exhibit B. What is shown on page 60 in table four?

17 A Page 60 table four shows that, after exposure
18 to Thinkmail with the same services and asked the same
19 questions, that no one gave a Facebook response to
20 question 4.0.

21 The same thing is true on page 75 for question
22 5.0, no one gave a Facebook response to the
23 authorization approval question. And the same thing is
24 true on table 86 -- page 86 table six. No one gave a
25 Facebook answer to the question involving business

1 affiliation or business connection.

2 Q Okay. Thank you.

3 Dr. Ford, what were the results of the
4 likelihood of confusion survey?

5 A If you look at tab seven which is page 99, you
6 can see in total without ever -- you know, without
7 duplication, 36 percent of the respondents reported that
8 they believe Facebook either was the source of the
9 services or authorized or approved or has a business
10 connection or affiliation with the services Facemail
11 offered under that name.

12 Q And was there any adjustment for error in that?

13 A There was no adjustment, because there was --
14 no one gave Facebook in the control.

15 Q By the control, you mean when they were
16 presented with the Thinkmail?

17 A Thinkmail, yes, sir.

18 Q All right. In addition to the control cell for
19 each of the major questions, did you also ask the "why
20 did you say that" question?

21 A Right, as I think I indicated in my testimony.

22 Q Why do you do that?

23 A Well, it provides another measure I think of --
24 measure of why people are making this mental
25 association, this mental connection. As you can see

1 from the verbatims that primarily people report that
2 it's the "face" portion of the mark that was causing
3 them to hold that belief.

4 Q When you say the verbatims, are you referring
5 to Appendix A of Exhibit B?

6 A Right. You could look at Appendix A or, as I
7 indicated to you, after each of the table one, table
8 two, and table three, after each of those tables, the
9 verbatims for the Facebook answers are there for you
10 also. And maybe it's a little bit easier than looking
11 at Appendix A.

12 Q Each of these that you referenced contains an
13 accurate transcription of each survey's response to the
14 indicated questions?

15 A Right, these really aren't transcriptions.
16 This is what the respondents typed on their computer in
17 response to the survey questions.

18 Q Fair point. All right.

19 So based on the likelihood of confusion survey,
20 what is your conclusion about the likelihood of
21 confusion with regard to the Facemail mark?

22 A I think these data in Exhibit B strongly
23 support a finding that there is a likelihood of
24 confusion as to the source, the authorization or
25 approval or business affiliation and connection of the

1 services offered of email and instant messaging services
2 offered under the Facemail mark.

3 And I think that because of the way the survey
4 was designed, we know the causal nexus to this is the
5 word "face" in that mark and not due to any alternative
6 explanation.

7 Q Can you draw any conclusion with respect to the
8 use of Thinkmail as a mark?

9 A Well, the conclusion you would draw is you can
10 see that using a mark that didn't have face in it, in
11 this particular case, evidences no likelihood of
12 confusion.

13 So a mark that's different than the mark that
14 doesn't contain face does not appear to have any
15 relationship to the issue of likelihood of confusion.

16 MR. NORBERG: Okay. Let's take a break. And
17 we will go off the record.

18 (Recess taken.)

19 MR. NORBERG: Let's go back on the record. All
20 right.

21 Q Dr. Ford, just to wrap this up, Exhibit 1 that
22 we've been talking about this morning, does that
23 accurately represent your opinion that you are giving in
24 this matter as to the fame of the Facebook mark?

25 A It does.

1 Q Does it accurately represent your opinion that
2 you are giving in this matter as to the likelihood of
3 confusion as to the potential use of the Facemail mark
4 and the Facebook mark?

5 A It does.

6 Q And Exhibit A to Exhibit~No. 1, does that
7 accurately represent the fame survey that was conducted
8 in this matter?

9 A It does.

10 Q Do the responses that are recorded in Exhibit A
11 accurately -- are those accurate -- the accurate
12 responses that were provided by the respondents to the
13 fame survey?

14 A They are.

15 Q And Exhibit B to Exhibit~No. 1, is that an
16 accurate depiction of the -- strike that.

17 Does that accurately represent the likelihood
18 of confusion survey that was conducted in this matter?

19 A It does.

20 Q And do the responses that are recorded in that
21 Exhibit B, are those accurate representations of the
22 responses by the respondent?

23 A They were the responses reproduced from the
24 respondents, yes.

25 MR. NORBERG: Thank you, very much. I have no

1 further questions.

2 THE WITNESS: Do you want to identify Exhibit
3 C, D and E?

4 BY MR. NORBERG:

5 Q Go ahead and identify for us Exhibit C, D and
6 E.

7 A Okay. Exhibit C is a list of articles that
8 I've written since 2001. Exhibit D is a list of trial
9 testimony and deposition testimony since 1992. And
10 Exhibit E is just a copy of my professional history.

11 MR. NORBERG: All right. Thank you, very much.
12 Before I conclude my questioning, I would like to note
13 that Facebook moves that Exhibit~No. 1 be accepted into
14 evidence and that concludes my questions.

15 Thank you, very much.

16 Mr. Greenspan.

17 EXAMINATION

18 BY MR. GREENSPAN:

19 Q Hi, Dr. Ford. How you are you?

20 A I'm doing okay.

21 Q I was hoping we could start out back to the
22 beginning of your declaration. And I was wondering if
23 you would read for me the second sentence of paragraph
24 three at the very beginning of page two that starts with
25 "specifically."

1 A Yes. Specifically, the second survey was
2 designed, is that what you are asking me to read.

3 Q That's correct.

4 A Specifically the second survey was designed to
5 measure the degree, if any, to which Think Computer
6 Corporation's proposed Facemail mark, as identified in
7 the application serial No. 85056260 for quote, email
8 data services; providing email and instant messaging
9 services; providing email services; secure email
10 surveys, is likely to cause confusion as to the source,
11 authorization or approval of, or business affiliation or
12 business connection of applicant's business with
13 opposer, in particular due to the use of Face in the
14 proposed Facemail mark.

15 Q Thank you.

16 A You're welcome.

17 Q Did you write this sentence?

18 A Yes.

19 Q Am I correct in reading in paragraph four that,
20 quote, 95 percent or 94.58 percent of the general public
21 recognized the Facebook mark?

22 A Correct. From the fame survey, yes.

23 Q So 94.58 percent, that would be almost
24 everyone; is that correct?

25 A Recognized the mark either unaided or aided,

1 yes.

2 Q And am I correct in reading on page four in
3 paragraph seven that only, quote, 36 percent, or
4 specifically 36.20 percent, of the relevant universe of
5 potential, I'm sorry, consumers of email and/or instant
6 messaging expressed the belief that applicant's business
7 provided under proposed Facemail mark was either offered
8 by Facebook; is that a correct reading?

9 A Are you reading a particular sentence?

10 Q Yes. This is the very beginning of paragraph
11 seven, page four. Paragraph seven kind of spills over
12 from page three to page four.

13 A Where were you reading from, Mr. Greenspan?

14 Q Where it starts 36 percent.

15 A Okay. I'm not sure that the court reporter was
16 able to get everything that you were reading into the
17 record.

18 Q I'm sorry, that looks like paragraph six. I
19 think there is two references to 36 percent number.
20 36 percent, specifically 36.20 percent of the relevant
21 universe of potential consumers of email and/or instant
22 messaging expressed the belief that applicant's business
23 provided under the proposed Facemail mark is either
24 offered by Facebook, et cetera.

25 A Correct. What you read, you read correct.

1 Q Okay. Am I correct in reading that, quote, the
2 results of the second survey support a finding of
3 likelihood of confusion in paragraph seven?

4 A I believe it is actually paragraph seven, you
5 are correct.

6 Q So now I'm going to ask some questions to try
7 to determine the threshold that you used to determine
8 likelihood of confusion.

9 A Okay.

10 Q If out of a sample size of 100 individuals, if
11 no individuals, meaning zero, believed Facemail to be
12 associated with Facebook Incorporated, would you
13 consider that to be evidence of likelihood of evidence
14 of confusion?

15 MR. NORBERG: Objection to the form of the
16 question.

17 MR. GREENSPAN: Well, would you like me to
18 restate the question or would you like to answer it
19 anyway?

20 MR. NORBERG: You can answer.

21 THE WITNESS: You are asking if you took a
22 sample of 100 people and no one thought that the
23 services, email or instant messaging services, offered
24 up the name Facemail came from the source Facebook or
25 were affiliated or approved by Facebook or had a

1 business affiliation or business connection? Are you
2 asking me what I would conclude from that?

3 BY MR. GREENSPAN:

4 Q Yes. That's what I'm asking.

5 A Depends upon the sample. Assuming that you had
6 a relevant sample in a proper universe and you properly
7 constructed the questions, there would be no indication,
8 if no one said Facebook, there would be no indication at
9 least from those data of a likelihood of confusion.

10 Q Okay. If under those ideal circumstances that
11 you use described, instead of survey individuals, there
12 was only one individual who made that connection between
13 the Facemail mark and the Facebook, Incorporated, would
14 one individual's connection with that be indicative of
15 likelihood of confusion?

16 MR. NORBERG: I will object as incomplete
17 hypothetical.

18 You can answer if you can.

19 THE WITNESS: I assume that you are asking this
20 one individual is asked all three of the basic principal
21 survey questions that we've posed in this survey.

22 BY MR. GREENSPAN:

23 Q Yes. As I said in the question, the conditions
24 would be all the ideal conditions that you just
25 described when you answered the previous question?

1 A Right. But you characterized this person as
2 making an association which we didn't -- was not exactly
3 a question asked in this survey. That's why I was
4 asking for the clarification.

5 Q Well, to clarify, if instead of, I believe, it
6 was 279 individuals who indicated that they believed
7 Facebook be in some way connected to the Facemail mark,
8 if that number, instead of 279, was one, my question is:
9 In that case, would there be a likelihood of confusion?

10 MR. NORBERG: Objection; assumes a fact. Vague
11 and ambiguous.

12 BY MR. GREENSPAN:

13 Q Well, allow me to ask this question a different
14 way.

15 You've stated that 36.2 percent is indicative
16 of likelihood of confusion?

17 A No. I said that 36.2 percent would support a
18 finding of likelihood of confusion.

19 Q All right.

20 A The trademark trial and appeal board is the
21 fact finder here.

22 Q In that case, you've said that 36.2 percent
23 support the finding of likelihood of confusion?

24 A Correct.

25 Q What is the process that you've used to arrive

1 at 36.2 percent being supportive of that finding versus
2 any other number between zero and 36.2 percent?

3 A I'm not sure I understand your question. There
4 are lots of numbers underneath 36.2 percent that
5 would -- also assuming a competent survey and a relevant
6 universe would also support a finding of likelihood of
7 confusion.

8 Q What is the lowest number within that set?

9 MR. NORBERG: Let me object as vague and
10 ambiguous.

11 THE WITNESS: It's an interesting question,
12 Mr. Greenspan. These numbers really find their roots,
13 if you will, in the case law. And in the TTAB case law.

14 There have generally been rules of thumb that
15 experts and courts have suggested that numbers under
16 10 percent can be problematic. And may not support a
17 finding of likelihood of confusion.

18 But it's, when I say it's an interesting
19 question, if you look historically at survey percentages
20 that have been relied on to find a likelihood of
21 confusion, for example, one that pops into my mind right
22 off is the James Burrow Limited versus the sign of The
23 Beefeater case, which Judge Markley heard actually
24 sitting as a designee in the seventh circuit.

25 The survey finding in that case was 15 percent

1 of the survey respondents reported that a restaurant
2 with the name Beefeater, the sign of the Beefeater, was
3 owned or operated or endorsed by the gin company.

4 That particular survey -- this is why I say
5 it's an interesting question -- that particular survey
6 was before experimental survey designs were used, so
7 there was no control in that survey.

8 There was no control sale. So I don't know in
9 the future, as controls become more rigorous, whether
10 the courts will be willing to accept survey evidence as
11 supporting the likelihood of confusion at 6 percent or
12 7 percent or 5 percent. I don't know. I can tell you
13 that this is well above the threshold.

14 Q So what is the threshold?

15 A If you want to use 10 percent, this is well
16 above a 10 percent threshold.

17 Q Can you cite a specific case that you've used
18 the 10 percent threshold as used in this particular
19 study?

20 A I can't as I sit here. I'm sure we can find
21 those though.

22 Q Okay. Let's go back to the declaration for a
23 moment.

24 A Sure.

25 Q In paragraph 16 of the declaration, am I

1 correct in reading, the fame survey was administered
2 under a double blind protocol. Specifically, not only
3 were the respondents not informed as to the purpose or
4 sponsor of the survey, but similarly, both the survey
5 supervisors and interviewers were not informed as to the
6 purpose or sponsor of the survey.

7 A You read that correctly.

8 Q And then in paragraph 18 of your declaration,
9 am I correct in reading, after calling a telephone
10 number and identifying a respondent, who met the
11 screening criteria (i.e., the universe definition) the
12 qualified survey respondent was then told: In a moment
13 I'm going to ask you some questions about social
14 networking sites on the internet, end quote.

15 A You read that correctly.

16 Q Now, does this seem like a direct contradiction
17 to you to first say the supervisors and interviewers
18 were not going to be informed as to the purpose of the
19 survey and then to tell them roughly the purpose of the
20 survey?

21 A No, this doesn't tell them the purpose of the
22 survey. The purpose of the survey was to determine the
23 degree of recognition, if any, of the Facebook mark. It
24 doesn't tell them -- it doesn't disclose any of that.

25 Q Does it seem like a contradiction to tell them

1 even a general topic area ahead of time that might get
2 them thinking about various things in that subject?

3 A No. You don't get trademark rights in gross.
4 You get trademark rights with respect to a class of
5 goods or services and the class or goods of services
6 that was of interest to your social networking sites.

7 Q Okay.

8 A So that's exactly why you would tell
9 respondents that that's the area of inquiry.

10 Q In table one which is on page 15 and this is
11 the fame survey --

12 MR. NORBERG: You are talking about the fame
13 survey?

14 MR. GREENSPAN: We were talking about the fame
15 survey. And we are still talking about that.

16 MR. NORBERG: I'm sorry, in the declaration or
17 the fame survey itself?

18 MR. GREENSPAN: I'm sorry, I believe this is in
19 the fame survey itself.

20 THE WITNESS: Not the declaration?

21 BY MR. GREENSPAN:

22 Q Not the declaration. It looks like Exhibit A,
23 Tab C, table one.

24 MR. NORBERG: Thank you.

25 THE WITNESS: Unaided recognition of social

1 networking marks.

2 BY MR. GREENSPAN

3 Q That's correct. On 110, can you read the
4 number of people who responded to the term Google?

5 A Fifteen.

6 Q And what percentage does that correspond to?

7 A 3.69 percent.

8 Q Would you agree that Google is a famous mark?

9 MR. NORBERG: Objection; to the form of the
10 question.

11 THE WITNESS: I would agree that based upon
12 empirical evidence that I've looked at, based upon
13 surveys I've designed and conducted, that I think that
14 those surveys evidenced or provide support for finding
15 that Google a famous mark, yes.

16 BY MR. GREENSPAN:

17 Q Can you explain why so few people in your
18 survey seemed to have responded to the term Google?

19 MR. NORBERG: Objection; calls for speculation.

20 THE WITNESS: I don't think it's necessarily a
21 famous mark with respect to social networking sites.

22 BY MR. GREENSPAN:

23 Q Okay. Now; I have some questions about the
24 second survey you designed which is the likelihood of
25 confusion between Facebook mark and proposed Facemail

1 mark?

2 A Okay.

3 Q My first question regarding this study is: Do
4 you think that the fact that Knowledge Network and
5 Facebook are both based in Palo Alto could have biased
6 the results of the second study at all?

7 A No. To the degree in which they created some
8 bias there, you would see that in the control cell.
9 That's the reason for the control cells.

10 Q Does Knowledge Network use participants
11 primarily by its headquarters or does it evenly disburse
12 them throughout a given area?

13 A This was a national study. These people were
14 from all over the United States.

15 Q Okay. And you just mentioned the importance of
16 the control. Can you briefly tell me the importance of
17 having a control cell in conducting the survey in a
18 double blind matter. You mentioned previously surveys
19 were not conducted in that regard.

20 MR. NORBERG: Let me object to that as a
21 compound question. I think there are a number of
22 questions there.

23 BY MR. GREENSPAN:

24 Q Let's start with the first question. Can you
25 tell me the importance of having a control cell?

1 A I think it is important today to have a control
2 cell. It is not how survey evidence and likelihood of
3 confusion cases historically have been done. But the
4 surveys have evolved to be more rigorous and more
5 scientific in the last decade and a half.

6 They're oftentimes more frequently than a
7 separate control cell; although, it's traditional for
8 us. There are in-treatment controls like were used in
9 the fame survey.

10 But the bottom line though, Mr. Greenspan, I
11 don't think you can measure causality without an
12 in-treatment control or a control cell. I think we were
13 naive 25 years ago.

14 Q So would you agree then that today conducting a
15 survey would be sub optimal if it did not have an
16 effective control?

17 MR. NORBERG: Objection; vague and ambiguous.

18 THE WITNESS: I don't know whether I would
19 agree with that. I can think of circumstances where I
20 would disagree with that. Let's suppose that you did --
21 you had a test cell control design, experimental design
22 and you executed your test cell, and you found no
23 evidence of likelihood of confusion, I don't believe you
24 necessarily need a control cell to confirm that. So --

25

1 BY MR. GREENSPAN:

2 Q That's not necessarily what I was asking. I
3 apologize if it was unclear.

4 It may be that you could obtain data without
5 having an effective control. But my question is: If
6 you had the option of conducting a survey with or
7 without a control, would it be considered more rigorous
8 and more conclusive with the control?

9 MR. NORBERG: Again, vague and ambiguous.

10 THE WITNESS: I believe so. I think Professor
11 Diamond in her work on survey evidence in the Federal
12 Judicial Center's Manual on Scientific Evidence, I
13 think, concedes that even poor control was better than
14 no control at all.

15 BY MR. GREENSPAN:

16 Q And so in terms of making sure that your
17 control is not poor, would you agree that the process by
18 which you choose the control is fairly important?

19 A I missed one word in your question.

20 Q I'm sorry. In terms of determining that your
21 control that you are selecting is not a poor control
22 that you just described, would you agree that it's
23 important to go through a process to choose the correct
24 control?

25 A There may be lots of correct controls. I'm not

1 sure that there is only one.

2 Q Sure. But my question is about the process.

3 A Well, the guiding process is that the controls
4 shouldn't include the elements you are trying too
5 assess.

6 Q Okay. Well, I'm not sure that answered the
7 question. But let's move on in any event.

8 Can you explain the process that you used in
9 the second survey to pick the Thinkmail control?

10 A The process was recognizing that face couldn't
11 be in the control cell, that I wanted a two-word mark
12 like your application. And I needed to replace face
13 with some other word. And there are literally dozens of
14 other words I could have chose. And I chose Think
15 because it's the name of your company.

16 Q Okay. Now, you said something fairly
17 important, I think, which is that face could not be in
18 the control. Can you explain the reasoning behind that
19 in a bit more detail?

20 A Sure. It's a basic scientific principle in
21 experimental design that you couldn't have the element
22 that you are trying to assess in the control cell;
23 otherwise, you just have two test cells. I mean --

24 Q Go ahead.

25 A This is really basic survey design that goes

1 back decades.

2 Q Well, in paragraph 42 of your declaration, it
3 states that you used a process similar to -- and I'm
4 quoting here -- a pharmaceutical drug test. And I know
5 you have a long educational background, including a
6 doctorate. But are you a medical doctor?

7 A No.

8 Q Do you have a experience in designing or
9 conducting pharmaceutical drug tests?

10 A No. My only experiment is reading about those
11 designs.

12 Q Are you familiar with any particular drug tests
13 that selected for effective compound that shared some
14 active ingredient but lacked others?

15 MR. NORBERG: I'm sorry, I couldn't hear that
16 question. Would you mind repeating it?

17 BY MR. GREENSPAN:

18 Q Are you familiar with any particular drugs
19 tests that were selected for effect of compounds that
20 may have shared some active ingredient but lacked
21 others? So, for example, a test that would examine
22 Tylenol as compared to Tylenol with codeine?

23 MR. NORBERG: I'm going to object to that
24 question as vague and ambiguous.

25 THE WITNESS: What are you testing the effect

1 of; codeine?

2 BY MR. GREENSPAN:

3 Q My question was, generally speaking, are you
4 familiar with any particular drug test that resembles
5 such a setup?

6 A Where you have some of the active ingredient in
7 the control? Is that what you are asking me?

8 BY MR. GREENSPAN:

9 Q No.

10 A Okay.

11 Q I'm asking if you ever examined specifically or
12 are aware of any studies for compounds where some
13 ingredients are shared, but others are not?

14 MR. NORBERG: Vague and ambiguous.

15 THE WITNESS: Depends on what you are trying to
16 measure.

17 BY MR. GREENSPAN:

18 Q Okay. Would it be fair to say that, in this
19 particular study that you designed, we are trying to
20 measure the effect of the shared space component that
21 would be, I believe what you wrote and what I asked you
22 about in the very beginning of my questioning, in
23 paragraph three?

24 A Can you repeat what you just said?

25 Q Would it be fair to say that, in this

1 particular study, we are trying to examine a particular
2 use of face in the proposed Facemail mark which is
3 shared with the use of face in the Facebook mark?

4 MR. NORBERG: Objection; vague and ambiguous.

5 THE WITNESS: I'm not sure I understand. We
6 are trying to measure the impact, if any, of face in the
7 Facemail mark with respect to the issue of likelihood of
8 confusion.

9 BY MR. GREENSPAN:

10 Q But is the reason that we are focused on the
11 word face, because it is shared in the Facemail mark and
12 the Facebook mark, is there any other reason why we are
13 focusing on the word face?

14 A As I understand it, the opposer in this case is
15 asserting that there is a likelihood of confusion based
16 upon their Facebook mark.

17 MR. GREENSPAN: I'm going to object to that as
18 nonresponsive.

19 Q Is there, in fact, a shared component between
20 the Facebook mark and the Facemail mark?

21 A They both have face in them.

22 Q Thank you. So is that shared component that
23 you just acknowledged the reason why you wrote in
24 paragraph three of your declaration that you were
25 specifically interested, in particular, in the use of

1 face in the proposed Facemail mark?

2 A Right. That was the causality that was being
3 measured, whether or not the presence of face in the
4 Facemail mark was likely to cause confusion as to the
5 source or authorization of those services with the
6 source Facebook.

7 Q Okay. So then going back to the design of your
8 control Thinkmail. Would you agree that Thinkmail in no
9 way overlaps with the subject mark Facebook?

10 MR. NORBERG: Objection; vague and ambiguous.

11 THE WITNESS: Thinkmail doesn't have the word
12 face in it as it shouldn't.

13 BY MR. GREENSPAN:

14 Q How do you propose then to assess the impact of
15 the face prefix if the control has absolutely nothing in
16 common?

17 A It may have no impact. If there was no
18 reported likelihood of confusion as to the source of
19 those services, then you would conclude that it wasn't
20 having an impact. You can't have the shared word face
21 in the control. I mean, that's basic science.

22 Q You've said several times that it's basic
23 science. And you make it sound fairly obvious that you
24 should not have the word face in the control in these
25 circumstances.

1 But can you think of any situation in which it
2 might make sense to have multiple control where you
3 might have, for example, a control such as Thinkmail and
4 a control such as Facepad or Facebox?

5 MR. NORBERG: Objection; vague and ambiguous
6 compound.

7 THE WITNESS: I can't imagine doing that.

8 BY MR. GREENSPAN:

9 Q And why not?

10 A Because now you're just doing another test
11 cell. You are not -- you are violating the principle of
12 a control. Because you are putting into the control
13 cell the element you are trying to assess.

14 Q So you believe that by having multiple controls
15 that you are violating the principle of having a
16 control?

17 A No.

18 Q Can you explain again why you think it would be
19 improper to have multiple controls in a study such as
20 this?

21 A I didn't say it would be improper. I said it
22 would be improper to have a control that used the word
23 face as you were proposing.

24 Q Give me a minute.

25 MR. NORBERG: Would you like to take a break?

1 MR. GREENSPAN: Yeah, let's take a five-minute
2 break.

3 MR. NORBERG: Do you want to call back or
4 should we put you on mute?

5 MR. GREENSPAN: You can put me on mute.

6 (Recess taken.)

7 MR. NORBERG: We are back on the record.

8 BY MR. GREENSPAN:

9 Q Okay. Before we took a break, we were talking
10 about controls. Dr. Ford, do you think there are, I'm
11 sorry, do you think there is any situation in which
12 using multiple controls could have improved this study?

13 A I haven't thought about this.

14 Q Have you ever done studies in the past that you
15 used multiple controls?

16 A None that comes to mind right away.

17 Q Are you aware of any studies, whether
18 pharmaceutical or of any nature, that use multiple
19 controls?

20 A I mean, there may be. It may be appropriate
21 under certain circumstances. I just haven't thought
22 about what the circumstances might be.

23 Q Well, let's think about that some now. What
24 would be an appropriate circumstance in which you might
25 want to use more than one control?

1 A I don't know. I haven't thought about it.

2 Q If I were to tell you that a hypothetical study
3 involving several ingredients needed to be conducted,
4 would that be, based on your area of expertise, an
5 appropriate candidate for such a multiple control study?

6 A It may or may not be. What are you trying to
7 assess?

8 Q Well, I think that answers my question.

9 So do you think any meaning can actually be
10 derived from your study regarding the likelihood of
11 confusion stemming from the common use of the word face,
12 given that your control targeted the effectively
13 incorrect part of the Facemail proposed mark?

14 MR. NORBERG: I'll object to that as vague and
15 ambiguous.

16 THE WITNESS: You might have to restate your
17 question, because I'm not sure I followed it.

18 BY MR. GREENSPAN:

19 Q Your study effectively asks people to choose
20 between Facemail and Thinkmail in terms of assessing
21 likelihood of confusion; correct?

22 A No. Anyone responded wasn't exposed to both of
23 those marks.

24 Q Okay. Let me rephrase then.

25 The two marks that you examined were Facemail

1 and Thinkmail even if no respondent was exposed to both
2 simultaneously; is that correct?

3 A The mark that was surveyed was Facemail. And
4 the benchmark upon which the survey results would be
5 viewed was the control name Thinkmail.

6 Q Did you consider using a control such as
7 Facetime which is a trademark owned by Apple,
8 Incorporated and begins with the work face?

9 A No, it would be inappropriate.

10 Q On what grounds would it be inappropriate?

11 A Because now you are putting in the control cell
12 that the active ingredient you are assessing in the test
13 cell the portion of the mark that has face in it.

14 Q You are using this phrase active ingredient
15 again as though trademarks are pharmaceuticals. Can you
16 think of any regard in which a trademark is not like a
17 pharmaceutical?

18 A I'm using active ingredient to suggest -- and
19 we can stop using that word if that bothers you. And we
20 can call it the element that's being assessed.

21 Q It doesn't bother me. I think it's indicative
22 of your approach. And my question about that approach,
23 do you think that the element being assessed must always
24 be absolutely isolated? Or are there situations where
25 it's appropriate to allow that element to exist so that

1 other aspects can be examined?

2 A That question doesn't make any sense to me.

3 Q Okay. Let's turn to table one of your results
4 in Exhibit B. I believe that's on page 11.

5 A Yes, you are correct.

6 Q So on line one, am I correct, in reading that,
7 it's approximately 30.5 percent of respondents believed
8 that Facebook was offering the Facemail services or
9 services under the Facemail name?

10 A Correct.

11 Q And would I be correct then in saying that
12 almost 70 percent of respondents did not believe that
13 Facebook was offering services under the Facemail name?

14 A That would also be correct. Although that
15 isn't the issue with respect to likelihood of confusion.

16 Q And then what is the issue?

17 A The issue is what the proportion of people that
18 evidence a likelihood of confusion, not the proportion
19 that don't.

20 Q You can't directly examine, though, so-called
21 likelihood of confusion, you have to ascertain that
22 likelihood from other factors; is that correct?

23 A Alternative explanations, yes.

24 Q So even though you say that the 30.5 number
25 isn't directly issue, it is one of the main factors for

1 ascertaining likelihood of confusion; is that correct?

2 MR. NORBERG: Objection; lacks foundation.

3 THE WITNESS: It is one of the factors that I
4 would look to in concluding that the survey evidence
5 supports a finding of likelihood of confusion.

6 BY MR. GREENSPAN:

7 Q Do you believe that it's significant that
8 almost three quarters of the population you surveyed did
9 not believe that there was any connection between the
10 Facebook and Facemail in response to question four?

11 A I do not believe that's significant. What is
12 significant is that approximately 35 or 36 percent of
13 the people did exhibit beliefs that would be indicative
14 that they were misled or deceived by the belief that
15 Facebook either authorized or approved or is a business
16 connection with email as instant messaging services
17 offered under the name Facemail.

18 Q Okay. Let's go to table two. So in table two,
19 it appears that if you add up the 5.73, the 1.08, the
20 6.81 percent of respondents believed that the Facemail
21 mark represented services being offered with the
22 authorization or approval of Facebook, Incorporated. Is
23 that a correct statement?

24 MR. NORBERG: Objection; to the form of the
25 question.

1 THE WITNESS: Yeah, there were almost 7 percent
2 that gave a Facebook answer in response to that series
3 of questions.

4 BY MR. GREENSPAN:

5 Q Now, earlier on, you mentioned that there was a
6 threshold that had been established by case law of
7 something like 10 percent; although, you weren't able to
8 cite the origin. 7 percent is less than 10 percent.

9 So can you explain the difference in response
10 of this question 5 versus a much higher response to
11 question 4?

12 MR. NORBERG: Objection; vague and ambiguous.

13 THE WITNESS: It seems from a research
14 perspective that respondents believed in a greater
15 proportion that Facebook was the source of services
16 offered -- the email and instant messages offered under
17 this name than they believed that Facebook authorized or
18 approved of these services under this name.

19 BY MR. GREENSPAN:

20 Q I find that a little bit confusing. Does that
21 suggest that your respondents believed that Facebook was
22 the source, but did not approve of the services?

23 A No.

24 Q Can you better explain what that means?

25 A Sure. As you know, likelihood of confusion can

1 take many forms. Confusion as to source, confusion as
2 to authorization or approval, confusion as to
3 affiliation or connection. Clearly the largest
4 proportion of the respondents evidenced confusion as to
5 source in this particular case.

6 Q Okay. For your question 4, you had several
7 responses that mentioned Facebook in the verbatims. Did
8 you happen to notice the answers given by responses 786
9 and 924?

10 A Respondent 786.

11 Q Yes. And 924.

12 A What page is 786 on?

13 Q They are both on page 26.

14 A Okay.

15 Q Can you read the answer to question 4.1 given
16 by respondent 924?

17 A This person says Apple to question 4.0. And
18 then why do you say that. And then they say because
19 they have an app called Facetime.

20 Q Just a few more questions. Do you personally
21 have a Facebook provide file?

22 A No.

23 Q My next question is are you a Facebook
24 shareholder?

25 A No.

1 Q Has Facebook promised you, your employees or
2 affiliates future stock ownership of any kind in
3 exchange for your work on any of these studies?

4 A No.

5 Q To your knowledge, are you a shareholder in any
6 companies that do business with Facebook?

7 A Not to my knowledge.

8 Q And any academic literature in your filed
9 which, based on your testimony today, that you are
10 familiar with are studies that are sponsored financially
11 by a particular party involved in the study considered
12 to be unbiased?

13 MR. NORBERG: Objection; to the form of the
14 question, vague and ambiguous.

15 THE WITNESS: I'm not sure I understand your
16 question.

17 BY MR. GREENSPAN:

18 Q Can you name a few journals that are at the
19 forefront of your field?

20 A The American Journal of Consumer Behavior. The
21 Journal of the American Marketing Association Journal.

22 Q Any of these journals are papers frequently
23 published and well regarded if they are conducted with
24 financial sponsorship of the parties being examined by
25 the papers?

1 A My general experience is that they generally
2 are not with the exception of government grants.

3 Q How much in total did Cooley pay you to conduct
4 this survey?

5 A Which survey?

6 Q Well, actually each one of them.

7 A I think the total cost, including all of our
8 out-of-pocket expenses for each survey, was
9 approximately \$60,000.

10 Q So those are your total costs. Is that also
11 the amount that Cooley paid you?

12 A That was the total amount that was billed, yes.

13 MR. GREENSPAN: Okay. I have no further
14 questions.

15 MR. NORBERG: I have no further questions.
16 This concludes the deposition.

17 Original goes to Cooley and a copy to the
18 witness.

19

20 * * *

21 (WHEREUPON, THE PROCEEDINGS ENDED AT 12:00
22 P.M.)

23 (DECLARATION OF PENALTY OF PERJURY ON THE
24 FOLLOWING PAGE, ATTACHED HERETO.)

25 DECLARATION UNDER PENALTY OF PERJURY

1 I declare under penalty of perjury that the
2 foregoing is my Statement Under Oath and are the
3 questions asked of me and are my answers hereto; that I
4 have read same and have made necessary corrections,
5 additions, or changes to my answers that I deem
6 necessary.

7
8 In witness thereof, I hereby subscribe my
9 name this 4th day of January,
10 2011, at Huntington Beach, CA.
(City) (State)

11
12
13
14 
Witness

REPORTER'S CERTIFICATE

I, KATHY L. PA'U, CSR No. 5684, Certified Shorthand Reporter, certify;

That the foregoing proceedings were taken before me at the time and place therein set forth, at which time the witness was put under oath by me;

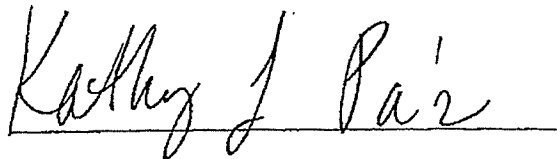
That the testimony of the witness, the questions propounded, and all objections and statements made at the time of the examination were recorded

stenographically by me and were thereafter transcribed;

That the foregoing is a true and correct transcript of my shorthand notes so taken.

I further certify that I am not a relative or employee of any attorney of the parties, nor financially interested in the action.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct.

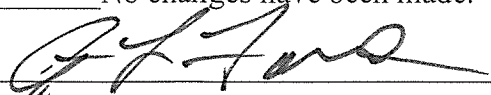
A handwritten signature in cursive script, reading "Kathy L. Pa'u", written over a horizontal line.

KATHY L. PA'U, CSR No. 5684

Errata Sheet for Facemail Matter Transcript

Page	Line	Change	Reason
6	13	service to surveys	Transcription error
7	14	Laws to Law	Transcription error
7	25	reporting to reported	Transcription error
9	18	test to tests	Transcription error
9	20	manuel for complex litigation to Manuel for Complex Litigation	Transcription error
9	23	of manual and scientific to Manual on Scientific	Transcription error
9	24	evidence to Evidence.	Transcription error
12	9	they to is	Transcription error
12	9	dial to dialing	Transcription error
12	10	Delete "in".	Transcription error
12	16	surveyed to selected	Transcription error
17	12	comp scores to ComScore	Transcription error
17	21	aided survey to assisted telephone	Transcription error
23	14	Delete "phase"	Transcription error
23	24	ever to Eveready	Transcription error
23	25	Delete "ready"	Transcription error
24	1	Every Ready to Ever-Ready	Transcription error
24	7	involved to evolved	Transcription error
24	21	to to and	Transcription error
24	21	maintain to maintained	Transcription error
24	21	knowledge to Knowledge	Transcription error
24	22	Delete "of"	Transcription error
24	22	networks to Networks	Transcription error
25	11	GfK to GfK	Transcription error
30	15	half to to half the	Transcription error
30	16	respond to respondents	Transcription error
30	16	Delete "to"	Transcription error
30	16	Delete "with"	Transcription error
30	17	five to seven	Transcription error
41	24	up to under	Transcription error
44	22	Burrow to Burrough	Transcription error
44	22	sign to Sign	Transcription error
45	8	sale to cell	Transcription error
53	10	experiment to experience	Transcription error
59	22	Anyone responded to any one respondent	Transcription error

X Subject to the above changes, I certify that the transcript is true and correct.
 _____ No changes have been made. I certify that the transcript is true and correct.


 Signature

1/4/12
 Date