

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

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

**TIMELINES, INC.'s MEMORANDUM OF LAW IN OPPOSITION
TO FACEBOOK, INC.'s MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Timelines, Inc. (“Timelines”) is a small Chicago company that was in pursuit of the American dream just like a young Mark Zuckerberg was when he started what would become one of the world’s most recognized and influential companies, Facebook. One can hardly walk Michigan Avenue, ride the El, hop a taxi to O’Hare, or take in a Cubs game, without seeing Facebook’s trademarked logo plastered on ads for either Facebook or one of the thousands of companies that market their products and services through Facebook. This is true in nearly every city and town in the United States and the rest of the world. This is no overstatement. Facebook enjoys such widespread recognition because trademark law protects Facebook against infringing uses of its many trademarks by others. While trademark law protected (and protects) Facebook in its pursuit of success, Facebook wants this Court to deny the same protections to Timelines.

Facebook has acknowledged that when it developed its own “Timeline” offering, it was aware that the United States Patent and Trademark Office (“USPTO”) had actually registered three trademarks to Timelines for “TIMELINES,” “Timelines.com” and the TIMELINES design mark. Under the same law that protects Facebook, these marks presumptively are valid and enforceable and reflect that the USPTO carefully considered Timelines’ applications and granted them. Timelines proceeded to invest significant financial resources, and untold blood, sweat and tears, working to build the little company that it had sought to protect. Those efforts, however, were dashed to bits when, on September 22, 2011, at Facebook’s fourth annual Developers’ Conference (a/k/a the f8 Conference), Mr. Zuckerberg stood on stage in front of thousands, if not millions, of live and media-connected viewers and announced [REDACTED] [REDACTED] to be prominently featured on Facebook’s front page--- “Timeline.” [REDACTED] [REDACTED]

[REDACTED]

[REDACTED] Consistent with that sentiment, soon after the f8 announcement, and for days thereafter, Facebook redirected traffic from Timelines' own Facebook page to Facebook's "Timeline" page. The calls and emails to Timelines from people confused about Facebook's announcement started coming in. The confusion would be funny were it not the case that Facebook's announcement and subsequent roll out of "Timeline" to its more than one billion worldwide users sounded the death knell for Timelines' ability to be identified by its registered trademarks.

Facebook now seeks summary judgment, arguing that Timelines' marks are generic, descriptive, and that Facebook's own use of the term is generic and non-infringing. It is beyond ironic that these arguments come from the very company that has trademarked and enforced the terms "like," "poke," and "wall," to name just a few. Moreover, Facebook itself refers to "Timeline" in a brand and trademark way, which absolutely undercuts every other argument it makes. Inexplicably, Facebook notes that the USPTO uses the term "timelines" generically on its website. This is the same USPTO which also granted Timelines three registered trademarks for TIMELINES, granted Timelines these marks after each of the purportedly pre-existing uses from third parties that Facebook identifies in its brief, and which has continued to grant marks with the term "timeline(s)" in them.

Given Facebook's history, there is no question that were it not for this legal dispute, Facebook already would have applied for its *own* trademark for the term TIMELINE, and presumably would argue that the term is suggestive and also that it has acquired secondary meaning. That is because Facebook has filed lawsuits or USPTO objections against many companies for many similar terms, and this case falls within the ambit of those efforts. The simple fact is that Timelines does not use the term "timeline(s)" generically or in a manner

consistent with the third-party uses Facebook has identified, sufficient to void its registered trademarks. In contrast, Facebook's use infringes on Timelines' trademarks, and Facebook has made ██████████ dollars using Timelines' trademarks to sell advertising through "Timeline" – while Timelines has lost absolutely everything it invested in building its company. Because Timelines' trademarks are presumptively valid, any effort to overcome them because of claims that the terms are generic or descriptive, present quintessential fact questions that established Seventh Circuit precedent requires to be reserved for trial. This case is no different.

SHORT BACKGROUND ABOUT TIMELINES

Timelines started in 2007 with less than 10 employees, most of whom have had to leave the company because of this litigation. Timelines offers or has offered various online services, including the website LifeSnapz.com, the website Timelines.com, an application services provider called Timelines SE, an application called Photogram, and an application called Disaster of the Day. *See* Timelines Local Rule 56.1(b)(3)(C) Statement of Additional Facts ("SAF") ¶¶ 1-2. Its website, Timelines.com, allows users to record and share events, and contribute descriptions, photos, videos, geographic locations and links (collectively for ease of reference "Content") related to events. *Id.* at ¶¶ 3-4. Anyone can post Content simply by creating an account. *Id.* The concept is to let the people of the world record the history of the world, however they define that history. *Id.* LifeSnapz, Timelines SE, Photogram and Disaster of the Day are separately described and are separate products. *Id.* at ¶¶ 5-8.

Timelines has invested several million dollars into its business, and sought to protect itself by securing federal trademarks from the USPTO. *Id.* at ¶¶ 9, 19. Timelines uses its trademarks as brand identifiers for its goods and services, including, without limitation, in "[p]roviding a web site that gives users the ability to create customized web pages featuring user-defined information about historical, current and upcoming events." *Id.* at ¶ 10. Timelines'

trademarks all pre-date Facebook’s “Timeline.” *Id.* at ¶¶ 11-14. Timelines has continuously and consistently used the TIMELINES Marks on the services described herein to promote and endorse its business and has actively promoted Timelines.com and its goods and services using the TIMELINES Marks. *Id.* at ¶¶ 14, 16-17. Because of its efforts, approximately 3-4 million people cumulatively have visited the Timelines.com website (which averaged 94,000 users per month in 2011 and 2012). *Id.* at ¶¶ 14-15. Timelines believed that Timelines.com could become a repository of information from all over the world, and that it could earn revenue by selling advertising. *Id.* at ¶¶ 4, 15. In addition to having a federal registration on the TIMELINES Marks and the strong nature of the TIMELINES Marks due to their suggestive nature, the time and effort that Timelines has put into developing and marketing the TIMELINES Marks has made it so that the TIMELINES Marks have secondary meaning and the public associates the TIMELINES Marks as identifiers for Timelines’ goods and services. *Id.* at ¶¶ 14-15, 20.

For its efforts, Timelines has been nominated or recognized for numerous awards and accomplishments. *Id.* at ¶ 18. Despite what Facebook might argue, Timelines was never about having a company where a person could go to create or see a “timeline.” *Id.* at ¶ 21. A “timeline” is a graphical presentation of things that happen over time with a horizontal or vertical line, with appendages coming off of the line indicating different points in time and information about something ascribed to that point in time. *Id.* The company is called Timelines and has a site called Timelines.com but does not provide timelines because there are not graphical displays of chronological information. *Id.* It offers a broad array of services.

When Facebook announced “Timeline,” people were confused and wrote or called Timelines believing that it had done a deal, or otherwise had made an agreement, with Facebook, and wanted to extend their congratulations. *Id.* at ¶ 53. Other individuals, believing that Timelines was Facebook, wrote Timelines asking Timelines to change their Facebook settings.

Id. at ¶ 54. Facebook’s use of Timelines’ trademarks has dried up Timelines’ funding, and called into question Timelines’ business model because it is difficult for Timelines to compete when the world’s biggest social media company is “stomping” all over it. *Id.* at ¶ 41. Ironically, Facebook maintains “Community Standards” that it asks its users to respect, which include requesting that its users respect trademarks. *Id.* ¶ 51. By not following its own standards, [REDACTED] *Id.* at ¶ 58.

ARGUMENT

I. FACEBOOK USES “TIMELINE” IN A TRADEMARK AND BRAND WAY

Transparently, Facebook placed its arguments that it does not use “Timeline” as a trademark, and that it uses the term in good faith, at the back of its brief. But, the factual premise to these arguments should be treated up front. Facebook does use “Timeline” in a trademark and brand way, and this necessarily colors and gives credibility to Timelines’ arguments while shading the arguments Facebook advances. Facebook has admitted that it was aware of Timelines and its registered trademarks before it announced “Timeline.” *See* SAF ¶ 25. Despite this awareness, [REDACTED] *Id.* Facebook was developing “Timeline” to replace, in part, its prior product “Wall.” *Id.* at ¶¶ 25, 30. [REDACTED]

[REDACTED] *Id.* at ¶ 25. In advance of the Facebook f8 Developers Conference where Facebook announced “Timeline,” [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

██████████ *Id.* at ¶ 27. During this development and ahead of the conference, Facebook was referring to its “Timeline” in a brand and trademark way. *Id.* at ¶¶ 45-46.

On September 22, 2011, Facebook held the conference (the f8 Conference), and we have provided the Court with a video of the presentation. *Id.* at ¶¶ 28-29. Mr. Zuckerberg unveiled “Timeline,” which he called the “heart of your Facebook experience.” *Id.* at ¶ 31. As noted, the precursor to Facebook’s “Timeline” was called the “Wall,” a term that Facebook had trademarked (even though “wall” is in dictionaries, the media uses it, a search of the term on Google yields 1.65 billion responses, and third parties use it generically). *Id.* at ¶ 30. Throughout the presentation, the video screen behind the presenters refers to “Timeline” with a capital “T” and the speakers all refer to it in a brand and trademark way. *Id.* at ¶¶ 31-32. Facebook refers to “Timeline” in the same manner in its public securities filings. *Id.* at ¶ 33. And, both Facebook’s Rule 30(b)(6) deponent and its Vice President of Marketing referred to “Timeline” as a product. *Id.* at ¶¶ 34-35.

During development, Facebook did not consider its use of capital “T” “Timeline” to be generic, because it considered the term to be similar to its other branded products, such as “like” or “poke.” *Id.* at ¶ 38. Facebook now describes its “Timeline” product as a feature which, among other things, allows Facebook’s users to review posts that they have made to Facebook, and as a Facebook user’s “collection of photos, stories and experiences that tell your story.” *Id.* at ¶¶ 36-37. Facebook knew that its announcement of “Timeline” would have a terrible impact on Timelines’ trademarks, because after the conference Facebook ██████████ ██████████ and secured headlines from media such as “Facebook Timeline Review: This is the Greatest Thing Facebook’s Ever Done.” *Id.* at ¶ 39. After its rollout, Facebook made engineering changes to its website that caused people searching for Timelines’ Facebook page to, instead, be directed to Facebook’s “Timeline” page, and this lasted for at least a week. *Id.* at ¶

40. Facebook only corrected the re-direction after Timelines filed this lawsuit. *Id.* After the conference, Facebook continued to refer to Timeline” in a brand and trademark way *Id.* at ¶¶ 43-44, 47-49. And, Facebook uses “Timeline” as a brand identifier in connection with other associated brands for its Timeline product. *Id.* at ¶ 47. These are just a handful of hundreds of examples. There is no leap in logic required to see that with Timelines out of the way, Facebook would pursue its own trademark strategy for “Timeline.” We address Facebook’s fair use and good faith legal arguments later in this brief.

II. TIMELINES’ TRADEMARKS ARE NOT GENERIC

Despite the fact that Facebook treats “Timeline” in a brand and trademark way, it argues that the term is generic. *See* Facebook’s Br. pp. 4-10. Each of its arguments fail.

A. Genericness Is Not Appropriate For Summary Judgment

A genericness challenge is extremely fact-intensive and is not typically accepted on a motion for summary judgment. *See, e.g., Door Sys., Inc. v. Pro-Line Door Sys., Inc.*, 83 F.3d 169, 172 (7th Cir. 1996) (warning “against yielding to the temptation” to grant summary judgment on genericness grounds “as an abbreviated form of trial”); *Energy Services Air Conditioning & Heating Co., Inc.*, No. 97 C 373, 1997 WL 790725, at * 6-7 (N.D. Ill. Dec. 22, 1997); *see also McKillip Indus., Inc. v. Integrated Label Corp.*, 477 F. Supp. 2d 928, 930 (N.D. Ill. 2006); *Cf. Chicago Tribune Co. v. Fox News Network, LLC*, 520 F. Supp. 2d 930, 933 (N.D. Ill. 2007) (“Classification of a trademark is a factual question.”).

Proving that a mark is generic is far more difficult than Facebook argues. There are many marks, no stronger than TIMELINES, which have overcome genericness challenges. *See, e.g., San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 532-35 (1987) (finding the mark “Olympic” to be protectable); *Te-Ta-Ma Truth Foundation-Family of Uri, Inc. v. World Church of the Creator*, 297 F.3d 662 (7th Cir. 2002) (“Church of the

Creator” not generic); *Committee for Idaho’s High Desert, Inc. v. Yost*, 92 F.3d 814 (9th Cir. 1996) (“Committee for Idaho’s High Desert” not generic); *California Cooler, Inc. v. Loretto Winery, Ltd.*, 774 F.2d 1451 (9th Cir. 1985) (“California Cooler” not generic); *Park ‘N Fly, Inc. v. Dollar Park and Fly, Inc.*, 718 F.2d 327 (9th Cir. 1983) (“Park ‘N Fly” not generic), *rev’d on other grounds*, 469 U.S. 189 (1985); *United States Jaycees v. San Francisco Junior Chamber of Commerce*, 513 F.2d 1226 (9th Cir. 1975) (per curiam) (“Junior Chamber of Commerce” not generic); *Kelley Blue Book v. Car-Smarts, Inc.*, 802 F. Supp. 278 (C.D. Cal. 1992) (term “blue book” for valuation of cars was not generic); *Woodroast Sys., Inc. v. Restaurants Unlimited, Inc.*, 793 F. Supp. 906 (D. Minn. 1992) (granting preliminary injunction against defendant’s use of “wood roasted” to describe food cooked over a wood fire); *Eagle Snacks, Inc. v. Nabisco Brands, Inc.*, 625 F. Supp. 571, 581 (D.N.J. 1985) (marks “honey roast” and “honey roasted” are not generic); *Schmidt v. Quigg*, 609 F. Supp. 227, 229-30 (E.D. Mich. 1985) (“honey baked ham” was not generic). Even Facebook has previously agreed with the argument we make here. *See Facebook, Inc. v. Teachbook.com LLC*, 819 F. Supp. 2d 764, 778 (N.D. Ill. 2011) (“even if we were to focus exclusively on the suffix-BOOK in Facebook’s and Teachbook’s marks, Facebook has still made sufficient allegations to preclude a finding of genericness at this point”). Facebook should know this because many of the cases it relies upon were not summary judgment motions, but rather cases with full trials. *See, e.g., Igloo Products Corp. v. Brantex, Inc.*, 202 F.3d 814, 816 (5th Cir. 2000) (involving an appeal from a jury verdict on the issue of whether the mark is descriptive); *Murphy Door Bed Co., Inc. v. Interior Sleep Sys., Inc.*, 874 F.2d 95, 97 (2d Cir. 1989) (finding genericness only after a bench trial on that issue).

Other times, Facebook cites and relies on cases in which the Seventh Circuit did all it could to avoid affirming a grant of summary judgment on the issue of genericness. For instance, in *Door Sys. v. Pro-Line Door Sys.*, the Circuit Court explained that “before [summary

judgment] can be properly granted . . . the court must have a very high degree of confidence that any disagreement over facts is spurious.” 83 F.3d 169, 173 (7th Cir. 1996). The court then bypassed the issue of genericness altogether and held that plaintiff’s claim failed because it could not demonstrate a likelihood of confusion. *Id*; *See also Packman v. Chicago Tribune Co.*, 267 F.3d 628, 639 (7th Cir. 2001) (avoiding genericness and affirming on the basis of the defendant’s fair use of the mark). Based on the case law, this is simply not an issue that should be decided at the summary judgment stage. *See Ty Inc. v. Softbelly’s, Inc.*, 353 F.3d 528, 531 (7th Cir. 2003).

B. Timelines’ Presumption of Validity Demonstrates That Facebook’s Genericness Arguments And Evidence Are, At Best, Factual Disputes for Trial

A mark can only be considered generic when the good or service being claimed is literally the definition of the word mark. *See, e.g., TE-TA-MA Truth Found.--Family of URI, Inc. v. World Church of Creator*, 297 F.3d 662, 666-67 (7th Cir. 2002). This presumption does not “evaporate” as easily as Facebook claims. Facebook suggests that as long as it presents a scant of evidence that suggests genericness, the validity of the mark goes out the window, requiring a plaintiff to amass a mountain of evidence to get the mark back. That is not the law. *See V & V Food Products, Inc. v. Cacique Cheese Co., Inc.*, 683 F. Supp. 662, 669 (N.D. Ill. 1988) (a federally registered trademark is prima facie evidence of the registrant’s right to use it, and this includes the specific presumption that the trademark is not generic) (quotations and citations omitted). It is obvious that Facebook does not understand how the presumption of validity functions, which is probably why it inappropriately relies on several cases that do *not* even involve a federally registered trademark or a presumption of validity. *See, e.g., Echo Travel, Inc. v. Travel Associates, Inc.*, 870 F.2d 1264, 1265 (7th Cir. 1989) (unfair competition case that did not involve a registered trademark); *Blau Plumbing, Inc. v. S.O.S. Fix-It, Inc.*, 781 F.2d 604, 606 (7th Cir. 1986) (trade dress case that did not involve a registered trademark); *Gimix, Inc. v. JS & A Group, Inc.*, 699 F.2d 901, 903 (7th Cir. 1983) (plaintiff’s mark, “Auto Page” was not a

registered trademark). Thus, when there is presumption of validity and the defendant presents evidence of genericness the “presumption perform[s] its function . . . thus creating a conflict in evidence” on the issue of genericness. *See Door Sys.*, 83 F.3d at 173.

In granting the TIMELINES trademark registrations, the USPTO necessarily found that the marks were both not generic and, either not descriptive (i.e., at least suggestive) or had established secondary meaning. *See Park N’ Fly v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 200 (1985) (“a merely descriptive mark cannot be registered [in the first place] unless the Commissioner finds that it has secondary meaning”) (citations omitted). Courts throughout the country have noted the strong presumption of validity in registered marks and the heavy burden a defendant has to prove genericness. “The decision of the PTO . . . is to be accorded great weight.” *Murphy Door Bed v. Interior Sleep Sys.*, 874 F.2d 95, 101 (2d Cir. 1989).

Consequently, “registered trademarks are presumed to be distinctive and should be afforded the utmost protection.” *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867, 871 (2d Cir. 1986); *see also KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 408 F.3d 596, 604-06 (9th Cir. 2005); *Reno Air Racing Ass’n, Inc. v. McCord*, 452 F.3d 1126, 1135 (9th Cir. 2006); *Playboy Enter., Inc. v. Chuckleberry Pub., Inc.*, 687 F.2d 563, 567 (2d Cir. 1982). “In cases involving properly registered marks, a presumption of validity places the burden of proving genericness upon the defendant.” *Filipino Yellow Pages, Inc. v. Asian Journal Publications, Inc.*, 198 F.3d 1143, 1146 (9th Cir. 1999) (citing 15 U.S.C. § 1057(b)); *see also Hermès Int’l v. Lederer de Paris Fifth Avenue, Inc.*, 219 F.3d 104, 110 (2d Cir. 2000); *Deflecta-Shield Corp. v. Kar-Rite Corp.*, No. 85 C 5743, 1986 WL 15091, at *2 (N.D. Ill. Dec. 24, 1986).¹

¹ Even *Liquid Controls Corp. v. Liquid Control Corp.*, 802 F.3d 934 (7th Cir. 1986), cited by the Jury Instruction book Facebook cites does not go as far as Facebook wishes. It does state (p. 937) that enough proof can overcome the presumption of validity, but “the burden is on the defendant not only to overcome whatever presumption of nongenericness exists, but also to show that there is no genuine issue of material fact as to genericness.”

C. Facebook's Genericness Arguments Fail

1. **Facebook's Dictionary Argument Fails**

Facebook argues that because timeline is defined in a dictionary, this is evidence that Timelines' trademarks are generic. Facebook forgets that its very name comes from the "generic" name that was given to certain college picture books known as "face books." *See* SAF ¶ 55. Furthermore, Timelines does not describe its goods and services as permitting the creation of a "timeline" or as concerning "timelines." *Id.* at ¶ 21. Moreover, Facebook's own trademark history demonstrates that it seeks trademark protection for terms that appear in dictionaries, including fourteen trademark applications for the term "LIKE" alone, almost all of which concern Facebook's "Like" button, which its users click on when they like something. *Id.* at ¶ 57. USPTO records also reveal Facebook applications and registrations for the terms "POKE" and "WALL." *Id.* Facebook's official description of its (trademarked) WALL function is "Your Wall is the space on your profile where you and friends can post and share." Other marks Facebook has applied for include "FACEBOOK POKE," "LIKE," "LIKE & design," "FB," "F8," "FACEBOOK PAGES," "FACEBOOK ADS," "FACEBOOK INSIGHTS," "FACEPILE," "FACE," "REACH GENERATOR," "GRAPH SEARCH," "SOCIAL ADS," and "SOCIALADS." *Id.* at ¶ 57. And, Facebook aggressively litigates its own trademarks that appear to be generic. When other entities have attempted to register or use any term close to Facebook's registrations, such as "WALL" or even terms using "BOOK," Facebook has attacked those entities (including one that sought to trademark "F*") in courts and before the Trademark Trial and Appeal Board ("TTAB"). *Id.* at ¶ 56. It is hard to distinguish what Facebook itself has claimed as valid and enforceable trademarks (e.g., LIKE, POKE, and WALL) and what it claims is generic (TIMELINE). Clearly, Facebook would vigorously fight any attempt to cancel any of its marks on dictionary definitions. Moreover, the dictionary cannot help Facebook where the

goods and services offered under the TIMELINES Marks do not actually meet the dictionary definition of the word “timelines.” As described below, they do not.

2. Facebook’s Argument That Timelines Uses “timeline(s)” Generically Fails

Facebook’s second argument is that Timelines uses the term “timeline(s)” generically. *See* Facebook’s Br. at pp. 6-7. For this argument, Facebook refers back to paragraphs 8-10, 16-19, and 21 of its Local Rule 56.1 Statement of Facts. However, Facebook fails to properly authenticate the exhibits (or provide support for the factual allegations) in Paragraphs 8-10, 17-19 and 21. *See* Timelines’ Local Rule 56.1 responses to each of those paragraphs (citing authority on the objections made). This leaves Facebook with just the allegations in Paragraph 16. But, even taking into account the other cited paragraphs, all that the proffered evidence reflects is that in a few instances, Timelines had generic references to “timeline(s)” on certain web pages or services other than the timelines.com website.

Even if those references are taken in the best light for Facebook, a single or handful of generic uses does not make a valid trademark generic. Otherwise, extremely famous marks like GOOGLE and, yes, Facebook, would have lost protection long ago. As Timelines’ witnesses have explained, the TIMELINES website is not about generic “timelines,” and the term was used in the way Facebook describes in a few isolated instances to increase web traffic. SAF at ¶¶ 21-22. This is not evidence that Timelines engages in any extensive and long-term use of TIMELINES in a generic manner; nor has Facebook produced any evidence to the contrary. Timelines’ sporadic and incidental use of its mark in a generic manner is of a far different character than the widespread and pandemic generic use in the case Facebook cites, *Retail Services, Inc. v. Freebies Publ’g*, 364 F.3d 535, 545 (4th Cir. 2004). There, the trademark holder used the term “freebie” extensively throughout its website to indicate something that a consumer is usually charged for but receives for free. *Id.* On top of that, the trademark owner admitted

that its use of the term “freebie” was consistent with the commonly understood meaning of the word. *Id.* Facebook is wrong to assert that trademark law is so unforgiving that the fleeting reference to the generic use of a mark renders it forever generic.²

3. Facebook’s Third-Party Competitors Argument Fails

Facebook’s next argument is that third-parties use the term “timeline(s)” generically, and, so, the term is generic. *See* Facebook Br. pp. 7-9. To make this argument, Facebook refers back to paragraphs 13, 15, 23-27, 29, and 35-37 of its Local Rule 56.1 Statement.

Paragraph 13 is a reference to a search run on Google, which is not authenticated and irrelevant in any event because a search on Google for “wall” yields four times as many hits.

Paragraph 15 is the reference to the USPTO’s use of “timeline(s)” already discussed.

Paragraphs 23-25, 27, 29, and 35-37 turn upon unauthenticated web pages, or affidavits from undisclosed witnesses, and should therefore be disregarded. *See* Timelines’ Local Rule 56.1 Response to each of those paragraphs.

Regardless, Facebook’s supposed third-party evidence actually cuts against its argument. Facebook lists five entities and their supposed historical generic use dates: TimelineIndex.com since 2003, Famento since 2007, Dipity since 2008, TimelineSoftware.com since 2002, and Twitter since 2006. *See* Facebook Br. pp. 7-8. However, all of Timelines’ trademark registrations are from 2009 and after. In fact, Facebook specifically notes that its third-party evidence “predate[s] Plaintiff’s first use of ‘timelines.’” *Id.* at 8. What Facebook is therefore admitting is that on three separate occasions, the USPTO was fully aware of wide-ranging uses of the term “timelines” in the Internet industry, yet specifically found that Timelines was not using TIMELINES in a generic (or descriptive) fashion. *See Park N’ Fly*, 469 U.S. at 200. Furthermore, a search of the USPTO database shows that in the last four years—since 2009

² *Ty, Inc v. The Jones Grp.* involved an unregistered mark, and was a preliminary injunction proceeding. Therefore, it does not apply. 98 F.Supp.2d 988, 998 (N.D. Ill. 2000).

when it first granted one of Timelines’ trademark applications for TIMELINES—the USPTO has granted multiple trademark registrations on the Principal Register for marks incorporating the term “timeline” or “timelines,” including, among others, “THE TIMELINE OF YOUR LIFE.” *See* SAF at ¶ 65 (listing classes and services). The USPTO database also shows various applications using the term “timeline” or “timelines” that the Office has already reviewed and found acceptable and published for opposition, but registration just has not issued yet, including “TIMELINE OF EYE DISEASE” and “DYNAMIC TIMELINE.” *Id.* at ¶ 66.

Moreover, these third parties’ uses of “timeline(s)” are not the same as those of Timelines and are not relevant to any genericness analysis because their uses are so different than those of Timelines and Facebook that they are rendered almost meaningless. By way of example, a produce company may use “apple” generically while “Apple” is a perfectly valid and strong trademark for electronics. The produce company’s use of the term would not be relevant in a case regarding the electronics company. Importantly, unlike these third-parties, Facebook and Timelines use TIMELINE(S) as the name of an actual product, allow customers to use the TIMELINE(S) product in a collaborative way to create and share many types of information, adding and editing non-linear details in a system that is never closed and is always open to interpretation, expansion, and commentary, to have an interactive experience, sharing events, feelings, and ideas with other members of one’s community. And, both Facebook and Timelines’ products are free (SAF ¶¶ 3, 50), web-based, and neither truly attempts to portray a linear representation of chronological events. On the other hand, the third-parties presented in Facebook’s motion use the term “timelines” in a different, more literal way. For the most part, their software or web-product is a paid product used to create graphical presentations in a one-time, static, closed system incapable of being edited or commented upon. *See* SAF ¶¶ 59-64.

Additionally, courts recognize that it is impossible for trademark holders to correct every

trademark infringement of others or even stop all generic uses. *See, e.g., Louis Vuitton S.A. v. Lee*, 875 F.2d 584, 588 (7th Cir. 1989). Finally, this heavily disputed evidence from a mere five companies is a far cry from the third-party evidence in Facebook’s cases. In *Mil-Mar Shoe Co., Inc. v. Shonac Corp.*, 75 F.3d 1153, 1159 (7th Cir. 1996), the defendant put forth evidence of over 8,000 retail stores that used the term “warehouse” generically. Likewise, the defendant in *Hickory Farms, Inc. v. Snackmasters, Inc.*, identified over 100 companies that used the terms at issue on their products. 500 F. Supp. 2d 789, 794 (N.D. Ill. 2007).

4. Facebook’s Media Argument Fails

Facebook’s next argument is that the media generically uses the term “timeline(s).” Its evidence for this is a search run on Google that returned four times fewer hits than a search on Google for “wall.” Its other evidence is a collection of news articles. In light of the USPTO’s actions and timing on marks regarding the term “timeline(s)” noted above, at best this media argument demonstrates a very weak factual dispute for Facebook, for trial. Moreover, it bears noting that the media refer to Facebook’s “Timeline” in a brand and trademark way. SAF ¶ 52. Moreover, when the media do use the term, they use it to describe a horizontal or vertical axis of dates, which is not how Timelines’ uses the term. No doubt the media also use “apple” generically, but that does not make the term generic for Apple Computer.

5. Facebook’s Survey Argument Fails

Facebook’s last argument is that its genericness survey demonstrates that the term “timeline(s)” is generic. *See* Facebook’s Br. at pp. 10-11 (noting survey from Dr. Jay). All of the arguments addressed above, including Facebook’s own trademark and brand use and the USPTO’s actions, demonstrate that this survey, at best, presents a factual dispute. Furthermore, Facebook’s survey is so flawed, and contains so many biases, that its results simply are not valid. *See* Timelines’ Response to Facebook’s SUF ¶¶ 38-39 (noting Timelines’ experts’

critique of Facebook's survey). The most prominent problem with Dr. Jay's survey is that by being conducted over the telephone, it completely failed to replicate market conditions or real-life- consumer experience. *Id.* This violated a fundamental survey requirement. *See Competitive Edge, Inc. v. Staples, Inc.*, 763 F. Supp. 2d 997, 1010 (N.D. Ill. 2010) (“[A] survey . . . must attempt to replicate the thought processes of consumers encountering the disputed mark or marks as they would in the marketplace.”); *see also*, 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:163 at 32-237 (4th ed.1999). Because Dr. Jay's survey was conducted over the phone, survey respondents did not encounter the mark at issue as they would under real market conditions, which in this case is purely visual and consists of consumers viewing the TIMELINES mark online and in the context of a webpage. Resp. to Facebook's SUP ¶¶ 38-39. The result then was “auditory bias.”

This manner of exposure is a complete departure from how a consumer would encounter the TIMELINES mark and “introduce[ed] an unknown bias.” *Id.* The Seventh Circuit and this Court have been critical of phone surveys for this very reason. *See, e.g., Spraying Sys. Co. v. Delavan, Inc.*, 975 F.2d 387, 396 (7th Cir. 1992) (holding that a phone survey “failed to replicate market conditions and was of minimal probative value for purposes of the trade dress claim.”); *Quill Natural Spring Water, Ltd. v. Quill Corp.*, 91 C 8071, 1994 WL 559237 (N.D. Ill. Oct. 7, 1994) (“[T]elephone surveys may not accurately reflect the market conditions in which consumers would confront the parties' marks.”). Likewise, research marketing authority is clear that phone surveys “can be used *only* when it is unnecessary to show the respondent any visual materials.” Shari Seidman Diamond, *Reference Guide on Survey Research*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 359, 399–400 (Fed. Judicial Ctr. 3d ed. 2011) (emphasis added). Dr. Jay knows this and, in a publication, has stated that “visual stimuli may be appropriate in a genericness survey.” *See* E. Deborah Jay, *Genericness Surveys in Trademark*

Disputes: Evolution of Species, 99 TRADEMARK R. 1118, 1158 (2009)). Where, as here, a consumer would *only* encounter the mark by reading it on a webpage, visual stimuli was necessary to replicate the real life exposure conditions. Resp. to Facebook’s SUF ¶¶ 38-39.

Another problem with Dr. Jay’s survey is that it did not properly randomize the order of the questions. *Id.* Instead, the questions concerning the term “Timelines” were always asked in the *same* position—*last*— while the 6 other masking names were randomly rotated for each respondent. *Id.* There is no justification for why the noncritical names were randomized and “Timelines” was not. *Id.* As a result, Dr. Jay’s survey failed to control for “order bias.” *Id.*; see also *Rust Env’t & Infrastructure, Inc. v. Teunissen*, 131 F.3d 1210, 1218 (7th Cir.1997) (affirming district court’s rejection of a survey that failed to incorporate random rotation of questionnaire options); *In Re Stouffer Foods Corp.*, 118 F.T.C. 746, 806 (1994) (stating that order of survey questions should be rotated to avoid “order bias.”); *Atlanta Allergy & Asthma Clinic, P.A. v. Allergy & Asthma of Atlanta, LLC*, 685 F.Supp. 2d 1360, 1372 (N.D. Ga. 2010). The survey’s “order bias” was potentially amplified by use of the *phone* survey and questions regarding the term “Timelines” were *always* asked last. See *Diamond, supra*, at 359, 396 (noting that in oral telephone surveys “respondents are more likely to choose the last choice offered”). Add to the mix the survey’s other biases, which include bundling together certain questions and failing to take into account the “Product Life Cycle,” and we are left with a survey riddled with flaws and biases. Resp. to Facebook’s SUF ¶¶ 38-39.

If Dr. Jay’s survey must come in, its only place is before a jury. See, e.g., *Windsurfing Int’l, Inc. v. Fred Ostermann GmbH*, 613 F. Supp. 933, 936 (S.D.N.Y. 1985), *aff’d in part, rev’d in part*, 782 F.2d 995 (Fed. Cir. 1986)) (survey evidence of genericness presented during bench trial); *Intel Corp. v. Advanced Micro Devices, Inc.*, 756 F. Supp. 1292 (N.D. Cal. 1991) (survey evidence was presented during a sixteen day trial). Even in the *Teflon* case, which Facebook

relies on to justify Jay's methodology, the survey evidence was presented at trial. *See E. I. DuPont de Nemours & Co. v. Yoshida Int'l, Inc.*, 393 F. Supp. 502, 505 (E.D.N.Y. 1975).

* * *

In sum, just because a mark is made up of a word that has a real meaning does not mean that it is being used generically. The USPTO did not believe that TIMELINES was being used generically when it issued Timelines' three registrations. The USPTO did not believe that Facebook's evidence of third-party uses of the word "timelines," all available to the USPTO at the time, was cause to find TIMELINES generic and reject the applications. And, although it has rejected a single Timelines' application for the principal register, the USPTO clearly still believes that the term "timelines" can be appropriate as a valid and enforceable trademark, neither generic nor even descriptive.³

D. Timelines' Trademarks Are Not Descriptive

Facebook's next argument is that the TIMELINES marks are merely descriptive. Facebook's Br. at pp. 11-13. Yet this argument fails, in part, for reasons already discussed. First, the USPTO found that the marks are not descriptive, or if descriptive had established secondary meaning. Second, the TIMELINES marks do not describe anything. Facebook mischaracterizes Timelines' services as allowing users to create timelines and chronologies of events so that it can argue that the TIMELINES marks are descriptive of those services. Again, this is not what Timelines is or does. *See* SAF at ¶ 21. Timelines' services have a historical and time-like flavor to them, but it does not offer timelines in the sense that Facebook argues. Rather, the TIMELINES marks are suggestive because they stand "for an idea which requires some operation of the imagination to connect it with the goods . . ." *Sands, Taylor & Wood Co. v. Quaker Oats Co.*, 978 F.2d 947, 952 (7th Cir. 1992); *see also Cmty. First Bank v. Cmty. Banks*, 360 F. Supp. 2d 716, 723 (D. Md. 2005) ("Coppertone®, Orange Crush®, and Playboy® are

³ The one rejected Timelines application was not rejected on grounds that it was generic for the services applied for.

good examples of suggestive marks because they conjure images of the associated products without directly describing the products.”) While Facebook’s imagination may seemingly be limited, a juror’s may not be -- descriptiveness is a question of fact. *See Johs. De Kuyper & Zoon v. Phillips Products Co.*, No. 92 C 4996, 1993 WL 134903 (N.D. Ill. Apr. 22, 1993).

E. Facebook Does Not Make Fair Use

Facebook’s last, miniscule argument is that it makes fair use of the term “timeline,” and uses the term in good faith. *See* Facebook’s Br. at pp. 13-15. In response, Facebook’s own use of its “Timeline” in a brand and trademark way demonstrates that these arguments are not true. Moreover, Facebook’s arguments only demonstrate, at best, fact issues for trial. The USPTO was correct when it granted Timelines three registrations for the TIMELINES Marks. While the term “timelines” may have an actual meaning in certain contexts, it is not used generically by Timelines. As alluded to above, Timelines.com and the products and services offered under the TIMELINES Marks do not attempt to simply allow the creation of some graphical “timeline” of events. TIMELINES allows users of the Timelines.com website to maintain a record of important events in their lives and to share these important events with other people – there is and never has been a “create a timeline” button on Timelines.com. Hand Dep. at p. 44.

Facebook, which offers extremely similar, if not identical, goods and services under its own “Timeline” mark, just as clearly uses “Timeline” as a brand identifier and not as a generic term. Given the way that “Timeline” has been positioned as a brand identifier from the beginning, was intended to and has replaced the registered trademarked WALL brand identifier, and further knowing that Facebook has registered or applied for multiple trademarks for its similar brand identifiers LIKE, POKE, FACE, FACEBOOK, FB, FBOOK – and has aggressively challenged anyone who attempted to use any similar terms, including attacking various entities for their online uses of “BOOK”—it is preposterous for Facebook to claim that

fair use or good faith warrants summary judgment. “Absence of malice is no defense to trademark infringement: In ‘Through the Looking Glass’ we are told the walrus shed copious tears as he devoured the innocent oysters who had accepted his invitation to stroll along the beach. He meant them no harm, of course. He merely wished to eat them.” 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:124 (4th ed.1997) (quoting *Laundry Operating Co. v. Spalding Laundry & Dry Cleaning Co.*, 383 S.W.2d 364, 366 (Ky.1964)).” See also *Interstellar Starship Servs., Ltd. v. Epix Inc.*, 184 F.3d 1107, 1111 (9th Cir. 1999) (“Adopting a designation with knowledge of its trademark status permits a presumption of intent to deceive.”). Furthermore, while Facebook has not filed a trademark application for “Timeline,” that is only because it knew of Timelines’ registrations and was sued by Timelines before it got the chance. Facebook’s use of “Timeline” is no more a mere a simple “feature of a user’s profile” and is far less “inconspicuous” (Facebook Mem. at 14), than were/are WALL, POKE, and LIKE, all Facebook registered trademarks. That evidence discounts the argument Facebook makes in a single paragraph without support at the end of its brief: that Facebook uses “Timeline” in good faith because, rather than trying to protect offerings on user profiles as trademarks, it just “names things what they are.” That is clearly not borne out by the evidence.

CONCLUSION

Wherefore, for all of the foregoing reasons, Timelines respectfully submits that the Court should deny Facebook’s motion for summary judgment.

Dated: February 14, 2013

Respectfully submitted,

TIMELINES, INC.,

Plaintiff/Counter-Defendant

By: /s/ Douglas A. Albritton

James T. Hultquist (SBN 6204320)
Douglas A. Albritton (SBN 6228734)
Michael L. DeMarino (SBN 6298337)
Bruce R. Van Baren (SBN 6310375)
REED SMITH LLP

10 South Wacker Drive
Chicago, IL 60606-7507
312-207-1000
Counsel for TIMELINES, INC.

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys of record in this case, hereby certifies that he caused true and correct copies of Timelines, Inc.'s Memorandum of Law in Opposition to Facebook's Motion for Summary Judgment, Local Rule 56.1 Responsive Statement, and Exhibits, to be filed under seal with the Court via the CM/ECF System, and also served copies of these documents upon Counsel of Record for Facebook via e-mail on February 14, 2013.

/s/Douglas A. Albritton
An attorney