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.	)	

MEMORANDUM IN SUPPORT OF FACEBOOK, INC.'S MOTION *IN LIMINE* NO. 4: TO EXCLUDE EVIDENCE, ARGUMENT, AND TESTIMONY REGARDING NON-ACTIONABLE ALLEGED "CONFUSION"

I. INTRODUCTION

Defendant Facebook, Inc. ("Facebook") respectfully moves this Court *in limine* for an order excluding evidence, argument, and testimony regarding instances of non-actionable "confusion" alleged by Plaintiff. Facebook anticipates that Plaintiff will attempt to introduce as alleged evidence of "actual confusion" testimony and documentary evidence obtained from friends and family members who, after learning about the launch of Facebook's new "timeline" feature, inquired whether Facebook had purchased Plaintiff or if there had been some other type of business transaction between the companies. These individuals, however, are not "relevant consumers" for the purpose of a trademark infringement action. Further, their inquiries and/or congratulatory communications regarding what they believed to be Facebook's purchase of Plaintiff or its services do not constitute actionable consumer confusion. Such evidence is therefore irrelevant and inadmissible under Federal Rules of Evidence 401 and 402.

In the alternative, if the Court determines that such evidence might have some remote relevance to this case, it should nonetheless be excluded under Federal Rule of Evidence 403

because its weak probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, wasting trial time, and misleading the jury.

II. BACKGROUND

In its opposition to Facebook's motion for summary judgment, Plaintiff relied on the deposition testimony of Randy Cassidy, Keith Koeneman, Esther Barron, Don Jenkins, Pam Cole, and Thomas R. Fallon to assert that "people who were aware of [Plaintiff] were confused by the announcement [of Facebook's new "timeline" feature] and wrote or called [Plaintiff] believing that it had done a deal, or otherwise made an agreement, with Facebook." (Doc. No. 92 (Pl. SAF) at ¶ 53.) These witnesses all have close business or personal ties to Plaintiff. (Declaration of Brendan J. Hughes in Support of Defendant Facebook, Inc.'s Motion *in Limine* No. 2 ("Hughes Decl."), Exs. A (Cassidy Depo.) at 27:10-11; B (Koeneman Depo.) at 32:15-22, 33:15-24, 35:5-9; C (Barron Depo.) at 12:7-15, 31:5-6, 33:15-25; D (Jenkins Depo.) at 26:15-20, 25:16-18; E (Cole Depo.) at 18:24-19:11; F (Fallon Depo.) at 6:19-20.) Each witness admitted to knowing about Plaintiff's timelines.com website only because certain employees of Plaintiff had shared the existence of the website with them. (Hughes Decl., Exs. A (Cassidy Depo.) at 38:3-4; B (Koeneman Depo.) at 90:18-91:14; C (Barron Depo.) at 34:20-35:25; D (Jenkins Depo.) at 21:10-22:2; E (Cole Depo.) at 18:22-19:11; F (Fallon Depo.) at 18:2-15.) Further, many of the individuals are not even users of the services offered by either Plaintiff or Facebook. (Hughes Decl., Exs. A (Cassidy Depo.) at 38:3-18; B (Koeneman Depo.) at 90:18-91:14; C (Barron Depo.) at 34:20-35:25; D (Jenkins Depo.) at 21:5-7, 22:3-9; E (Cole Depo.) at 21:17-22:22; F (Fallon Depo.) at 18:2-15.)

The relevant testimony of each witness is provided below.

Randy Cassidy -- Mr. Cassidy testified that Brian Hand, co-founder and CEO of Plaintiff, "is a very good friend of mine" (Hughes Decl., Ex. A (Cassidy Depo.) at 27:10-11), and

that he called to congratulate Mr. Hand because he "thought Brian sold [Plaintiff] to Facebook." (*Id.* at 41:19-24, 50:11-13.) He was close enough to Mr. Hand that he readily agreed to draft an email at Mr. Hand's request claiming that he had been confused by the announcement of the Facebook timeline feature:

> "… Brian called me back a couple of days later -- you know, it may have been a week, maybe an hour, I don't know -- and said, you know, listen, based upon our conversation, you know, you were clearly confused as to what Facebook is doing. Would you mind putting that in an e-mail to me? And I said: No, not at all. So that's what I did." (*Id.* at 51:16-24.)

Keith Koeneman -- Mr. Koeneman and Mr. Hand coached a youth basketball team together in 2009 (Hughes Decl., Ex. B (Koeneman Depo.) at 32:15-22, 33:15-24), and Mr. Koeneman knows Mr. Hand socially, having taken vacations and attended parties with him (*Id.* at 35:5-9). Mr. Koeneman testified that he visited the timelines.com website three years ago only after Mr. Hand told him about the website. (*Id.* at 90:20-14.) When Mr. Koeneman saw Facebook's timeline feature, he also thought that Mr. Hand had sold his company to Facebook. (*Id*. at 36:5-13.)

Esther Barron -- Ms. Barron and Mr. Hand maintain a professional relationship. (Hughes Decl., Ex. C (Barron Depo.) at 33:21-25.) Mr. Hand has been a guest speaker at Ms. Barron's entrepreneurship law class at Northwestern Law School several times (*Id*. at 12:7-15, 31:5-6), and she has seen him at certain business events in the Chicago area (*Id*. at 33:15-20). Ms. Barron testified that she "may have" visited timelines.com close in time to when Mr. Hand was scheduled to visit her class as a guest speaker. (*Id*. at 35:6-22.) When she "learned about Facebook's Timeline update or application," she "wondered whether it was connected to [Mr. Hand's] company in some way." (*Id*. at 42:7-10.)

Don Jenkins -- Mr. Jenkins has known Mr. Hand for about "eight or nine years." (Hughes Decl., Ex. D (Jenkins Depo.) at 26:15-20.) Their children play sports together, and they have "overlapping professional areas of expertise." (*Id*. at 25:16-18.) Mr. Jenkins testified that he is not a user of timelines.com and that he "visited the website just obviously to familiarize myself with it after being produced to the concept by Brian [Hand] on numerous occasions." (*Id.* at 21:19-22:2.) After hearing about Facebook's timeline feature in the media, Mr. Jenkins assumed Plaintiff "was purchased by Facebook." (*Id.* at 36:5-9.)

Pam Cole -- Ms. Cole is the sister of Geoffrey Buesing, a co-founder of and former developer at Plaintiff. (Hughes Decl., Ex. E (Cole Depo.) at 18:24-19:11; *see also* http://timelines.com/about.) She testified that she visited timelines.com in 2008 after becoming informed of the website by her brother, "only looked at it really briefly," and has no current plans to visit the timelines.com website more frequently. (Hughes Decl., Ex. E (Cole Depo.) at 18:22-19:4, 21:5-9, 22:3-14, 22:15-18.) Ms. Cole asked her brother, Mr. Buesing, whether Plaintiff had sold "a timeline to Facebook" or "if [Plaintiff] had some sort of software that you could use on Facebook or what it was." (*Id.* at 30:5-13.)

Thomas R. Fallon -- Mr. Fallon is the brother-in-law of Bob Armour, the former CEO of Plaintiff. (Hughes Decl., Ex. F (Fallon Depo.) at 6:19-20.) Mr. Fallon testified that, other than Mr. Armour possibly signing him up for timelines.com as a user approximately four years ago, he has never visited the website. (*Id*. at 18:10-15.) After learning about Facebook's new timeline feature through the media, Mr. Fallon asked Mr. Armour if Plaintiff had "hook[ed] up with Facebook" or "sold their service to Facebook." (*Id.* at 23:7-15.)

III. ARGUMENT

A. Evidence Relating to the Alleged "Confusion" by Plaintiff's Family Members, Friends, and Business Acquaintances Is Inadmissible Because These Individuals Are Not Relevant Consumers.

To be relevant to a claim of trademark infringement, alleged "confusion" evidence must arise from actual or potential users of the services at issue. *Packman v. Chicago Tribune Co.*, 267 F.3d 628, 645 (7th Cir. 2001); Seventh Circuit Model Jury Instructions 13.1.2.3 (Infringement – Elements – Likelihood Of Confusion – Factors, Comments ¶ 7 (Purchaser or Potential Purchaser)). Not surprisingly, courts typically find evidence of "confusion" by family members, friends, and acquaintances to be irrelevant because they do not reflect the perception of relevant consumers. *See Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 59 F.3d 902, 910 (9th Cir. 1995) ("Attestations from persons in close association and intimate contact with [the senior user] do not reflect the views of the purchasing public."); *Walter v. Mattle, Inc.*, 210 F.3d 1108, 1112 (9th Cir. 2000) (affirming the decision by the district court to disregard plaintiff's evidence of actual confusion from acquaintances, friends, and family); *Gameologist Group, LLC v. Scientific Games Intern., Inc.*, 838 F. Supp. 2d 141, 162 (S.D.N.Y. 2011) (citation omitted) (evidence relating to alleged confusion on the part of friends and family members of plaintiff was disregarded as irrelevant to the perception of the consuming public as a whole given they were interested parties already familiar with plaintiff's mark through personal connections).

For example, in *Packman*, the plaintiff obtained a trademark registration for THE JOY OF SIX in connection with "entertainment services in the nature of basketball games" and sought to license the use of the mark on merchandise relating to the Chicago Bulls' sixth NBA title. The plaintiff sued the Chicago Tribune for trademark infringement after the Tribune used "the joy of six" in a headline and then offered t-shirts and other merchandise bearing the same phrase. In

support of its claim, the plaintiff offered as evidence four instances of actual "confusion" in the form of "phone calls she received from two friends, her father, and [her] former co-worker who had seen the Tribune's front page and called to congratulate her on her 'deal' with the Tribune." Affirming summary judgment, the Seventh Circuit held that the district court correctly rejected such evidence as irrelevant to the question of a likelihood of consumer confusion. The Seventh Circuit found that there was no evidence that "the four individuals ***had purchased or attempted to purchase*** 'the joy of six' goods, either from [plaintiff] or from defendants, and thus [the individuals] were ***not relevant 'consumers' under the Lanham Act***." *Packman*, 267 F.3d at 645 (emphasis added).

Here, Plaintiff's purported "confusion" witnesses are not relevant consumers of Plaintiff's services. All are either family members, friends, or business acquaintances of one of Plaintiff's employees. Furthermore, the witnesses all admitted to visiting Plaintiff's website rarely, if at all, and were motivated by their personal or business connections to Plaintiff. (Hughes Decl., Exs. A (Cassidy Depo.) at 38:3-18; B (Koeneman Depo.) at 90:18-91:14; C (Barron Depo.) at 34:20-35:25; D (Jenkins Depo.) at 21:5-7; 22:3-9; E (Cole Depo.) at 21:17-22:22; F (Fallon Depo.) at 18:2-15.) Likewise, a few of the witnesses even testified that they have never used Facebook. (Hughes Decl., Exs. D (Jenkins Depo.) at 19:16-24; F (Fallon Depo.) at 13:24-15:8.)

Further, the alleged "confusion" the witnesses experienced is not actionable or even relevant under the Lanham Act. Each of them contacted Plaintiff shortly after the announcement of Facebook's timeline feature in order to determine whether Plaintiff had entered into some sort of business arrangement with Facebook. The witnesses neither experienced point-of-sale confusion, nor mistakenly used Plaintiff's timeline service while intending to use Facebook's

timeline feature or vice versa. Moreover, none of the witnesses testified to somehow being lured to Facebook's services because of its use of the term "timeline." *See Promatek Inds., Ltd.*, 300 F.3d at 812 (initial interest confusion "occurs when a customer is lured to a product by the similarity of the mark, even if the customer realized the true source of the goods before the sale consummated").

The Court should thus prohibit any evidence, argument, or testimony regarding their purported confusion under Federal Rules of Evidence 401 and 402.

B. Even if the Alleged "Confusion" by Plaintiff's Friends, Family Members, and Business Acquaintances Is Deemed Relevant, It is Inadmissible Under Fed. R. Evid. 403.

Fed. R. Evid. 403 provides that even relevant evidence should be excluded if its probative value is substantially outweighed by its danger of unfair prejudice, confusing the issues, wasting time, and misleading and inflaming the jury. FED. R. EVID. 403. *See also Empire Gas Corp. v. American Bakeries Co.*, 646 F.Supp. 269, 276 (N.D. Ill 1986) (citing Fed. R. Evid. 403) (courts are empowered to exclude even relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues, or …wasting time….")

This purported "confusion" evidence is unfairly prejudicial to Facebook because Plaintiff will undoubtedly attempt to portray it as evidence of actual confusion to the jury, which will only serve to confuse the real issues in this case and mislead the jury. Facebook will be forced to re-educate the jury as to what constitutes actionable confusion under the law, and thus will needlessly waste trial time. This evidence will also unfairly prejudice Facebook by causing an "undue tendency to suggest decision on an improper basis." Fed. R. Evid. 403 Advisory Committee Notes. These individuals are unquestionably biased due to their relationships to employees of Plaintiff and likely harbor disdain for Facebook based on their unfounded belief

that Facebook misappropriated Plaintiff's "invention" – a sentiment that some of the witnesses actually expressed. Their testimony thus may inflame the jury such that its decision will be based on emotion, rather than on the evidence and law.

IV. CONCLUSION

Based on the foregoing, Facebook respectfully requests that the Court exclude evidence, argument, and testimony regarding the non-actionable alleged "confusion" by Plaintiff's family members, friends, and business acquaintances.

Dated: April 8, 2013

Respectfully submitted,

COOLEY LLP

By: */s/ Peter J. Willsey*

Peter J. Willsey *(pro hac vice)*
Brendan Hughes *(pro hac vice)*
1299 Pennsylvania Avenue, NW
Suite 700
Washington, DC 20004-2400
Tel: (202) 842-7800; Fax: (202) 842-7899
Email: pwillsey@cooley.com,
bhughes@cooley.com

Steven D. McCormick (#1824260)
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654-3406
Tel: (312) 862-2000; Fax: (312) 862-2200
Email: smccormick@kirkland.com

Michael G. Rhodes *(pro hac vice)*
101 California Street, 5th Floor
San Francisco, CA 94111-5800
Tel: (415) 693-2000; Fax: (415) 693-2222
Email: mrhodes@cooley.com

Counsel for Facebook, Inc.

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he served the foregoing **MEMORANDUM IN SUPPORT OF FACEBOOK, INC.'S MOTION IN LIMINE NO. 4: TO EXCLUDE EVIDENCE, ARGUMENT, AND TESTIMONY REGARDING THE ALLEGED NON-ACTIONABLE "CONFUSION"** by means of the Court's CM/ECF System, which causes a true and correct copy of the same to be served electronically on all CM/ECF registered counsel of record, on April 8, 2013.

Dated: April 8, 2013

/s/ Brendan J. Hughes

Brendan J. Hughes (*pro hac vice*)
COOLEY LLP
1299 Pennsylvania Avenue, NW
Suite 700
Washington, DC 20004-2400
Tel: (202) 842-7800
Fax: (202) 842-7899
Email: bhughes@cooley.com

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