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

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

FACEBOOK, INC.'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

A mountain of evidence establishes that the alleged "timelines" mark is generic or at most merely descriptive, and that Facebook's use of "timeline(s)" is fair. Nonetheless, Plaintiff Timelines, Inc. ("Plaintiff") is hoping for a shot at a jury trial so, as evidenced by the opening paragraph of its opposition brief, it can play the part of local underdog against the larger, non-resident Facebook. However, no reasonable jury could conclude that the alleged "timelines" mark is anything other than the generic term for what many of us have been familiar with since grade school — a timeline. The evidence clearly shows that the ordinary usage of the term "timeline" is to refer to a chronological sequence of events. That is how the parties and many others in the industry use the term. Plaintiff has no legal basis to claim a monopoly over this common noun, and no jury trial is needed to reach this straight-forward conclusion.

Plaintiff offers no evidence in its opposition memorandum to rebut the two principal bases of Facebook's motion for summary judgment: (1) Plaintiff does not actually own any trademark rights in "timelines" because of the inherently generic or, at most, merely descriptive nature of the term; and (2) even if "timelines" were protectable as a trademark, Facebook makes non-infringing use of "timeline" to fairly and accurately describe a feature of its user interface. After reviewing the undisputed material facts set forth in the sections below, the Court should grant summary judgment in Facebook's favor on either the invalidity of Plaintiff's alleged "timelines" mark or Facebook's fair use of the term "timeline," or both.

II. ARGUMENT

A. Plaintiff Fails to Demonstrate That the Court Should Not Grant Summary Judgment on the Issue of the Invalidity of the Alleged "Timelines" Mark.

Courts have routinely found trademarks – even federally registered trademarks – to be generic or merely descriptive without secondary meaning on summary judgment. *See Liquid*

Controls Corp. v. Liquid Control Corp., 802 F.2d 934, 941 (7th Cir. 1986) (affirming the finding on summary judgment that the federally registered "Liquid Controls" mark is generic); *Hickory Farms, Inc. v. Snackmasters, Inc.*, 500 F. Supp. 2d 789 (N.D. Ill 2007) (finding on summary judgment that the federally registered "Beef Stick" mark is generic); *see also Mil-Mar Shoe Co. v. Shonac Corp.*, 75 F.3d 1153 (7th Cir. 1996) (affirming the finding on summary judgment that "Warehouse Shoes" is generic); *Spraying Sys. Co. v. Delavan, Inc.*, 975 F.2d 387 (7th Cir. 1992) (affirming the finding on summary judgment that "---JET" marks were merely descriptive and lacked acquired secondary meaning). This case presents the Court with the same type of undisputed material facts supporting summary judgment on the invalidity of the alleged "timelines" mark.

Even considering the arguments made by Plaintiff in its opposition, the following material facts remain undisputed:

- Dictionaries define Plaintiff's alleged mark as chronological sequence of events. (Facebook's Statement of Undisputed Material Facts ("SUMF") ¶ 12; Pl. Responses to SUMF ("Resp. to SUMF") ¶ 12.)

- Plaintiff offers services that allow for the arrangement of events or other information in chronological order. (SUMF and Resp. to SUMF ¶¶ 6, 8-10; Pl. Statement of Additional Facts ("SAF") ¶¶ 23, 6; Pl. Ex. 1 (Hand Decl.), ¶ 7.)

- Plaintiff, numerous third parties, and the media use "timeline(s)" generically and/or merely descriptively to refer to arrangements of events or other information in chronological order or to describe products or services that pertain to timelines. (*Id.*; SUMF and Resp. to SUMF ¶¶ 14, 15, 16, 19, 21, 23, 26, 29-34; SAF ¶ 59.)

- Third parties have testified that they would be at a competitive disadvantage if they were prevented from using the term "timeline" to identify or describe their goods and/or services that arrange events or other information in chronological order. (SUMF and Resp. to SUMF ¶ 36.)

- 69% of survey respondents believe "timelines" to be generic for a website or website feature like the one offered by Plaintiff. (SUMF and Resp. to SUMF ¶ 39.)

- Plaintiff has not provided any direct consumer testimony or a consumer survey to establish that its alleged "timelines" mark has acquired secondary meaning. (SUMF and Resp. to SUMF ¶ 44.)

- Plaintiff has only used its alleged mark in commerce since April 2009, and Plaintiff's expert admits that the alleged mark is "new to the market." (SAF and Resp. to SUMF ¶¶ 11-13; Pl. Ex. 93 (Seggev's Rebuttal Report), ¶ 18.)

- Plaintiff's total revenues relating to the use of the term "timelines" during the past three years are only approximately $[redacted] at most. (SUMF and Resp. to SUMF ¶ 46.)

- Plaintiff has only 1,209 registered users to its website at timelines.com. (SUMF and Resp. to SUMF ¶ 47.)

- Plaintiff's out-of-pocket expenses on advertising and promotional efforts relating to the alleged "timelines" mark have been *de minimis*. (SUMF and Resp. to SUMF ¶ 45; Pl. Ex. 2 (Hand Depo.) at 184:15-185:5.)

These uncontroverted material facts demonstrate the generic or, at most, descriptive nature of Plaintiff's alleged "timelines" mark.

1. Facebook Has Successfully Rebutted the Presumption of Validity Afforded by Plaintiff's Registrations for the Alleged "Timelines" Mark.

Contestable federal trademark registrations, such as Plaintiff's registrations for "Timelines" and "Timelines.com," merely create a rebuttal presumption that the registered marks are valid. Seventh Circuit Model Jury Instructions, 13.1.2 (Comment No. 5, Contestable Registered Trademarks); *see Custom Vehicles, Inc. v. Forest River, Inc.*, 476 F.3d 481, 486 (7th Cir. 2007). The presumption that the mark is not generic or merely descriptive "'bursts' once the defendant presents sufficient evidence of genericness." *Liquid Controls Corp.*, 802 F.2d at 937, n.2. Despite Plaintiff's heavy reliance on its three trademark registrations, the existence of a registration "cannot in itself prevent the grant of summary judgment." *Id.*

Furthermore, "[i]t is well established that where descriptive words are used, the presumption of validity attaching to a registered trademark may be easily overcome." *Shaw-*

Barton, Inc. v. John Baumgarth Co. 313 F.2d 167, 169 (7th Cir. 1963) (citation omitted) (finding the federally registered mark "Homemakers" invalid when applied to certain calendars because it is descriptive of the class of intended consumers and not protectable without a showing of secondary meaning). If not generic, Plaintiff's alleged "timelines" mark falls squarely within the merely descriptive category.

Facebook has overcome the presumption of validity afforded by Plaintiff's registrations by presenting substantial evidence of genericness, such as dictionary definitions of the term "timeline(s)," Plaintiff's own generic use of the term "timeline(s)," competitors' generic and descriptive uses of the term "timeline(s)," media usage of the term "timeline(s)," and survey evidence demonstrating the genericness of the term "timeline(s)."[1] (SUMF ¶¶ 6, 8-10,12-39.) *See* 2 Thomas J. McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION ("McCarthy") § 12:13 (4th ed. 2012). Facebook's evidence not only "bursts" the validity presumption, it demonstrates that the term "timelines," when used in connection with services of the nature offered by Plaintiff, is undoubtedly generic or at most merely descriptive.

[1] Plaintiff's objections to Facebook's evidence on the grounds that Facebook did not properly authenticate certain web pages are unwarranted. (*See* Resp. to SUMF ¶¶ 5, 6, 8-11, 13, 17-21, 23, 29, 48-50, 53.) Facebook's counsel declared under penalty of perjury that all such web pages were captured at his direction. (*See* Declaration of Brendan J. Hughes in Support of Facebook's Motion for Summary Judgment ("Hughes Decl."), ¶ 1.) Further, counsel attested to the fact that the printouts were true and correct copies of web pages from the parties' websites and third party websites available at a given web address/location on a given date. (*Id.*, ¶¶ 3-5, 7-10, 17-18, 23-33, 38, 40, 42, 44, 46, 48, 50, 53, 55-62, 68-70, 72); *see also* Declaration of Brendan J. Hughes in Support of Facebook's Reply ("Hughes II Decl."), ¶ 2.) This is sufficient for authentication. *See* Fed. R. Evid. 901(a); *see also United States v. Harvey*, 117 F.3d 1044, 1049 (7th Cir.1997). This is particularly true given that Plaintiff has already verified the accuracy of the web pages captured from its website in response to Facebook's requests for admissions (Hughes II Decl., ¶ 3), admits the web pages contain the information which Facebook claims in its responses to Facebook's SUMF (Resp. to SUMF ¶¶ 5, 8-11, 17-19, 21, 29, 49, 53), and does not call into question the reliability of any of the web pages (*id.* at ¶¶ 5,6, 8-11, 13, 17-21, 23, 29, 48-50, 53). *See Hood v. Dryvit Sys., Inc.*, No. 04-CV-3141, 2005 WL 3005612, *2 (N.D. Ill Nov. 8, 2005) (declining to strike exhibits that were properly supported by an affidavit from counsel and where defendant did not deny the contents of the website or argue it was unreliable). Finally, the cases cited by Plaintiff are easily distinguishable and are inapplicable to the circumstances of this case. None of the issues raised in those cases regarding reliability are present here.

2. There Is No Genuine Issue of Material Fact That Plaintiff's Alleged Mark Is Generic.

Plaintiff does not dispute the evidence offered by Facebook, which is of the same nature and typically relied upon by courts when determining whether a term is generic: (1) dictionary definitions; (2) Plaintiff's own generic use of the term; (3) competitors' generic uses of the term; (4) media usage of the term; (5) testimony of persons in the trade; and (6) survey evidence.

Plaintiff does not dispute that "the noun 'timeline(s)' refers to a chronological organization of events or other information." (SUMF and Resp. to SUMF ¶ 16.) Nor does Plaintiff dispute that the term "timeline" is defined in several dictionaries as "a chronology," *i.e.*, an arrangement of events or other information in chronological order. (SUMF and Resp. to SUMF ¶ 12.) Plaintiff further admits that the news articles Facebook used as examples to show the media's generic use of the term "timeline" are in fact "generic uses of the term 'timeline' …." (Resp. to SUMF ¶ 14.)

Moreover, it is undisputed that Plaintiff uses the term "timeline" generically in connection with its various services. Plaintiff either expressly admitted, or failed to deny and therefore admitted, the following material facts:

- Timelines.com uses "***timelines***, maps and lists to enable unique ways for readers to explore and learn about topics…" (SUMF and Resp. to SUMF ¶ 6, not denied and therefore admitted by Plaintiff, *emphasis added*.)

- LifeSnapz allows users to "record and organize important events, milestones and memories in their lives" and "explore these events using dynamic ***timelines***, maps, and lists." (SUMF and Resp. to SUMF ¶ 8, expressly admitted by Plaintiff, *emphasis added*.)

- Timelines SE is "a 100% outsourced, custom branded service, [that] helps news websites organize, present, and monetize past content *** For readers, the service makes past content more readily available and presents it in an intuitive, easy-to-navigate manner using ***timelines***, maps, and lists …." (SUMF and Resp. to SUMF ¶ 10, expressly admitted by Plaintiff, *emphasis added*.)

Plaintiff also admits that it used "timeline(s)" for over two years on its Timelines.com website for the names of its various arrangements of information in chronological order (SUMF and Resp. to SUMF ¶¶ 7, 17, 16; SAF ¶ 22), and that several of its blog posts include uses of the terms "timeline" and "timelines" to refer to an arrangement of information in chronological order. (SUMF and Resp. to SUMF ¶ 19.)

Plaintiff argues that it does not offer timelines on its timelines.com site because its chronological listings do not include a physical line with "appendages" branching off a centerline. Plaintiff's made-for-litigation definition is neither credible nor consistent with common usage. Given that Plaintiff admits that it uses "timelines" generically in connection with LifeSnapz and Timelines SE (SUMF and Resp. to SUMF ¶¶ 8-10; SAF ¶¶ 6, 23), and that all three services share one thing in common (the listing of events in chronological order), its position that "timelines" is not generic when used in connection with Timelines.com cannot be taken seriously.

Finally, Plaintiff does not and cannot dispute that "numerous third party competitors of Plaintiff have used the term 'timeline(s)' to identify or describe their timeline-related goods and services."[2] (SUMF and Resp. to SUMF ¶ 23; SAF ¶ 59.) Twitter, TimelineIndex.com,

[2] Plaintiff's objections to the affidavits of Jan Battem, company representative for TimelineIndex, Jillian West, company representative for Twitter, Inc., Kevin Chen, company representative for Famento, Inc., and Alex Kearns, company representative for Webalon Ltd. as undisclosed witnesses are unwarranted. (Resp. to SUMF ¶¶ 23,25, 28.) The Court should consider this evidence because Plaintiff has not claimed it has been prejudiced, or that the Court's consideration of this evidence is likely to disrupt trial, or that Facebook acted with bad faith or willfulness. *See David v. Caterpillar, Inc.*, 324 F.3d 851, 857 (7th Cir. 2003) (before imposing sanctions under Rule 37, the Seventh Circuit has indicated a number of factors which should be considered, including whether the parties have been prejudiced, the likelihood of disruption at trial, and whether there was bad faith or willfulness involved in not disclosing the evidence at an earlier date). Nor can Plaintiff satisfy any of these elements because Facebook disclosed these companies in its supplemental initial disclosures (except for Famento), as well as other means such as in its document productions, and other correspondence. *See Krawczyk v. Centurion Capital Corp.*, No. 06-C-6273, 2009 WL 395458, *6 (N.D. Ill. Feb. 19, 2009) (denying a motion to strike affidavits of company representatives as "undisclosed witnesses" when the company had been disclosed in the initial disclosures).

Xtimeline, Ztimeline, Underlying, Webalon, Kidasa, Tom Snyder Productions, International Reading Association, MIT, Timetoast, Allofme, TimelineMaker, HistoricalTimeline.com, Timelines.info, and Ourtimelines.com, among others, use the term "timeline(s)" to identify or directly describe their products or services that arrange, or allow users to arrange, events and other information in chronological order. (SUMF and Resp. to SUMF ¶¶ 23-34.) Plaintiff's statements that these third parties "use the term 'timeline' in a … literal way" actually prove Facebook's point and fall well short of creating a disputed material fact regarding third party use of the term "timeline." (Pl.'s Opp. Br. at 14.)[3]

a. Facebook's Consumer Survey Evidence Is Sound and Admissible.

The consumer survey conducted by Dr. Jay demonstrated that 69% of respondents believed that the term "timelines" was generic (not a brand) when used in connection with a website or website feature, and that 68% of respondents believed that the term "timeline" was generic (not a brand) when used in connection with a website or website feature. (SUMF and Resp. to ¶ 39.) Although consumer surveys are not required, they "have become almost *de rigueur* in litigation over genericness." McCarthy's § 12:14 at 12–31; *see also Gimix, Inc. v. JS&A Group, Inc.*, 213 U.S.P.Q. 1005, 1006 (N.D. Ill. 1982).

Plaintiff argues that this Court should disregard Facebook's survey because it is allegedly "so flawed … [that] its results simply are not valid" and that "[i]f Dr. Jay's survey must come in,

[3] Plaintiff argues based on mere conjecture that "the USPTO was fully aware of wide-ranging uses of the term 'timelines' in the Internet industry [before it issued its registrations], yet specifically found [Plaintiff] was not using TIMELINES in a generic (or descriptive) fashion." (Pl.'s Opp. Br. at 13). There is no evidence to suggest that the USPTO was aware of these third party uses at the time it issued Plaintiff's registrations; nevertheless, this argument has no bearing on the issue of whether the term "timeline" is now generic. Plaintiff's identification of other registrations incorporating the term "timeline" is similarly irrelevant.

its only place is before the jury." (Pl. Opp. Br. at 15, 17.) The Seventh Circuit has developed a three-step approach for assessing the admissibility of expert testimony:

> First, "the witness must be qualified 'as an expert by knowledge, skill, experience, training, or education.'" Second, "the expert's reasoning or methodologies underlying the testimony must be scientifically reliable." Third, the expert's testimony must be relevant, that is, it must "assist the trier of fact to understand the evidence or to determine a fact in issue."

Competitive Edge, Inc. v. Staples, Inc., 763 F. Supp. 2d 997, 1007 (N.D. Ill. 2010) (citing *Ervin v. Johnson & Johnson, Inc.*, 492 F.3d 901, 904 (7th Cir. 2009) (internal citations omitted). Applying this analytical framework, Dr. Jay's survey is clearly admissible.

Dr. Jay is a renowned expert in the field of market research with over thirty years experience conducting large-scale surveys of all types, including genericness. (Hughes Decl., Ex. 62 (Jay's Report) at p. 3.) Dr. Jay's survey method was based on the "Teflon format," which is one of two genericness survey models widely accepted by courts. McCarthy, *supra*, at § 12:16 (citing *E.I. DuPont de Nemours & Co. v. Yoshida Int'l, Inc.*, 393 F. Supp. 502 (E.D.N.Y.1975)). *See also, Premier Nutrition Inc. v. Organic Food Bar Inc.*, 86 U.S.P.Q. 2d 1344 (C.D. Cal. 2008) (court accepted Teflon-style survey in support of summary judgment that the term "Organic Food Bar" was generic); *March Madness Athletic Ass'n, L.L.C. v. Netfire, Inc.*, 310 F. Supp. 2d 786, 803-804 (N.D. Tex. 2003), *aff'd*, 120 Fed. Appx. 540 (5th Cir. 2005) (court accepted Teflon-style survey in support of a finding that MARCH MADNESS was not generic).

Plaintiff attacks the admissibility of Dr. Jay's survey based on the fact that it "failed to replicate market conditions" because it was conducted over the phone and contained alleged biases that bore out in the administration of the survey questions over the phone. (Pl.'s Opp. Br. P. 15-17.) Genericness surveys, however, are routinely conducted over the telephone. *See, e.g.*, *March Madness Athletic Ass'n, L.L.C. v. Netfire, Inc.*, 310 F. Supp. 2d 786, 803 (N.D. Tex.

2003) ("Approximately 700 adults were contacted by phone . . ."); *SportsChannel Assocs. v. Comm'r of Patents and Trademarks*, 903 F. Supp. 418, 421 (E.D.N.Y. 1995) ("This survey was a random-digit dial telephone survey conducted in a defined twenty-nine county market area surrounding and including New York City."); *Intel Corp. v. Advanced Micro Devices, Inc.*, 756 F. Supp. 1292, 1296 (N.D. Cal. 1991) ("The method of conducting the survey consisted of computer assisted telephone interviews."); *Schmidt v. Quigg*, 609 F. Supp. 227, 230 (E.D. Mich. 1985) ("The survey was conducted by telephone . . ."). The cases cited by Plaintiff in support of its argument that Dr. Jay's survey "violated a fundamental survey requirement" by not replicating market conditions can be easily distinguished because they involved or discussed surveys testing consumer confusion – not genericness – and therefore do not apply. *Competitive Edge, Inc.*, 763 F. Supp. 2d at 1009 ("surveys testing consumer confusion should mimic market conditions, including the context in which purchases are made"); *Spraying Sys. Co.*, 975 F.2d at 396 (survey testing trade dress infringement); *Quill Natural Spring Water, Ltd. v. Quill Corp.*, No. 91-C-8071, 1994 WL 559237 (N.D. Ill. Oct. 7, 1994) (survey testing trademark infringement). Unlike genericness surveys, replicating market conditions is a fundamental survey requirement for a survey that is testing for *infringement* because the only actionable confusion occurs at the point of purchase. *See Packman v. Chicago Tribune Co.*, 267 F.3d 628, 645 (7th Cir. 2001) (finding that for confusion evidence to be relevant it had to be evidence of confusion amongst consumers who purchased or attempted to purchase defendant's goods).

The alleged "auditory bias" and "order bias" alleged by Plaintiff are simply not enough to exclude an otherwise admissible survey. Furthermore, it is undisputed that Dr. Jay's survey is scientifically reliable given that it identified the proper universe of respondents; relied upon the appropriate selection of a sample population that accurately represents that universe; used clear,

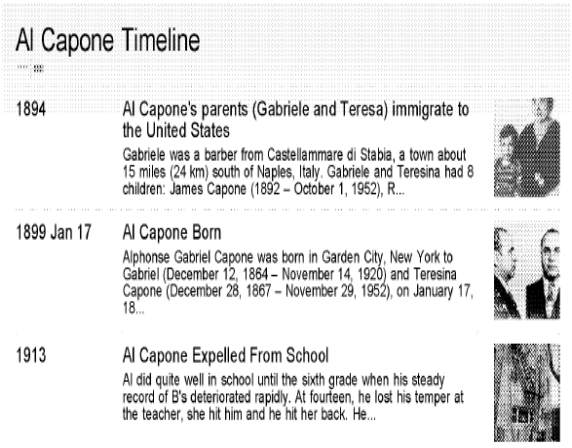
precise, and unbiased questions; incorporated filter questions and double-blind research methodology; and utilized consistent and accurate data classification and recordation procedures. *See Competitive Edge, Inc.* 763 F. Supp. 2d at 1008-1009.

Dr. Jay's survey squarely comported with the generally accepted *Teflon* approach to genericness surveys and used scientifically reliable methodology. Therefore, Dr. Jay's findings that the terms "timeline" and "timelines" are generic should be given great weight by this Court.

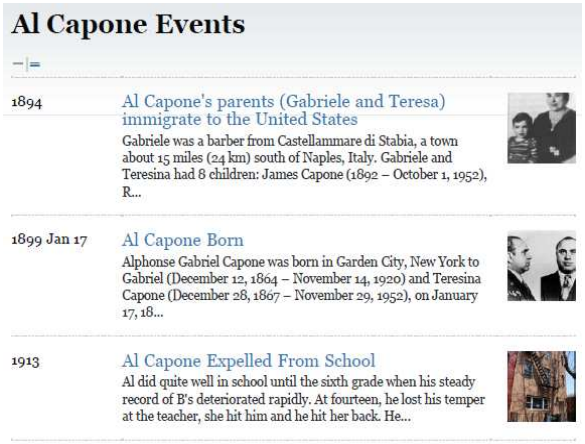
b. The Undisputed Facts Demonstrate That Plaintiff Offers Timeline Services As Commonly Defined and Understood.

When assessing the generic nature of the term "timelines," the undisputed facts reveal that the core of Plaintiff's service is to arrange events in chronological order: "Timelines.com allows users to record and share events, and contribute descriptions, photos, videos, geographical locations and links (collectively for ease of reference "Content") related to events." (SAF ¶ 3.) Timelines.com organizes this Content by connecting events "in space and through time to other related events." (SUMF and Resp. to SUMF ¶ 5.) Events are categorized by topic. (SUMF and Resp. to SUMF ¶ 16.) Each topic has its own webpage that arranges events that relate to that topic in chronological order. (Hughes Decl., Exs. 4, 23, 24, 26-28.) These listings of events are identical in nature to the chronological arrangements appearing in newspaper articles that Plaintiff has admitted constitute generic uses of the term "timeline." (SUMF and Resp. to SUMF ¶ 14.)

For over two years prior to this lawsuit, Plaintiff accurately identified its timelines on its website by calling them "timelines." (SUMF and Resp. to SUMF ¶¶ 16, 17.) Only after filing this lawsuit did Plaintiff scrub its website of generic uses of "timeline(s)." (*Id.*)



[September 29, 2011]



[January 10, 2013]

(Hughes Decl., Exs. 23, 26.)

In an effort to salvage its case, Plaintiff has now crafted its own unique definition of "timeline" so that it can argue that it does not offer "timelines" in a generic sense: "***For [Plaintiff]***, 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.' [Plaintiff] does not do this." (SAF ¶ 21, *emphasis added*.) Plaintiff offers no factual or legal support for its assertion that in order for something to be a "timeline," it must include some particular graphical elements; and not surprisingly, it cannot clearly identify what those graphical elements must look like. Plaintiff's argument is the equivalent of a contention that a "map" is not a map unless it displays vertical and horizontal indices reflecting longitude and latitude. Plaintiff cannot create and rely upon its own customized and unsupported definition of "timeline" in order to manufacture a factual issue.

3. Even If Not Generic, There Is No Genuine Issue of Material Fact that Plaintiff's Alleged Mark Is Merely Descriptive Without Secondary Meaning.

Even if the Court determines that the above undisputed evidence falls short of establishing "timelines" as generic, it unquestionably demonstrates that the term "timelines"

merely describes a central aspect of Plaintiff's services.[4] This was the conclusion reached by the United States Patent and Trademark Office ("PTO") when it refused to register Plaintiff's most recent application for "timelines" on the ground that the term is merely descriptive of the services described in the application. (SUMF and Resp. to SUMF ¶ 42.) And Plaintiff has not demonstrated that its alleged mark has acquired the requisite secondary meaning to avoid a summary judgment that its alleged mark is unprotectable.

Contrary to Plaintiff's assertion, its registrations do not create a presumption of secondary meaning. A presumption of secondary meaning attaches only when the mark was registered upon the PTO's acceptance of proof of secondary meaning under Section 2(f) of the Lanham Act. McCarthy at § 11:43; *Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352 (Fed. Cir. 2009) ("[T]he presumption of validity that attaches to a Section 2(f) registration includes a presumption that the registered mark has acquired distinctiveness."). Plaintiff did not apply for its marks claiming secondary meaning under Section 2(f); therefore, its reliance on its registrations as evidence of secondary meaning is unfounded. (Hand Decl., Group Exhibit 4.) The issue of acquired distinctiveness was never before the PTO.

Plaintiff fails to offer probative direct evidence of acquired secondary meaning such as direct consumer testimony or consumer surveys. (SUMF ¶ 44.) Plaintiff offers only unsubstantiated statements made in its own deposition testimony or declarations that are devoid

[4] *See Spraying Sys.*, 975 F. 2d at 393 (holding JET marks descriptive based in part on uses by third parties); *Platinum Home Mortg. Corp. v. Platinum Fin. Group, Inc.*, 149 F.3d 722, 727-28 (7th Cir. 1998) (third party uses of PLATINUM relied on in holding PLATINUM descriptive of mortgage services). It is well established that third party use, dictionary definitions and/or media publications can suffice to establish a mark as unenforceable. *See Colt Def. LLC v. Bushmaster Firearms, Inc.*, 486 F.3d 701, 706 (1st Cir. 2007) (relying on media publications and use by competitors to hold mark unenforceable); *Filipino Yellow Pages, Inc. v. Asian Journal Publ'ns, Inc*., 198 F.3d 1143, 1145 (9th Cir. 1999) (summary judgment granted, in part, based on dictionary usage, competitor use and media use of purported mark); *In re Northland Aluminum Prods., Inc.*, 777 F.2d 1556, 1559, (Fed. Cir. 1985) (newspaper and other publications evidence of descriptiveness); see also McCarthy §11.69 ("Articles from trade publications evidencing use by others of the term in a descriptive manner are competent to prove descriptiveness....").

of support or evidence. (SAF ¶¶ 14-20.) In fact, many of the statements that Plaintiff now offers as "proof" of secondary meaning were simply alleged in Plaintiff's complaint — in other words, they amount to nothing more than unsubstantiated allegations. (Dkt. No. 27, ¶¶ 26-30.) It is well settled that Plaintiff as the nonmoving party must "set forth specific facts showing that there is a genuine [material] issue for trial" in order to avoid summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Plaintiff has failed to do so here.

Careful consideration of Plaintiff's "evidence" demonstrates that no reasonable trier of fact could find that Plaintiff's alleged mark has acquired secondary meaning:

- *Exclusivity, length, and manner of use of the alleged mark*: Plaintiff's own expert admits that its alleged mark is "new to the market" (Pl. Ex. 93 (Seggev's Rebuttal) at ¶ 18). The extensive evidence of third party use of "timelines" and Plaintiff's short duration of use heavily weigh against a finding that consumers could possibly associate Plaintiff's alleged mark with one source. Plaintiff has not sought to enforce its exclusive ownership against any other business using the term "timeline" or "timelines." (SUMF ¶ 22)

- *Amount and manner of advertising*: Plaintiff states that it has spent $100,000-300,000 in advertising. This alleged amount includes the estimate spent on advertising and promoting *all three* of Plaintiff's services — including LifeSnapz, Timelines SE and Timelines.com, not just Timelines.com — and includes an estimated value for the manpower hours for the CEO and the then-CFO of the company, as well as their travel expenses. (Pl. Ex. 2 (Hand Depo.) at 184:15-185:5.) Plaintiff fails to provide any documentary evidence substantiating this allegation or any evidence demonstrating the effect or success of the advertising. *See Echo Travel, Inc. v. Travel Assocs., Inc.*, 870 F.2d 1264, 1270 (7th Cir. 1989) (noting that "the effect or success of the advertising, not the mere fact of advertising" is the relevant test for secondary meaning). In reality, Plaintiff's advertising efforts for its Timelines.com services have been *de minimis*. (SUMF ¶ 45.)

- *Amount of sales and number of customers*: Plaintiff's total revenue from the past three years was only approximately $[redacted] (SUMF and Resp. to SUMF ¶ 46); and Plaintiff has only 1,209 registered users of its website. (*Id.* ¶ 47.)

- *Recognition in the marketplace*: Plaintiff states that its Timelines.com site has had between 3 to 4 million visitors in approximately four years. (Pl.'s SAF ¶ 14.) Plaintiff, however, admits that this figure includes non-U.S. visitors and would count repeat visitors as multiple hits. (Pl.'s Ex. 2 (Hand Depo.) at 186:9-11; Hughes II Decl., Ex. 3 (Hand Depo.) at 190:14-25.) Plaintiff's CEO and president testified that he could produce Google analytics data for the U.S. only, but never did (nor was it submitted in

support of its opposition). (Hughes II Decl., Ex. 3 (Hand Depo.) at 191:21-25.) Regardless, Plaintiff offers no evidence establishing that the "visitors" to its website believed that the term "timelines" identified the source of the services offered by Plaintiff. The awards and accomplishments upon which Plaintiff relies appear to be mostly local or from narrow market tech blogs and publications with minimal circulation. Given the relatively little amount of substantiating evidence in support of this statement that Plaintiff produced, there is simply no way to evaluate their significance, and therefore they are insufficient to create a triable issue.

- *Proof of intentional copying*: Plaintiff provides no evidence of intentional copying by Facebook or any other party.

See Spex, Inc. v. The Joy of Spex, Inc., 847 F. Supp. 567, 577 (7th Cir. 1994). The undisputed facts overwhelmingly show that Plaintiff's alleged mark is, at most, merely descriptive and that it lacks acquired secondary meaning.

B. Plaintiff Has Failed to Demonstrate That the Court Should Not Grant Summary Judgment on the Issue of Facebook's Fair Use of the Term "Timeline."

Plaintiff fails to dispute a single material fact provided by Facebook showing that Facebook makes descriptive fair use of the term "timeline." Rather, it attempts to generate a dispute relating to Facebook's registration and enforcement of wholly unrelated trademarks.[5] Plaintiff's response addresses neither the applicable standard for the fair use defense nor the material facts supporting Facebook's assertion of that defense.

As described in Facebook's memorandum in support of its motion for summary judgment, fair use is a complete statutory defense to a claim of infringement if the term at issue is used to accurately describe a feature of the alleged infringer's goods or services. 15 U.S.C. § 1115(b)(4). Plaintiff chose the term "timelines" knowing that it is commonly used and

[5] Plaintiff's arguments concerning Facebook's trademarks and product names and its efforts to protect them are completely immaterial to this motion. None of Facebook's trademarks are at issue in this case. The relative distinctiveness of Facebook's trademarks and its enforcement efforts have absolutely no bearing on whether Plaintiff's mark is valid or if Facebook uses the term "timeline" fairly. Plaintiff's arguments relating to this issue on pages 11-12 and 19-20 of its Opposition Brief and Plaintiff's SAF ¶¶ 55-57 should be disregarded and the related evidence stricken from the record.

understood to describe an arrangement of events or other information in chronological order. "By choosing a [generic] or descriptive term, the trademark owner must live with the result that everyone else in the marketplace remains free to use the term in its original 'primary' or descriptive sense. A junior user is always entitled to use a descriptive term in good faith in its primary, descriptive sense other than as a trademark." McCarthy § 11:45. As such, Facebook is entitled to use the term "timeline" in its commonly accepted parlance to describe its user interface feature that allows users to arrange their Facebook postings chronologically along a timeline – which is represented by a physical line down the center of the Facebook page.

In support of its claim of fair descriptive use, Facebook submitted the following material facts, none of which Plaintiff has disputed with anything more than unsubstantiated statements, if at all:

- Facebook does not use any trademark symbols or other indicia that might create the impression that the term "timeline" is meant to identify Facebook as the source of its user interface. (SUMF and Resp. to SUMF ¶ 52.)

- Facebook uses the word "timeline" in textual sentences in lower-case letters as a generic *noun* to refer to a feature of a user's profile. (*Id.* ¶ 53.)

- Facebook describes its timeline product as a feature which allows Facebook's users to review the timeline of all posts that they have made to Facebook. *See* Lessin Dep. at p. 49. Facebook also describes it as a chronological expression of information that a Facebook user has entered into Facebook. (*Id.*; SAF ¶ 36.)

- Facebook's use of the term "timeline" is often virtually inconspicuous to users of Facebook's services, and the word "timeline" appears on a user's profile page within various menus relating to display options (such as photos, events, friends, map) and privacy or preferences settings (such as "Hide from Timeline"). (SUMF ¶¶ 49-50.)

- The "timeline" on a user's Facebook page is but one feature of Facebook's services, which include other features descriptively referred to with terms such as "Map," "Friends," "Photos," and "Events." (*Id.*)

- The term "Map" describes a feature that displays the geographic location of events and experiences; the term "Friends" describes a feature that lists a user's friends on Facebook; the term "Photos" describes a feature that displays photographs; and the

term “Events” describes a feature that identifies and provides information regarding specific events. (SUMF ¶ 50.)

Plaintiff makes no attempt to dispute these material facts, nor could it. Plaintiff merely concludes that Facebook uses the word “timeline” in a “brand and trademark way.” (Pl. Opp. Br. at p. 5-6, 19.) In support of its conclusion Plaintiff turns to employee references to the feature and internal communications dated prior to the launch of the feature and Facebook’s occasional use of a capital “T” in presentations and financial disclosures. (*Id.*) Plaintiff has made no attempt to establish that consumers see the term used in a trademark manner on external facing web pages or the Facebook platform itself. Plaintiff, in fact, admits that Facebook uses the term “timeline” along with other generic terms, *e.g.* “Map,” “Events,” and “Friends”; furthermore, Plaintiff does not refute the fact that an average user typically only sees the term “timeline” in that context (*i.e.*, along with other generic terms). (SUMF and Resp. to SUMF ¶ 50.) Similarly, Facebook’s use of a capital “T” in certain contexts does not transform a generic term into a trademark; the term “Timeline” continues to identify a timeline feature just like Facebook’s use of “Group,” “Photos,” and “Platform” refers generically to features, not trademarks. (Facebook’s Responses to SAF ¶ 33.)

Plaintiff’s assertions fall woefully short of creating a genuine issue of material fact regarding Facebook’s fair use of “timeline.” Summary judgment is therefore entirely appropriate on this record. *See M.B.H. Enters., Inc. v. WOKY, Inc.*, 633 F.2d 50 (7th Cir. 1980) (affirming district court’s application of the fair use defense to undisputed facts of record to find defendant made fair use of mark I LOVE YOU).

As explained in its initial memorandum, Facebook uses the term “timeline” in its commonly accepted meaning to describe the feature of its user interface that allows users to display their content in a timeline. Plaintiff agrees that Facebook describes this feature as a

"timeline." (SAF ¶ 36.) A descriptive use serves to "impart information directly" or is "necessary to the description of the goods and services in question." *Custom Vehicles, Inc. v. Forest River, Inc.*, 476 F.3d 481, 483 (7th Cir. 2007); *M.B.H. Enters., Inc.*, 633 F.2d at 54. Facebook's use of the term "timeline" qualifies as classic non-infringing descriptive fair use.

III. CONCLUSION

For the foregoing reasons, Facebook respectfully requests that this Court grant its motion for summary judgment.

Dated: February 21, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he served the foregoing **FACEBOOK, INC.'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT** 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 February 21, 2013.

Dated: February 21, 2013

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