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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

ALABAMA CREDIT UNION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
THE CREDIT UNION OF ALABAMA FEDERAL CREDIT UNION, formerly known as BF Goodrich Employees federal Credit Union; LOCKLEAR CHRYSLER JEEP DODGE, DON DRENNEN CHRYSLER JEEP,	)	
	)	
Defendants.	)	**CV 05-B-1692-W**
	)	
THE CREDIT UNION OF ALABAMA FEDERAL CREDIT UNION,	)	
	)	
Counter Claimant,	)	
	)	
v.	)	
	)	
ADMINISTRATOR T. GLENN LATHAM; ALABAMA CREDIT UNION,	)	
	)	
Counter Defendants,	)	
	)	
THE CREDIT UNION OF ALABAMA FEDERAL CREDIT UNION,	)	
	)	
Counter Claimant,	)	
	)	
v.	)	
	)	
ADMINISTRATOR T. GLENN LATHAM; ALABAMA CREDIT UNION,	)	
	)	
Counter Defendants.	)	
	)	

MEMORANDUM OPINION

This case is currently before the court on defendant The Credit Union of Alabama Federal Credit Union's ("TCUAFCU") Motion for Summary Judgment on the Grounds That There Is No Likelihood of Confusion, (doc. 74).[1] Upon consideration of the record, the submission of the parties, the arguments of counsel, and the relevant law, the court is of the opinion that TCUAFCU's Motion for Summary Judgment, (doc. 74),[2] is due to be denied.

SUMMARY JUDGMENT STANDARD

Pursuant to Fed. R. Civ. P. 56(c), summary judgment is appropriate when the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See Clark v. Coats & Clark, Inc.*, 929 F. 2d 604, 608 (11th Cir. 1991); *see Adickes v. S.H. Kress & Co.*, 398 U.S. 144,157 (1970). Once the moving party has met its burden, Rule 56(e) requires the non-moving party to go beyond the pleadings and show that there is a genuine issue for trial. Fed. R. Civ. P.

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[1] Reference to a document number, ["Doc. ___"], refers to the number assigned to each document as it is filed in the court's record.

[2] TCUAFCU has also filed a Motion for Summary Judgment On the Grounds That "Alabama Credit Union" is Unprotect able as Generic or Descriptive Without Secondary Meaning, (doc. 72). That Motion for Summary Judgment, (doc. 72), is addressed in a separate Memorandum Opinion.

56(e); *see Celotex Corp. V. Catrett*, 477 U.S. 317, 324 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In deciding a motion for summary judgment, the court's function is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* At 249. Credibility determinations, the weighing of evidence, and the drawing of inferences from the facts are left to the jury, and, therefore, evidence favoring the non-moving party is to be believed and all justifiable inferences are to be drawn in her favor. *See id.* At 255. Nevertheless, the non-moving party need not be given the benefit of every inference but only of every reasonable inference. *See Brown v. City of Clewiston*, 848 F. 2d 1534, 1540 n. 12 (11th Cir. 1988).

STATEMENT OF FACTS

Alabama Credit Union ("ACU") is an Alabama state-chartered credit union with its principal place of business in Tuscaloosa, Alabama. (Doc. 69 at 5.) The Federal Credit Union of Alabama Federal Credit Union ("TCUAFCU") is a federally-chartered credit union with its principal place of business in Tuscaloosa, Alabama. (Doc. 69 at 5.) TCUAFCU formerly operated under the name, "B.F. Goodrich Employees Federal Credit Union." (*Id.*) ACU has branches in Baldwin, Tuscaloosa, Pullman, Lafayette, and Madison Counties, while TCUAFCU has branches in Tuscaloosa and Pickens Counties. (Doc. 75 at 3.)

ACU has used the name "Alabama Credit Union" for more than fifty years to identify its credit union services in the Tuscaloosa, Alabama area. (Doc. 73 at 1.) For approximately the past twenty years, ACU has used the name "Alabama Credit Union" to identify its credit union services in portions of Alabama extending beyond the Tuscaloosa, Alabama area. (*Id.*)

Almost twenty credit unions doing business in Alabama use the words "Alabama" and "credit union" in their names. (Doc. 73 at 1-2.) Of those credit unions, Alabama Central Credit Union, Alabama Mental Health Credit Union, Alabama Postal Credit Union, and Alabama State Employees Credit Union were chartered before ACU. (Doc. 73 at 2.) The only credit unions with the words "Alabama" and "credit union" in their name that have branches in Tuscaloosa or Pickens County are TCUAFCU, ACU, Alabama Central Credit Union, and Alabama Mental Health Credit Union. (Doc. 86 at 4.) ACU states it has never suffered any significant confusion with Alabama Central Credit Union. (*Id.*) Alabama Mental Health Credit Union's sign reads, "AMH Credit Union." (*Id.*)

The trade association known as the "Alabama Credit Union League" was established in or around 1934, approximately twenty years prior to the establishment of ACU. (Doc. 73 at 2.) The Alabama Credit Union Administration is the agency responsible for administering the activities of credit unions in Alabama. (Doc. 73 at 3.)

ACU has a substantial marketing budget. (Doc. 86 at 3.) Since the 1960s, ACU

has frequently used the University of Alabama landmark Denny Chimes as part of its logo. (*Id.*) Since around 2000, a primary thrust of ACU's marketing efforts has been to identify ACU as the credit union for the University of Alabama family and fans. (Doc. 73 at 4.) ACU has advertised itself as "The University of Alabama's credit union." (*Id.*)

ACU's marketing emphasis varies based on the market and the competitive situation, and has included emphasizing the "quality and convenience of personal service" provided to members and positioning itself "as an alternative to the mega bank." (Doc. 86 at 1-2.) In providing and advertising credit union services, ACU makes a conscious effort to communicate the name of "Alabama Credit Union" as being the source of the credit union services. (Doc. 86 at 5.) ACU communicates "Alabama Credit Union" as the source of the credit union services in part by signs inside and outside of the branches, by shirts worn by most tellers and many employees when performing services for members, by internet sites, by employees stating the name when answering the telephone, and by displaying the name on account statements, checks, and other correspondence. (Doc. 86 at 5-7.)

ACU's advertising prominently features its name. (Doc. 86 at 8.) As ACU has increased its marketing expenditures, it has experienced corresponding increases in assets, loans, and members. (Doc. 86 at 9.) ACU advertises its services in Tuscaloosa County primarily by radio, newspaper, magazine, direct mail, and billboards. (*Id.*) Approximately two-thirds (2/3) of ACU's marketing expense is allocated to advertising in

the Tuscaloosa area. (*Id.*)

ACU currently has approximately 36,000 members. (Doc. 73 at 5.) Approximately two-thirds (2/3) of ACU's members live in the Tuscaloosa area. (Doc. 86 at 5.) Approximately 50% of ACU's members have some connection to the University of Alabama. (*Id.*) Over the past five years, ACU has been the second fastest growing credit union in Alabama. (*Id.*)

In 2005, B.F. Goodrich Employees Federal Credit Union announced that it was changing its name to "The Credit Union of Alabama Federal Credit Union." (Doc. 44 at 12.) ACU officers and directors first learned of the name change on Sunday, March 27, 2005. (Doc. 80 at 2.) On the following day, ACU's lawyer, Ben Hayley, wrote a cease and desist letter to TCUAFCU protesting the new name. (*Id.*)

On August 9, 2005, ACU sued TCUAFCU pursuant to the Lanham Act, for unfair competition, Alabama common law trademark infringement, and violation of the Alabama Deceptive Trade Practices Act. (Doc. 9.) According to ACU, it has a protectable interest in the name "Alabama Credit Union," and TCUAFCU's use of its new name is likely to cause confusion. (Doc. 9 at 3-6.) ACU requests, among other things, that TCUAFCU be permanently restrained "from using Alabama Credit Union's mark 'Alabama Credit Union,' or variants thereof such as 'The Credit Union of Alabama,' 'Alabama Federal Credit Union,' or 'The Federal Credit Union of Alabama.'" (Doc. 9 at 11.)

DISCUSSION

TCUAFCU moves for summary judgment on the grounds that there is no likelihood of confusion between ACU's mark and the marks used by TCUAFCU. ACU's mark is "Alabama Credit Union," while TCUAFCU claims that is uses both "The Credit Union of Alabama Federal Credit Union" and "Alabama Federal."[3]

Courts consider the following seven factors in assessing whether or not a likelihood of consumer confusion exists:

1. Type of mark
2. Similarity of mark
3. Similarity of the products the marks represent
4. Similarity of the parties' retail outlets (trade channels) and customers
5. Similarity of advertising media
6. Defendant's intent
7. Actual confusion

Frehling Enters., Inc. v. Int'l Select Group, Inc., 192 F.3d 1330, 1335 (11th Cir. 1999).

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[3] ACU argues that TCUAFCU has not used, and cannot use, "Alabama Federal" as a trade name. (Doc. 88 at 2-4; doc. 44 at 3.) According to ACU, TCUAFCU has not used the words "Alabama Federal" unaccompanied by "The Credit Union of Alabama Federal Credit Union" in any advertising, and does not plan to do so. (*Id.*) Moreover, it is undisputed that the National Credit Union Administration requires that "[t]he last three words in the name of every credit union chartered by NCUA must be 'Federal Credit Union.'" (Doc. 88 at 4.)

Therefore, the court does not consider the likelihood of confusion between "Alabama Credit Union" and "Alabama Federal" in isolation. Instead, the court considers TCUAFCU's actual, side-by-side use of its marks. *See CareFirst of Maryland, Inc. v. First Care, P.C.*, 434 F.3d 263, 267 (4th Cir. 2006) (quoting 3 McCarthy on Trademarks and Unfair Competition § 23:58 (4th ed. 2005) ("In conducting the likelihood-of-confusion analysis, a court does not 'indulge in a prolonged and minute comparison of the conflicting marks in the peace and quiet of judicial chambers, for this is not the context in which purchasers are faced with the marks.' Rather, we look to how the two parties actually use their marks in the marketplace to determine whether the defendant's use is likely to cause confusion.").

"Of these, the type of mark and the evidence of actual confusion are the most important." *Id.* (citing *Dieter v. B & H Indus. of Southwest Fla., Inc.*, 880 F.2d 322 (11th Cir. 1989)). However, "[t]he appropriate weight to be given to each of these factors varies with the circumstances of the case." *AmBrit v. Kraft, Inc.*, 812 F.2d 1531, 1538 (11th Cir. 1986).

1. Type of Mark

This factor measures the strength of the plaintiff's mark, which determines the scope of legal protection accorded to the mark. *See John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 973 (11th Cir.1983). Stronger marks are accorded a greater scope of protection than weaker marks. *Id.* at 973. In order to find the strength of the mark, the court first determines what category – generic, descriptive, suggestive, or arbitrary – the mark is. *Choice-Hotels Int'l, Inc. v. Kaushik*, 147 F.Supp.2d 1242, 1247 (M.D. Ala. 2000) (citing *John H. Harland*, 711 F.2d at 975). The court then determines the relative market strength of the mark. *Id.*

There are four categories of marks: (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary. ACU's mark, which consists of a geographic location and a type of service, is a descriptive mark. *See Investacorp, Inc. v. Arabian Inv. Banking Corp. (Investcorp) E.C.*, 931 F.2d 1519, 1522-23 (11th Cir. 1991); *Am. Television and Commc'ns Corp. v. American Commc'ns and Television, Inc.*, 810 F.2d 1546 (11th Cir. 1987). "A geographically descriptive mark is generally considered not inherently distinctive, but weak, and given a narrow range of protection." *HBP, Inc. v. Am. Marine Holdings*, 290

F.Supp.2d 1320, 1328 (M.D. Fla. 2003) (citing *Investacorp*, 931 F.2d at 1522; *John H. Harland*, 711 F.2d at 974). Therefore, ACU's classification as a descriptive mark indicates that it merits only a narrow range of protection.

However, also relevant to the overall strength of the mark is the relative market strength of the mark. *See Choice Hotels Intern. v. Kaushik*, 147 F.Supp.2d 1242, 1247-48 (M.D. Ala. 2000); *John H. Harland*, 711 F.2d at 975 n.13 ("even if [plaintiff's] mark initially was weak, it may have subsequently acquired strength through [plaintiff's] promotional efforts"). The relative market strength of ACU's mark is determined by secondary meaning and third party uses. As the court has noted, there is a question of fact as to whether ACU's mark has acquired a secondary meaning in the area at issue. Therefore, assuming it has acquired a secondary meaning, it is entitled to a greater scope of protection. *See AmBrit*, 812 F.2d at 1540 ("The existence of secondary meaning leads to greater protection."). A finding of secondary meaning "is probative on the strength of the mark issue because it also establishes the mark's standing in the marketplace." *Id.* at 1540 n.40.

Also important in gauging the strength of a mark is the degree to which third parties make use of the mark. *See John H. Harland Co.*, 711 F.2d at 974-75; *Sun Banks of Fla., Inc. v. Sun Fed. Sav. & Loan Ass'n*, 651 F.2d 311, 316 (5th Cir. 1981). The less that third parties use the mark, the stronger it is, and the more protection it deserves. *See John H. Harland Co.*, 711 F.2d at 975.

Seventeen credit unions in Alabama use the words "Alabama" and "credit union" in their names. (Doc. 73 at 1-2.) However, prior to the TCUAFCU name change, only three of the nine credit unions whose names begin with "Alabama" and end with "credit union" were in Tuscaloosa or Pickens County – Alabama Central Credit Union, Alabama Mental Health Credit Union, and ACU. (Doc. 86 at 30.) *See, e.g., Chase Fed. Sav. and Loan Ass'n v. Chase Manhattan Fin. Servs., Inc.*, 681 F.Supp. 771 (S.D. Fla. 1987) (appropriate inquiry was "the primary significance of the name Chase in the minds of *South Florida* consumers of financial products and services") (emphasis added); *Univ. of Georgia Athletic Ass'n v. Laite*, 756 F.2d 1535, 1545 (11th Cir. 1985) (focusing its inquiry into third-party uses on schools using the English bulldog as a mascot in the state of Georgia, and finding that the "Georgia Bulldog" is a strong mark "at least in Georgia"); *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 975 (11th Cir. 1983) (noting that the strength of a mark should be based in part upon "the amount of use of the term by others in this product and geographical area") (quoting 1 J.T. McCarthy, Trademarks & Unfair Competition § 11:24, at 401 (1973)). Therefore, only two third-party uses have the potential to significantly weaken ACU's mark. *See Laite*, 756 F.2d at 1545 n.27. Furthermore, the proper inquiry is not simply how many total third-party uses exist, but "whether the unauthorized third-party uses significantly diminish the public's perception that the mark identifies items connected with the owner of the mark." *Id.* Because of its distinctive additional words, it is doubtful that the existence of the

Alabama *Mental Health* Credit Union significantly diminishes the connection in the consumer's mind between ACU and its mark. *See Safeway*, 675 F.2d at 1165 ("[t]hird-party users that incorporate the word Safeway along with distinctive additional words . . . may not diminish the strength of the Safeway mark). Thus, the third party uses of the terms "Alabama" and "Credit Union" may diminish the strength of ACU's mark.

2. Similarity of Marks

This factor compares the marks and considers the overall impressions that the marks create, including the sound, appearance, and manner in which they are used. *See Frehling Enterprises*, 192 F.3d at 1337 (citing *John H. Harland Co.*, 711 F.2d at 975-76). There are several differences in the sound and appearance of the marks. "The Credit Union of Alabama Federal Credit Union" is a much longer name and includes the word "Federal." However, when one says "The Credit Union of Alabama Federal Credit Union," the emphasis is on "The Credit Union of Alabama," which is essentially a rearrangement of "Alabama Credit Union." "Alabama Federal" is different from "Alabama Credit Union" because it does not contain the words "credit union," and instead emphasizes the term "federal." There are also differences and similarities in "the manner in which [the marks] are used." As ACU points out, the dominant words in TCUAFCU's "The Credit Union of Alabama Federal Credit Union" logo are "Credit Union of Alabama."[4] The words "Credit Union of Alabama" appear in a larger font, and

[4] The logos appear in Doc. 75 at pages 16 and 17.

are clearly the focus of the logo. However, the depiction of Denny Chimes, a prominent feature of ACU's logo, is not present in TCUAFCU's logo, and TCUAFCU uses a different color scheme. Overall, TCUAFCU's "Alabama Federal" logo is simply different in appearance from ACU's logo. The "Alabama Federal" logo does not contain the words "credit union" and contains a depiction of the state of Alabama.

Because of the variance in the sound, appearance, and manner in which ACU and TCUAFCU's marks are used, and especially in the way the marks are represented in the two credit unions' distinctive logos, the marks do not appear sufficiently similar to create a likelihood of confusion. Thus, this factor weighs in favor of finding no likelihood of consumer confusion.

3. Similarity of Services

TCUAFCU concedes that the products are the same. (Doc. 75 at 17-18.) ACU and TCUAFCU are both credit unions.

4. Similarity of Sales Method

In addition to sales method, this factor also looks at the identity of customers. *Freedom Sav. and Loan Ass'n v. Way*, 757 F.2d 1176, 1184 (11th Cir. 1985). TCUAFCU essentially concedes that the sales methods and customers are the same, though it notes that ACU can accept new members from a number of additional counties. (Doc. 75 at 18-19.) Nevertheless, both credit unions accept members from Tuscaloosa County, where two-thirds of ACU's members live. (Doc. 86 at 4-5.)

When customers "are making a major investment, they are likely to be especially well-informed buyers." *Freedom Sav. and Loan Ass'n*, 757 F.2d at 1185. "The sophistication of a buyer certainly bears on the possibility that he or she will become confused by similar marks." *Id.* In the present case, customers choosing a credit union or any other financial institution are likely to use a high degree of care. While the degree of care lessens the risk of a likelihood of confusion, because this factor also looks at the credit unions' sales methods, which are substantially similar, this factor thus weighs in favor of a likelihood of confusion.

5. Similarity of Advertising Methods

TCUAFCU concedes that both parties use the same advertising methods and media. (Doc. 75 at 19.)

6. Defendant's Intent

This factor looks to whether TCUAFCU intends to gain a competitive advantage by trading off of the goodwill associated with ACU's mark. *See Frehling Enters.*, 192 F.3d at 1340. ACU's only allegation of bad intent is that TCUAFCU once ordered promotional pens that were a shade of red and designed a logo that used a shade of red. (Doc. 88 at 17.) However, less than one month after the announcement of TCUAFCU's name, TCUAFCU instructed its advertising agency not to use red. (Doc. 94 at 4.) Furthermore, TCUAFCU switched to a gold and black format, which is very different from ACU's color scheme. (Doc. 88 at 17.)

In *Freedom Savings*, the Eleventh Circuit noted that "the trial court reasonably interpreted [defendant's modification of its name in an effort to distinguish its business from plaintiff's] as evidence of good faith." *Freedom Sav. and Loan Ass'n v. Way*, 757 F.2d 1176, 1185 (11th Cir. 1985). In the instant case, TCUAFCU claims that it is involved in a transition from "The Credit Union of Alabama Federal Credit Union" to "Alabama Federal" in response to ACU's complaint.

7. Actual Confusion

The next and final factor looks to whether there have been instances of actual confusion. Actual confusion by a few customers is the best evidence of likelihood of confusion by many customers. *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 263 (5th Cir.), *cert. denied*, 449 U.S. 899 (1980).

ACU offers evidence of 199 instances of actual confusion in 53 declarations of its employees. (*Id.*) Some of the incidents involve a TCUAFCU customer calling or going inside an ACU branch while believing that he was calling or going inside a TCUAFCU branch. (*See, e.g.,* ACU's Evidentiary Material, Vol. 2, filed under seal, Ex. 8, 9, 13, 15, 17, 18, 27.) Other incidents involve TCUAFCU customers attempting to use ACU's internet access to access their TCUAFCU accounts. (*See id.* at Ex. 1.) Still other incidents involve prospective TCUAFCU employees attempting to apply for a job at ACU while under the impression that they were applying to TCUAFCU. (*See id.* at Ex. 22.)

ACU also points to the following testimony of TCUAFCU CEO John Dee Carruth:

> Q. Are the branches of the credit union now all bearing the – a sign that says BF Goodrich?
> A. No.
> Q. What – what do the signs on the branches say?
> A. I am sorry, they do say BF Goodrich. BF Goodrich Employees Federal Credit Union.
> Q. And don't mention the Credit Union of Alabama in the sign – outside signage in any way, correct?
> A. That's correct.
> Q. Why have you not put up new signs? Y'all just – are you just tight?
> A. Well, I – I don't want any more nonmembers making mistakes and driving to those buildings to do business, I guess.

(Doc. 78, Ex. A at 119-20.) Upon further questioning, Carruth stated that he did not believe confusion existed between the credit unions. (*Id.*)

In *Investacorp*, the court noted that "[a]lthough instances of consumer confusion are probative of secondary meaning, the few isolated instances cited by appellant are not adequate to present a genuine issue of material fact." *Investacorp*, 931 F.2d at 1526. In the present case, ACU has presented evidence of a large number of instances of actual confusion.

However, TCUAFCU cites authority suggesting that instances of actual confusion do not prove a likelihood of confusion when the instances did not result in a loss of sales. *See Lang v. Ret. Publ'g Co., Inc.*, 949 F.2d 576, 583 (2d Cir. 1991); *Sun Banks*, 651 F.2d 311.[5] In *Sun Banks*, the court discounted the plaintiff's evidence of actual confusion:

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[5] TCUAFCU also cites *American Television and Communications Corporation v. American Communications*, where the Eleventh Circuit held:

> Although there is an obvious superficial tendency to confuse the parties' names, we nevertheless note the paucity of plaintiff's evidence on this

> In three years, less than fifteen such incidents were reported. Some of those involved relatives of Sun Banks' employees, while others could not be identified. Apparently none of the remarks was made by a potential customer considering whether to transact business with one or the other of the parties. Sun Banks also produced four witnesses who recounted having inquired whether Sun Banks and Sun Federal were related. Again in each instance there is no indication that the inquiry was made by a potential customer concerning the transaction of business.

Sun Banks, 651 F.2d at 319. First, the court notes that ACU has provided numerous instances of confusion, not fifteen. Second, the court in *Sun Banks* did not ignore the plaintiff's evidence of actual confusion because it did not involve potential customers. Instead, it found the fact that the confusion did not involve potential customers to be a "countervailing circumstance[] which lessen[ed] the impact of asserted instances of confusion." *Id.* Therefore, TCUAFCU's cases hold that courts should consider whether instances of actual confusion involve potential customers. They do not, however, stand for the proposition that instances of actual confusion involving consumers in general (like

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> point. As found by the district court, plaintiff's name is not particularly distinctive, and its terms are often used in corporate names in the industry. There is no direct competition between the parties and advertising and soliciting are carried out under the names of their respective subsidiaries, franchises or divisions. Moreover, plaintiff's evidence of actual confusion did not involve consumers, those with whom it contracts to provide services to consumers, suppliers, or members of the investment community . . . . [T]he instances of confusion relied upon were short-lived, involved no customers, and resulted in no loss of sales.

Am. Television, 810 F.2d 1546, 1550 (11th Cir. 1987). *American Television* is distinguishable from the instant case. Unlike the parties in *American Television*, ACU and TCUAFCU are in direct competition and carry out advertising and soliciting under their own names. Furthermore, ACU's evidence involves customers. Nevertheless, the court recognizes that the court in *American Television* considered the fact that the plaintiff's instances of confusion did not result in a loss of sales.

the instances reported by ACU) are meaningless.

Furthermore, as noted by ACU, there is authority that evidence of actual confusion even by non-consumers or non-purchasers is relevant because it may injure a company's reputation or goodwill. *See* McCarthy § 23:5; *see also Beacon Mut. Ins. Co. v. OneBeacon Ins. Group*, 376 F.3d 8, 17-18 (1st Cir. 2004) (general evidence of actual confusion, even when not involving lost sales, is commercially relevant).

Therefore, ACU's evidence of confusion merits serious consideration. "Evidence of actual confusion 'is difficult to find . . . because many instances are unreported.'" *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700 (3d Cir. 2004) (quoting *Checkpoint Sys., Inc. v. Check Point Software Techs., Inc.*, 269 F.3d 270 (3d Cir. 2001)). Therefore, even a few incidents can be "highly probative of the likelihood of confusion." *Id.* Because ACU has produced evidence of 199 incidents of actual confusion, this factor weighs in favor of a finding of likelihood of confusion.

CONCLUSION

The majority of the seven factors used to assess the likelihood of consumer confusion between marks weigh in favor of such confusion between ACU's mark and the marks used by TCUAFCU. Most significantly, the fact that the evidence raises a genuine issue of material fact over whether ACU's mark has acquired a secondary meaning, combined with ACU's evidence of numerous instances of actual confusion, lead the court to the conclusion that there is a question of fact as to the likelihood of confusion and that

TCUAFCU's motion for summary judgment on this issue is due to be denied.

DONE this 31st day of March, 2008.

Sharon Lovelace Blackburn

SHARON LOVELACE BLACKBURN
CHIEF UNITED STATES DISTRICT JUDGE