| CIRCUIT | HOLDING | CASES |
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| First | • Hearsay admissible under state of mind exception<br>• Testimony offered to show that customers were confused, but not to prove the truth of the matter asserted admissible as non-hearsay<br>• To be admissible, testimony must come directly from employees who witnessed the confusion | Boston Athletic Ass'n v. Sullivan, 867 F.2d 22 (1st Cir. 1989)<br>• President's affidavit that purchaser of infringing shirt was confused is not hearsay; evidence was not offered to prove the truth of the matter asserted (Fed. R. Evid. 801(c)), but only to show that members of the public believed that the shirts were authorized; evidence admissible<br><br>Copy Cop, Inc. v. Task Printing, Inc., 908 F. Supp. 37 (D. Mass. 1995)<br>• President's testimony about customer queries to store employees held inadmissible because it was not direct testimony from the employees who actually heard the queries<br><br>CCBN.com, Inc. v. C-call.com, Inc., 73 F. Supp. 2d 106 (D. Mass 1999)<br>• Employees' affidavits describing incidents of customer confusion fall under "state of mind exception" to hearsay rule (Fed. R. Evid. 803(3)); evidence admissible<br><br>Beacon Mut. Ins. Co. v. OneBeacon Ins. Group, 376 F. Supp. 2d 251 (D. R.I. 2005)<br>• Live employee testimony about customer behavior expressing confusion held admissible as non-hearsay since it was not being offered for the truth of the matter asserted (Fed. R. Evid. 801(c)); employees' testimony about customer confusion manifested by statements equivalent to "I'm confused" held admissible under then-existing state of mind exception to the hearsay rule (Fed. R. Evid. 803(3)); plaintiff's "confusion matrix," which summarized numerous instances of apparent consumer confusion (including phone and e-mail inquiries and misdirected checks, letters, medical records, insurance claim forms, and health care statements) held inadmissible because the document states that someone said, in effect, "I received a letter that indicated confusion on the part of the author" |
| Second | • Hearsay admissible under state of mind exception<br>• State of mind exception does not apply to statements indicative of the state of mind of third parties<br>• Testimony offered to show that customers were confused, but not to prove the truth of the matter asserted admissible as non-hearsay | Programmed Tax Sys., Inc. v. Raytheon Co., 439 F. Supp. 1128 (S.D.N.Y. 1977)<br>• Vice President's affidavit citing statements of customer confusion (expressed via phone calls) is offered for the truth of the matter asserted; held to be inadmissible hearsay, unless statements come within an exception to the hearsay rule (Fed. R. Evid. 801-02); exception is available for statements of customers who were describing their "then existing state of mind," i.e. their confusion (Fed. R. Evid. 803(3)); here the customers were telling the employee about the state of someone else's mind, so exception was not available<br><br>Inc. Publ'g Corp. v. Manhattan Magazine, Inc., 616 F. Supp. 370 (S.D.N.Y. 1985)<br>• Employees' testimony about customer confusion held admissible because an inquiry is not an "assertion" and accordingly is not and cannot be a hearsay statement (Fed. R. Evid. 801(a), (c)); statements of customers' then existing state of mind fall within the exception of Rule 803(3)<br><br>Fun-damental Too, Ltd. v. Gemmy Indus. Corp., 111 F.3d 993 (2d Cir. 1997)<br>• Sales Manager's testimony that customers complained because they saw defendant's product and mistakenly thought plaintiff was selling its product at a lower price to other retailers . . . |

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| Second (cont.) | • Confusion logs inadmissible unless they qualify for one of the exceptions to the hearsay rule<br>• Two instances of anonymous customer confusion held to be inadmissible hearsay | held admissible; testimony was not offered to prove that plaintiff was actually selling to other retailers at lower prices, but was probative of the customers' confusion; statements otherwise excluded as hearsay are allowed to show the customer's then existing state of mind (Fed. R. Evid. 803(3))<br><br>Trouble v. Wet Seal, Inc., 179 F. Supp. 2d 291 (S.D.N.Y. 2001)<br>• Plaintiff's testimony citing customer statements held admissible because statements show the customer's state of mind as opposed to the truth of what they said (Fed. R. Evid 803(3)); employees' recordings of customer confusion in confusion logs do not fall within business records or residual exceptions to hearsay rule and are inadmissible; confusion logs were not created and kept in the ordinary course of business, but were prepared due to instructions from Trouble's management; logs do not have "sufficient indicia of trustworthiness to be considered reliable" because many entries are incomplete, disjointed and fail to fully identify who made or recorded the statements; unclear whether employees recorded actual conversations they had with customers or conversations they overheard customers have with others<br><br>Nora Beverages Inc. v. Perrier Group of Am. Inc., 269 F.3d 114 (2d Cir. 2001)<br>• Employees' testimony about two anonymous customers who selected defendant's product instead of plaintiff's held inadmissible and de minimis in nature |
| Third | • Hearsay admissible under state of mind exception<br>• State of mind exception does not apply to statements indicative of the state of mind of third parties<br>• Testimony offered to show that customers were confused, but not to prove the truth of the matter asserted admissible as non-hearsay | Kraft Gen. Foods, Inc. v. BC-USA, Inc., 840 F. Supp. 344 (E.D. Pa. 1993)<br>• General Manager's testimony about customers he observed and statements they made to him held admissible under the state of mind exception to the hearsay rule (Fed. R. Evid. 803(3)); GM's testimony that sampling consultant reported customer confusion is inadmissible hearsay because it is indicative of the state of mind of third parties<br><br>Versa Prods. Co., Inc. v. Bifold Co. Ltd., 50 F.3d 189 (3d Cir. 1995)<br>• Vice President's testimony that the sales manager advised him of confusion at trade shows held inadmissible because VP could not identify the people allegedly confused, and further, testimony only indicated that people thought the valves' appearances were similar, but not that they were actually confused by the similar appearances<br><br>Kos Pharms., Inc. v. Andrx Corp., 369 F.3d 700 (3d Cir. 2004)<br>• Vice President's testimony that he received more than sixty reports of confusion in his official capacity is not hearsay but a factual claim that has independent evidentiary significance tending to show actual confusion; customer statements exhibiting confusion are not hearsay when they are not submitted for their truth; customer statements proclaiming confusion are admissible under state of mind exception; admissibility of statements under Rule 803(3) exception does not depend on identifying the customers involved in each incident |

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| Third (cont.) | | Citizens Fin. Group, Inc. v. Citizens Nat'l Bank, 383 F.3d 110 (3d Cir. 2004)<br>• Employees' testimony describing their personal experiences with customers at the bank is not hearsay; if customers' statements were considered hearsay, Fed. R. Evid. 803(3) would apply, allowing statements to be admitted to show the customer's then existing state of mind |
| Fourth | • Hearsay admissible under state of mind exception<br>• Testimony offered to show that customers were confused, but not to prove the truth of the matter asserted admissible as non-hearsay | Valcom, Inc. v. Valcom, Inc., 1986 U.S. Dist. LEXIS 19437 (E.D. Va. 1986)<br>• Employee's testimony impeached, but would otherwise be admissible under Fed. R. Evid. 803(3) state of mind exception<br><br>Tools USA & Equip. Co. v. Champ Frame Straightening Equip., Inc., 87 F.3d 654 (4th Cir. 1996)<br>• Employees' testimony that they received phone calls from confused customers held admissible; the court did not discuss the hearsay evidentiary issue<br><br>Lyons P'ship, L.P. v. Morris Costumes, Inc., 243 F.3d 789 (4th Cir. 2001)<br>• Company's testimony about children's statements and also newspaper articles was not offered to prove the truth of the matter asserted, but only to prove that the children and reporters expressed their belief that the costume was Barney; this was direct evidence of the children's and reporters' reactions and was not hearsay |
| Fifth | • Hearsay admissible under state of mind exception<br>• Testimony offered to show that customers were confused, but not to prove the truth of the matter asserted admissible as non-hearsay | Armco, Inc. v. Armco Burglar Alarm Co., Inc., 693 F.2d 1155 (5th Cir. 1982)<br>• Armco employees' testimony that they received phone calls from customers trying to reach Armco Burglar Alarm held admissible because it was not being offered to prove the truth of the matter asserted, but only to show that customers thought that they were the same business; even if customer statements were offered to prove the truth of the matter asserted, they would be admissible under the state of mind exception (Fed. R. Evid. 803(3))<br><br>Freddie Fuddruckers, Inc. v. Ridgeline, Inc., 589 F. Supp. 72 (N.D. Tex. 1984)<br>• Employees' testimony about customer confusion held admissible under Fed. R. Evid. 803(3) state of mind exception; customer survey cards and statements demonstrated the customers' confused state of mind as to the services rendered by Fuddruckers and Purdy's<br><br>Quantum Fitness Corp. v. Quantum Lifestyle Centers, L.L.C., 83 F. Supp. 2d 810 (S.D. Tex. 1999)<br>• Employees' testimony that they received phone calls from confused customers held admissible because it was not being offered to prove the truth of the matter asserted, but only to demonstrate that the statements were made |

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| Sixth | • Testimony offered to show that customers were confused, but not to prove the truth of the matter asserted admissible as non-hearsay<br>• Sixth Circuit has not decided state of mind exception, but a district court concluded that employee testimony regarding phone conversations does *not* invoke the exception | Sunfield Eng'g, Inc. v. L & R Sunfield Indus., Inc., 1990 U.S. Dist. LEXIS 11484 (W.D. Mich. 1990)<br>• On plaintiff's motion for preliminary injunction, much of plaintiff's evidence was based on hearsay and vague impressions of plaintiff's principals, however *defendant* testified that he received a fax intended for plaintiff; although defendants regard this particular example of confusion as trivial, it is entitled to at least some weight<br><br>Mktg. Displays, Inc. v. Traffix Devices, Inc., 967 F. Supp. 953 (E.D. Mich. 1997)<br>• Employees' testimony that they received phone calls from confused customers held inadmissible; district court concluded that testimony regarding alleged phone conversations is unreliable hearsay which does not invoke the 803(3) state of mind exception; state of mind exception not decided by Sixth Circuit (Mktg. Displays, Inc. v. Traffix Devices, Inc., 200 F.3d 929 (6th Cir. 1999))<br><br>Standard Coffee Co., Inc. v. Wm. B. Reily & Co., Inc., 2000 U.S. App. LEXIS 6716 (6th Cir. 2000)<br>• President's affidavit that Standard Coffee received several phone calls from customers intending to call Reily held admissible because he was merely recounting the fact that Standard had received misdirected phone calls; this is not hearsay evidence |
| Seventh | • Hearsay admissible under state of mind exception<br>• Testimony offered to show that customers were confused, but not to prove the truth of the matter asserted admissible as non-hearsay<br>• Testimony lacking an exact quote or identity of the declarant held to be inadmissible vague hearsay | Mile High Upholstery Fabric Co. v. Gen. Tire & Rubber Co. Inc., 1983 U.S. Dist. LEXIS 14855 (N.D. Ill. 1983)<br>• Employees' testimony about customer confusion (including calls and letters) held admissible; evidence is not hearsay since it is not offered to prove the truth of the matter asserted; if hearsay, it is admissible under Fed. R. Evid. 803(3) as evidence of the caller's then existing state of mind<br><br>Source Servs. Corp. v. Source Telecomputing Corp., 635 F. Supp. 600 (N.D. Ill. 1986)<br>• Employees' affidavits that they received phone calls from confused customers held admissible under Fed. R. Evid. 803(3) as statements of the declarant's then existing state of mind; criticism that the affidavits originate with the plaintiff's employees, lack specificity, and that their similar format suggests preparation by a single source goes to the weight to be accorded the evidence, not its admissibility<br><br>Int'l Kennel Club, Inc. v. Mighty Star, Inc., 846 F.2d 1079 (7th Cir. 1988)<br>• Employee testimony about customer confusion (including calls, letters, and questions at dog shows) held admissible; weight of authority allows the admission of letters directed to the plaintiff where the evidence contains factual data that is material to the issue of the likelihood of confusion<br><br>Smith Fiberglass Prods., Inc. v. Ameron, Inc., 7 F.3d 1327 (7th Cir. 1993)<br>• Employee's testimony disregarded as vague hearsay because it lacked an exact quote or the identity of the person making the statement; court may discount de minimis evidence of actual confusion, such as this vague paraphrase by unknown declarant |

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| Eighth | • Testimony offered to show that customers were confused, but not to prove the truth of the matter asserted admissible as non-hearsay<br>• *No* state of mind exception recognized<br>• Vague or ambiguous evidence of customer confusion considered hearsay | Vitek Sys., Inc. v. Abbott Labs., 675 F.2d 190 (8th Cir. 1982)<br>• Employees' and consultants' testimony that customers had told them that they were confused by the marks was hearsay in nature and the district court properly found it "ambiguous at best and not credibly probative of the asserted confusion;" district court could refuse to credit the uncorroborated testimony of such interested persons (company employees and consultants)<br><br>Duluth News-Tribune v. Mesabi Publ'g Co., 84 F.3d 1093 (8th Cir. 1996)<br>• At the summary judgment stage, vague evidence of misdirected phone calls and mail is "hearsay of a particularly unreliable nature given the lack of an opportunity for cross-examination of the caller or sender regarding the reason for the confusion;" evidence was de minimis because it demonstrated the inattentiveness of the caller or sender rather than actual confusion<br><br>Rainforest Cafe, Inc. v. Amazon, Inc., 86 F. Supp. 2d 886 (D. Minn. 1999)<br>• Restaurant manager's testimony about customer confusion (he was asked by customers if his restaurant got the idea for décor from the other restaurant and if the two restaurants were associated) held admissible because his affidavit clearly set forth the reason for the confusion demonstrated by the customers; affidavit did not allege that customers explicitly stated that they were confused (unlike Vitek noted above) and therefore was not presented to prove the truth of the matter asserted; affidavit instead presented statements and questions made that demonstrated confusion; statement that his staff was asked if the restaurants are affiliated held inadmissible as double hearsay<br><br>Bebe Stores, Inc. v. May Dep't Stores Int'l, Inc., 230 F. Supp. 2d 980 (E.D. Mo. 2002)<br>• Employees' testimony about customer confusion (customers coming into stores asking for items seen in "be" ads, attempting to return "be" merchandise at bebe stores, and asking questions or making comments about bebe selling its clothes in department stores) held admissible because the comments in affidavits are not hearsay; they were not introduced to prove the truth of the matter; unlike the speculative hearsay evidence rejected in Vitek (noted above) this is "very strong direct evidence"<br><br>Frosty Treats, Inc. v. Sony Computer Entm't Am., Inc., 426 F.3d 1001 (8th Cir. 2005)<br>• Employee's testimony that five to ten people had asked whether Frosty Treats sponsored the Twisted Metal games held inadmissible because he could not specifically recall what the individuals said to him, their names, or the dates or locations of the inquiries; even if the testimony was admissible, more is needed to establish the likelihood of confusion than the ambiguous testimony of an interested person that there were several inquires over a two-year period |

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| Ninth | • District courts have issued conflicting rulings on the admissibility of hearsay evidence<br>• The Ninth Circuit has not yet ruled on the issue<br>• The Central District of California had previously held hearsay evidence to be inadmissible, but the most recent case (*Conversive*) reached the opposite conclusion and held hearsay evidence to be admissible<br>• Testimony offered to show that customers were confused, but not to prove the truth of the matter asserted admissible as non-hearsay | Mustang Motels, Inc. v. Patel, 1985 U.S. Dist. LEXIS 22162 (C.D. Cal. 1985)<br>• Employees' testimony that they received numerous phone calls from confused customers held admissible; evidence is offered to prove that callers made the assertions, not to prove the truth of their statements<br><br>Alchemy II, Inc. v. Yes! Entm't Corp., 844 F. Supp. 560 (C.D. Cal. 1994)<br>• Company's evidence of fifteen customer phone calls inquiring where to purchase the defendant's product, declaration that a designer was shocked to learn of product differences, and newspaper articles referring to the defendant's product as an improved newer version of the plaintiff's is all inadmissible hearsay<br><br>Ultrapure Sys., Inc. v. Ham-Let Group, 921 F. Supp. 659 (N.D. Cal. 1995)<br>• Company's testimony that several people approached its booth at a trade show and displayed confusion regarding the source of its product held admissible because statements are not offered for the truth of the matter but only to show that people at the trade show asked questions regarding the source of the products; evidence though admissible is weak because the circumstances surrounding the statements and motivations of the speakers is unclear<br><br>Avery Dennison Corp. v. Acco Brands, Inc., 1999 WL 33117262 (C.D. Cal 1999)<br>• Employees' testimony about customer confusion held inadmissible because no identification was made of the people allegedly confused, and no reason or explanation was given by these unidentified people for their confusion; even where the person was identified, no reason was given for his confusion<br><br>Meeker v. Meeker, 2004 U.S. Dist. LEXIS 22708 (N.D. Cal. 2004)<br>• Winery owner's evidence including statements of several unidentified confused persons held to be inadmissible hearsay; there is little foundation for the introduction of the alleged statements of unknown persons; even if persons were identified, such evidence would carry de minimis evidentiary weight<br><br>Conversive, Inc. v. Conversagent, Inc., 433 F. Supp. 2d 1079 (C.D. Cal. 2006)<br>• Employees' testimony that potential customers were confused held admissible; followed reasoning of the Second, Third, Fourth, and Fifth Circuits applying evidence rules; court distinguished prior cases holding hearsay evidence to be inadmissible; stated that "none of these cases discuss the issue of whether the statements are offered for their truth or whether the state-of-mind exception to the hearsay rule applies. For that reason the court does not find them persuasive" |

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| Ninth (cont.) | | Sinhdarella Inc. v. Vu, 85 U.S.P.Q.2d 2007<br>• Employees' testimony about customer confusion held admissible; Ninth Circuit has not addressed the issue directly, but district court followed the majority of circuits allowing evidence to show actual customer confusion on the ground that it was not offered to show the truth of the matter asserted and was only offered to show the state of mind of the customer<br><br>Instant Media, Inc. v. Microsoft Corp., 2007 U.S. Dist. LEXIS 61443 (N.D. Cal. 2007)<br>• CEO's statement that the company received a number of phone calls and website inquiries from customers with questions held to be inadmissible hearsay; court cited Duluth (8th Cir.) and Alchemy II (C.D. Cal) as precedent |
| Tenth | • Hearsay admissible under state of mind exception | Jordache Enters., Inc. v. Hogg Wyld, Ltd., 828 F.2d 1482 (10th Cir. 1987)<br>• Executive Vice President's testimony about associates' confusion held admissible because it was offered to show the then existing state of mind of the associates (Fed. R. Evid. 803(3)) |
| Eleventh | • Hearsay admissible under state of mind exception<br>• Double hearsay is inadmissible<br>• Testimony offered to show that customers were confused, but not to prove the truth of the matter asserted admissible as non-hearsay | Univ. of Ga. Athletic Ass'n. v. Laite, 756 F.2d 1535 (11th Cir. 1985)<br>• Employee's affidavit that he received ten to fifteen inquiries in person or by phone about the sale of defendant's beer and its connection with the University held admissible; considered persuasive evidence of actual confusion; the court did not discuss the hearsay evidentiary issue<br><br>Ocean Bio-Chem, Inc. v. Turner Network Television, Inc., 741 F. Supp. 1546 (S.D. Fla 1990)<br>• Sales rep's affidavits contain inadmissible double hearsay; declarants cannot attest to the out-of-court statements of others; hearsay statements that do fall within the exception of Fed. R. Evid. 803(3) can be used to show actual confusion<br><br>Popular Bank of Fla. v. Banco Popular de P. R., 9 F. Supp. 2d 1347 (S.D. Fla. 1998)<br>• Switchboard Operator's testimony that she received over 3,000 phone calls from confused customers is admissible because it falls within the state of mind exception of Fed. R. Evid. 803(3); testimony regarding calls taken by someone else during her lunch break held to be inadmissible as double hearsay<br><br>Sun Prot. Factory, Inc. v. Tender Corp., 2005 U.S. Dist. LEXIS 35623 (M.D. Fla. 2005)<br>• President's testimony about customer confusion (in the form of mistaken orders, sales, and phone calls) held admissible because at the summary judgment stage the court draws all reasonable inferences in favor of the nonmoving party; here it is not apparent to the court whether customers told Sun Protection they were confused as to the source of the product (a direct statement of mind that would be inadmissible hearsay) or whether the customers merely demonstrated confusion (the company may make statements of customer confusion to demonstrate that the complaints were made); inference drawn in favor of the nonmoving party (Sun Protection) allows the testimony |

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| T.T.A.B. | • Hearsay admissible under state of mind exception | Toys "R" Us, Inc. v. Lamps R Us, 1983 TTAB LEXIS 229 (Trademark Trial & App. Bd. 1983)<br>• Employee's testimony that customers arrive at store at 10:00 (when it opens at 11:00) because customers believed the stores were affiliated held admissible as evidence that people have made an association between the two stores<br><br>Nat'l Rural Elec. Coop. Ass'n. v. Suzlon Wind Energy Corp., 2006 TTAB LEXIS 134 (Trademark Trial & App. Bd. 2006)<br>• Employee's testimony about e-mail from the general counsel of one of plaintiff's cooperatives expressing his confusion held admissible under state of mind exception to hearsay rule (Fed. R. Evid. 803(3)) |