

**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. 2:
TO EXCLUDE EVIDENCE, ARGUMENT, AND TESTIMONY REGARDING
FACEBOOK, INC.’S TEMPORARY REDIRECTION OF
PLAINTIFF’S FACEBOOK PAGE**

Defendant Facebook, Inc. (“Facebook”) respectfully moves this Court *in limine* for an order excluding evidence, argument, and testimony regarding Facebook’s temporary and unintentional redirection of Plaintiff’s Facebook page (www.facebook.com/timelines).

I. INTRODUCTION

Plaintiff will seek to introduce evidence that for a very brief period of time Facebook redirected Internet users attempting to access Plaintiff’s Facebook page to an informational page regarding Facebook’s timeline feature. This fact is irrelevant under Federal Rule of Evidence 401. Further, such evidence should be barred under Federal Rule of Evidence 403 because any probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. The Court should therefore preclude the admission of this evidence.

II. BACKGROUND

In connection with launching Facebook’s timeline feature at the f8 Conference, Facebook created an informational web page available at Facebook.com/about/timeline (the “About” Page). (Declaration of Brendan J. Hughes in Support of Defendant Facebook, Inc.’s Motion *in*

Limine No. 2: To Exclude Evidence, Argument, or Testimony Regarding Facebook, Inc.’s Temporary Redirection of Plaintiff’s Facebook Page (“Hughes Decl.”), Ex. A (Deposition of Samuel Lessin (“Lessin Dep. Tr.”)) at 277.) Facebook also made the information reachable via Facebook.com/timeline by redirecting users who entered that URL to Facebook.com/about/timeline. (*Id.* at 277-78; Hughes Decl., Ex. B at FB_TL00002147-2148.) In doing so, a Facebook engineer made a minor computer coding error that caused the redirection of Internet users seeking to access not just Facebook.com/timeline exactly, but also any URL starting with “Facebook.com/timeline,” including Plaintiff’s Facebook webpage at Facebook.com/timelines, and, hypothetically, Facebook.com/timelineanythingelse. (Hughes Decl., Ex. A (Lessin Dep. Tr.) at 278, 282.) The computer coding error was unintentional. Facebook immediately corrected the error once it learned about the problem (when Plaintiff filed its complaint in this action). (*Id.* at 278-79.)

Plaintiff has alleged that the temporary redirection demonstrates Facebook’s knowledge of and intention to create consumer confusion. (Dkt. No. 27 (Pl.’s First Amended Complaint), ¶¶ 10-12.) The redirection, however, demonstrates neither. The redirection was a technological glitch, entirely unrelated to Plaintiff, its purported “Timelines” mark, or this dispute. Thus, any evidence, argument, or testimony regarding the redirection should be excluded as irrelevant and potentially prejudicial evidence under Federal Rules of Evidence 401, 402, and 403.

III. ARGUMENT

Federal Rule of Evidence 401 provides that evidence is relevant if it “has any tendency to make a fact more or less probable than it would be without the evidence.” FED. R. EVID. 401. Irrelevant evidence is inadmissible, while relevant evidence is admissible unless a binding rule holds otherwise. *See* FED. R. EVID. 402. “The court may exclude relevant evidence if its

probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” FED. R. EVID. 403.

Where, as here, evidence lacking any probative value is simply proffered to elicit an emotional response from the jury, the Court should exclude it.

The term “unfair prejudice,” within the context of Rule 403, means undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one. *Depew v. Hanover Ins. Co.*, 438 F.Supp. 358, 360 (E.D.Tenn.1977); *cf. United States v. Grassi*, 602 F.2d 1192, 1197 (5th Cir.1979). Generally, it is said that the danger of unfair prejudice in the admission of evidence always exists where it is used for something other than its logical probative force.

Empire Gas Corp. v. American Bakeries Co., 646 F.Supp. 269, 276 (N.D. Ill 1986).

Plaintiff will attempt to introduce evidence of the temporary redirection of its Facebook page, which was the result of a technological coding error. The uncontroverted testimony of Sam Lessin, Facebook’s Director of Product Management, makes clear that Facebook was not aware of the mistake when it occurred, that the redirection was unintentional, and that Facebook resolved the mistake shortly after it was made aware of the issue (within a week of the error). (Hughes Decl., Ex. A (Lessin Dep. Tr.) at 278.) In short, not a shred of evidence developed and explored during discovery in this case indicates that the redirection was anything other than the result of an inadvertent software programming error, that Facebook had any intent to redirect users from Plaintiff’s page, or that anyone at Facebook was even aware of the redirection before Plaintiff brought it to Facebook’s attention by filing this lawsuit.

The redirection is not evidence of confusion because it has nothing to do with either Facebook’s or Plaintiff’s uses of the term “timeline” in connection with their respective products, or consumers’ perception of those uses. At most, the redirection provides an example of a simple mistake made by an engineer when assisting in the rollout of a new feature by Facebook.

Rather than assist the jury in making a determination of whether Facebook infringed Plaintiff's purported rights in the "TIMELINES" mark, evidence of the redirection would only confuse the jury during trial and inject extraneous information into their analysis. Plaintiff should therefore be precluded from introducing evidence of the redirection at trial.

IV. CONCLUSION

Based on the foregoing, Facebook respectfully requests that the Court exclude evidence, argument, and testimony regarding the temporary redirection of Plaintiff's Facebook page under Federal Rules of Evidence 401, 402 and 403.

Dated: April 8, 2013

Respectfully submitted,

COOLEY LLP

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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. 2: TO EXCLUDE EVIDENCE, ARGUMENT, AND TESTIMONY REGARDING THE TEMPORARY REDIRECTION OF PLAINTIFF'S FACEBOOK PAGE** 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

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