

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

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

**TIMELINES’ MEMORANDUM IN SUPPORT OF MOTION *IN LIMINE* NO. 2
TO EXCLUDE FACEBOOK FROM MENTIONING AT TRIAL THAT FACEBOOK IS
SEEKING CANCELLATION OF THE TIMELINES MARKS**

Plaintiff/Counter-Defendant Timelines, Inc. (“Timelines”), through its attorneys, Reed Smith LLP, moves this Court *in limine*, pursuant to Federal Rules of Evidence 401, 402, and 403, to bar Defendant/Counter-Plaintiff Facebook, Inc.’s (“Facebook”) from mentioning at trial or introducing any evidence at trial that Facebook filed a counterclaim seeking the cancellation of Timelines’ TIMELINES marks. In support of its Motion *In Limine* No. 2, Timelines state as follows:

INTRODUCTION

Facebook’s counterclaim to cancel Timelines’ trademark has no bearing on any issue that the jury must decide. The jury in this case will not decide whether Facebook is successful on its counterclaim to cancel Timelines’ trademark. Instead, the jury must address Facebook’s alleged infringement, Facebook’s affirmative defenses, and, if appropriate, damages. Only if the Jury finds against Timelines is Facebook then entitled to cancellation. And even then, the jury plays no role. Instead, Facebook must file a petition for cancellation with the Trademark Trial and Appellate Board or the Court may direct the board to cancel the marks. Because evidence of Facebook’s counterclaim for cancellation has no probative value, its only function is to unfairly

prejudice Timelines by legitimizing and crediting Facebook's infringement. For these reasons, which are discussed in detail below, the Court should exclude Facebook from presenting any evidence at trial relating to the fact that Facebook has filed a counterclaim seeking to cancel the TIMELINES marks.

ARGUMENT

A. Evidence that Facebook Has Filed a Counterclaim to Cancel the TIMELINES Marks is not Relevant under Fed. R. Evid. 401 and, Therefore, not Admissible at Trial.

Timelines anticipates that at trial Facebook will attempt to introduce evidence that Facebook has filed a counterclaim seeking cancellation of the trademarks in an improper attempt to legitimize, accredit, and even justify its infringement. This evidence, however, is not relevant under Fed. R. Evid. 401 and, therefore, is not admissible at trial. *See United States v. Klebig*, 600 F.3d 700, 710 (7th Cir. 2009) (“[A]ll relevant evidence is admissible, and evidence which is not relevant is not admissible.” (citing Fed. R. Evid. 402)). Under Fed. R. Evid. 401, evidence is relevant when it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *Thompson v. City of Chicago*, 472 F.3d 444, 453-54 (7th Cir. 2006) (citing Fed. R. Evid. 401).

First, Facebook's counterclaim does not meet the admissibility requirements of Rule 401 because the fact that Facebook has filed a counterclaim has no “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *See id.* There are no independent elements to Facebook's counterclaim and the merits of this claim are not directly put to the jury. Instead, the counterclaim's success is subsumed in the jury's determination of whether the TIMELINES

marks are distinctive or generic. The real issue, therefore, that the jury must decide is whether Timelines' trademarks are valid. And whether or not Facebook has counterclaimed to cancel the marks has no tendency to make the validity of the marks more or less probable. Under Rule 401, therefore, Facebook's counterclaim is not relevant and should be excluded from being mentioned at trial.

B. Evidence that Facebook Has Filed a Counterclaim to Cancel the TIMELINES Marks is Not Admissible Under Rule 403 because it is Unfairly Prejudicial and Confusing.

As set forth above, evidence that Facebook has filed a counterclaim seeking to cancel Timelines' trademarks has no probative value. But what this evidence *does* have, on the other hand, is a strong potential to prejudice Timelines and confuse the jury. This evidence, therefore, should be excluded under Rule 403, which permits a district court to "exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting of time, or needlessly presenting cumulative evidence." *United States v. Boros*, 668 F.3d 901, 909 (7th Cir. 2012) (citing Fed. R. Evid. 403).

The introduction of evidence, testimony, or argument related to the fact Facebook has filed a counterclaim to cancel Timelines' trademarks has a serious risk of improperly legitimizing or validating Facebook's infringement. A jury, for instance, may think that because Facebook is seeking cancellation, Facebook must have had a good faith belief that the TIMELINES marks are generic and not protectable. Or worse yet, the jury may inappropriately infer that the TIMELINES marks are generic simply because Facebook has counterclaimed to cancel them. Either way, Facebook's decision to roll out a nearly identically named product will appear excusable, perhaps even warranted. Because Facebook's counterclaim for cancellation

has no bearing on *any* issue to be decided by the jury, its only purpose would be to prejudice Timelines.

In addition to being unfairly prejudicial, evidence related to Facebook's counterclaim for cancellation will also confuse the jury. The jury in this case is already faced with complex factual and legal issues in determining the disputed issues related to Facebook's alleged infringement, Facebook's affirmative defenses, and damages. On top of this, the jury should not be presented with arguments related to a counterclaim that they will not decide or even see referenced in the jury instructions. Given this evidence's unfair prejudicial effect and the strong potential to confuse the issues the jury must actually decide in this case, it is not admissible under Rule 403.

CONCLUSION

At trial there is no proper role for evidence that Facebook has counterclaimed to cancel the TIMELINES marks under the Federal Rules of Evidence. Its only purpose would be to prejudice Timelines and confuse the jury's assessment of the claims, defenses, and damages actually at issue in this case. For these reasons and the reasons above, Rules 401, 402, and 403 require that this evidence be excluded at trial. Accordingly, this Court should grant this Motion *In Limine* No. 2.

DATED: April 8, 2013

Respectfully submitted,

TIMELINES, INC.,
Plaintiff/Counter-Defendant

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CERTIFICATE OF SERVICE

I, the undersigned attorney, certify that I electronically filed **TIMELINES' MEMORANDUM IN SUPPORT OF MOTION *IN LIMINE* NO. 2 TO EXCLUDE FACEBOOK FROM MENTIONING AT TRIAL THAT FACEBOOK IS SEEKING CANCELLATION OF THE TIMELINES MARKS**. Pursuant to Rule 5(b)(3) of the Federal Rules of Civil Procedure and Local Rule 5.9, I have thereby electronically served all Filing Users.

DATED: April 8, 2013

Respectfully submitted,

TIMELINES, INC.,
Plaintiff/Counter-Defendant

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