

**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. 3 TO EXCLUDE FACEBOOK FROM REFERRING TO
TIMELINES' ACTUAL DAMAGES AT TRIAL**

Plaintiff Timelines, Inc. (“Timelines”), through its attorneys, Reed Smith LLP, moves this Court *in limine*, under Federal Rules of Evidence 401, 402, and 403, to bar Defendant Facebook, Inc.’s (“Facebook”) from mentioning at trial or introducing any evidence at trial related to Timelines’ lack of actual damages. In support of its Motion *In Limine* No. 3, Timelines states as follows:

INTRODUCTION

Timelines’ actual damages and, more specifically, whether Timelines has any actual damages are not related to any issue in this case. Timelines, for instance, is not seeking actual damages. Nor are actual damages required to prove Timelines’ trademark infringement claim or recover Facebook’s profits. Simply put, whether Timelines has suffered actual damages is not relevant under Rule 401 because it has no tendency to make a fact that is of consequence in determining this action more or less probable. On top of that, evidence of whether Timelines has suffered actual damages is unfairly prejudicial under Rule 403 for several reasons, ranging from portraying Timelines in an unfavorable light to confusing and misleading the jury. For these

reasons, which are explained more fully below, Facebook should be barred at trial from mentioning, introducing, or referring to any evidence related to Timelines' actual damages or the fact that Timelines is not seeking or has not suffered actual damages.

ARGUMENT

A. Whether Timelines has any Actual Damages is not Relevant under Rule 401 and, Therefore, not Admissible at Trial.

Timelines anticipates that Facebook will improperly attempt to introduce evidence related to whether Timelines has suffered actual damages as a result of Facebook's infringement of Timelines' TIMELINES marks. This evidence, however, is not relevant under Rule 401 and, therefore, 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).

Here, evidence related to whether Timelines has suffered actual damages has no bearing on any matter that will be put to the jury. First, Timelines is not seeking to recover actual damages in this case. So Timelines' actual damages are not in dispute. Second, actual damages are not required to succeed on a trademark infringement claim. *See Web Printing Controls Co., Inc. v. Oxy-Dry Corp.*, 906 F.2d 1202, 1204 (7th Cir. 1990) (“[T]he elements necessary to establish a violation of section 43(a) of the Lanham Act do not include any involving actual injury”). Nor are they required to recover costs, attorney's fees, or Facebook's wrongful profits. *See id.* (contrasting the standard for damages with the standard for equitable relief, such as defendant's profits). The Seventh Circuit has made this point clear. In *Web Printing*

Controls, for instance, the Court explained that “a recovery of defendant’s profits, an award of costs of the action, and, in some exceptional cases, an award of attorney’s fees . . . flow not from the plaintiffs’ proof of its injury or damages” *Web Printing Controls Co., Inc.*, 906 F.2d at 1205.

Given that Timelines’ actual damages are neither in dispute nor related to any element in any of the claims in this case, evidence that Timelines may or may not have suffered actual damages 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 Thompson*, 472 F.3d at 453-54. On this basis alone, evidence of Timelines’ actual damages is inadmissible at trial and should be excluded pursuant to the Federal Rules of Evidence.

B. Even If Relevant, Timelines’ Actual Damages are Not Admissible under Fed. R. Evid. 403.

Even if evidence of Timelines’ actual damages is somehow relevant, it is still not admissible because the probative value of that evidence is outweighed by the dangers expressed in Rule 403. Rule 403 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).

As set forth above, evidence of Timelines’ actual damages has no probative value. Its only purpose, therefore, if admitted, would be to unfairly prejudice Timelines. A jury, for instance, may be resentful of, or worse yet, hostile to, a party that has no actual damages but, nonetheless, files a trademark infringement suit. This in turn could lead to a jury being reluctant to find infringement or discouraged from awarding Timelines Facebook’s wrongful profits. The

ultimate result then would be a jury verdict rendered on an improper basis, rather than the facts in evidence. The Seventh Circuit has repeatedly warned against this, explaining that “[e]vidence is considered unfairly prejudicial, not merely because it damages the opposing party’s case, but also because its admission makes it likely that the jury will be induced to decide the case on an improper basis, commonly an emotional one, rather than on the evidence presented” *Thompson*, 472 F.3d at 456-57 (internal citation omitted). Because evidence of Timelines’ lack of actual damages has the strong potential to improperly turn the jury against Timelines, while at the same time, garnering unwarranted sympathy for Facebook, it is not admissible under Rule 403 and should be excluded at trial.

Besides being unfairly prejudicial, admitting evidence of Timelines’ actual damages is also confusing and creates a serious risk of misleading the jury. The jury in this case is already faced with complex factual and legal issues in determining the disputed issues related to the infringement claim. The introduction of evidence, testimony or argument related to irrelevant actual damages would only cause juror confusion and divert the jury’s attention away from the issues that the jury must decide. As already explained, actual damages are not an element of Timelines’ trademark infringement claim. Nor are they required for Timelines to recover Facebook’s wrongful profits. Even with an instruction in this regard, a jury may still not fully understand this. Put differently, if Facebook is permitted to offer evidence that Timelines’ lacks actual damages, the jury may think that Timelines has not proved its infringement claim or that Timelines is not entitled to recover Facebook’s profits. This is yet another reason why, under Rule 403, evidence of Timelines’ damages, or the lack thereof, should be excluded at trial.

Because evidence of Timelines’ actual damages has *no* probative value, but, instead, has a strong likelihood to create unfair prejudice, Rule 403 requires this evidence be excluded at

trial. *See United States v. Vargas*, 552 F.3d 550, 557 (7th Cir. 2008) (“[T]he more probative the evidence, the more the court will tolerate some risk of prejudice, while less probative evidence will be received only if the risk of prejudice is more remote.”).

CONCLUSION

At trial there is no proper role for evidence regarding whether Timelines has suffered actual damages. Its only purpose would be to prejudice Timelines and confuse the jury’s assessment of the claims and damages actually at issue in this case. For these reasons and the reasons set forth above, Federal Rules of Evidence 401, 402, and 403 require that this evidence be excluded at trial. Accordingly, the Court should grant Timelines’ Motion *In Limine* 3.

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. 3 TO EXCLUDE FACEBOOK FROM REFERRING TO TIMELINES' ACTUAL DAMAGES AT TRIAL.** 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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