

**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.)	

**FACEBOOK, INC.’S MOTION *IN LIMINE* NO. 5: TO EXCLUDE EVIDENCE,
TESTIMONY, AND ARGUMENT RELATING TO FACEBOOK, INC.’S
OVERALL FINANCIAL CONDITION AND NET WORTH**

I. INTRODUCTION

Defendant Facebook, Inc. (“Facebook”) respectfully moves this Court *in limine* for an order excluding evidence, testimony, and argument relating to Facebook’s overall financial condition and net worth – *e.g.*, the valuation of the company as a whole, the ability of Facebook to pay damages, proceeds and any other facts related to Facebook’s initial public offering, revenues and profits from anything other than advertising on users’ “profile/timeline” pages, and other indicators of the size and value of Facebook’s entire business. Facebook anticipates that Plaintiff Timelines, Inc. (“Plaintiff”) will attempt to reference Facebook’s overall financial condition and net worth at trial. This evidence is irrelevant to any issue in this case and should be excluded under Federal Rules of Evidence 401 and 402. In the alternative, this evidence should be excluded under Federal Rule of Evidence 403 because its probative value is substantially outweighed by the likelihood that it will unfairly prejudice Facebook and waste the Court’s time.

II. BACKGROUND

Plaintiff purports to own “Timelines,” “Timelines.com,” and a stylized version of “Timelines” as trademarks. (Dkt. No. 27, Am. Compl. ¶ 19.) Plaintiff alleges that Facebook’s

use of the term “timeline” in connection with a feature on its social media website that organizes user content in chronological order constitutes forward and reverse trademark infringement, false designation, and unfair competition under the Lanham Act (Counts I-IV of Plaintiff’s Amended Complaint), unfair and deceptive acts and practices under the Illinois Consumer Fraud and Deceptive Practices Act (Count V), and deceptive trade practices under the Illinois Uniform Deceptive Trade Practices Act (Count VI). (*Id.* at ¶¶ 40-42, 48-49, 55-56, 68, 74.)

In support of its efforts to obtain a monetary award, Plaintiff relies on one expert witness (Declaration of Brendan J. Hughes in Support of Defendant Facebook, Inc.’s Motion *in Limine* No. 5 (“Hughes Decl.”), Ex. A (Hand Depo.) at 250:10-14.), who bases his theory for monetary recovery exclusively on the profits Facebook allegedly gained from using the term “timeline.” (Hughes Decl., Ex. B (Haas Report) ¶ 16.) Plaintiff’s expert did not opine on any actual damages sustained by Plaintiff, as there is no evidence whatsoever to suggest that there were any.

Facebook has provided Plaintiff with financial data relating to advertising displayed on the Facebook user pages previously known as “profile” and subsequently known as “timeline.” Plaintiff does not need to use any evidence relating to Facebook’s overall financial condition and net worth for its profits calculation.

III. ARGUMENT

A. Evidence Relating to Facebook’s Overall Financial Condition and Net Worth Is Inadmissible Because It Is Irrelevant.

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. Evidence that is not relevant is inadmissible. FED. R. EVID. 402.

As a general rule, evidence of a party's financial condition is inadmissible unless punitive damages are at issue. *Van Bumble v. Wal-Mart Stores, Inc.*, 407 F.3d 823, 826-827 (7th Cir. 2005) (punitive damages were not at issue and the court affirmed the district court's decision to exclude evidence relating to plaintiffs' financial situation because it was irrelevant and would be prejudicial to the jury's determination of damages); *U.S. v. Fuesting*, 845 F.2d 664, 673 (7th Cir. 1988) (affirming the district court's decision to exclude evidence relating to the defendant's financial transactions and general financial status under Rules 401 and 402 because they were irrelevant to the offenses with which he was charged); *Pivot Point Int'l, Inc. v. Charlene Prods., Inc.*, 932 F.Supp. 220, 223 (N.D. Ill. 1996) (finding a party's financial information irrelevant except perhaps to the issue of punitive damages under a state law claim); *Fopay v. Noveroske*, 31 Ill.App.3d 182, 199 (1975) (citing *Hedge v. Midwest Contractors Equip. Co.*, 53 Ill.App.2d 365 (1964)) ("when [only] compensatory damages are in issue, evidence of a party's wealth is clearly inadmissible"); *see also Whiteley v. OKC Corp.*, 719 F.2d 1051, 1055 (10th Cir. 1983) (citing 22 Am.Jur.2d Damages § 322 (1965)) ("To admit financial condition evidence, the damages to be determined must be punitive in nature.").

Punitive damages are not at issue in this case. For five of Plaintiff's six alleged counts, punitive damages are not available under applicable law. Plaintiff's Counts I-IV assert alleged violations of the Lanham Act, which the courts have consistently held prohibits an award of punitive damages. *BASF Corp. v. Old World Trading Co.*, 41 F.3d 1081, 1096 (7th Cir. 1994) (the Lanham Act has been construed to expressly forbid the award of damages to punish an infringer, *i.e.*, punitive damages). Plaintiff's Count VI claims an alleged violation of the Illinois Uniform Deceptive Trade Practices Act, which only permits injunctive relief — not damages, punitive or otherwise. *See Fedders Corp. v. Elite Classics*, 279 F.Supp.2d 965, 972 (S.D. Ill.

2003) (citing *Greenberg v. United Airlines*, 206 Ill.App.3d 40 (1990)) (the Illinois Uniform Deceptive Trade Practices Act “does not provide a cause of action for damages....”).

Under Plaintiff’s remaining cause of action (Count V), for an alleged violation of the Illinois Consumer Fraud and Deceptive Practices Act (“Consumer Fraud Act”), Plaintiff is not entitled to punitive damages because it has not suffered actual damages. *Dubey v. Public Storage, Inc.*, 395 Ill.App.3d 342, 356 (2009) (plaintiff must prove that it sustained actual damage in order to recover damages under the Consumer Fraud Act); *Kirkpatrick v. Strosberg*, 385 Ill.App.3d 119, 132 (2008) (citing 815 ILCS 505/10a) (if a person cannot show it suffered actual damage an award of punitive damages is not unavailable); *Keefe v. Allied Home Mortg. Corp.*, 393 Ill.App.3d 226, 235 (2009) (citing *Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 402 (2002)) (punitive damages cannot be awarded unless actual damages are proven).

Plaintiff relies exclusively on one expert witness to attempt to establish a basis for monetary relief in this case. (Hughes Decl., Ex. A (Hand Depo.) at 250:10-14.) Plaintiff’s expert’s theory for relief is based only on Facebook’s alleged profits attributable to its allegedly infringing use of the term “timeline,” not any actual damages suffered by Plaintiff. (Hughes Decl., Ex. B (Haas Report), ¶ 16.) Plaintiff has not and cannot prove it has sustained any actual damages – nor has it tried. *See id.* Given that Plaintiff has not produced any evidence that it suffered actual damages, Plaintiff is not entitled to punitive damages under the Consumer Fraud Act.

Because punitive damages are not at issue in this case, evidence, testimony, and argument relating to Facebook’s financial condition or its overall net worth is irrelevant and thus inadmissible. *See Fuesting*, 845 F.2d at 673; *Pivot Point Int’l*, 932 F.Supp. at 223. Accordingly, the Court should exclude any such evidence from trial, including facts, testimony, and argument

concerning the valuation of the company as a whole, the ability of Facebook to pay damages, proceeds and any other facts related to Facebook's initial public offering, revenues, and profits from anything other than advertising on users' "profile/timeline" pages, and other indicators of the size and value of Facebook's entire business.

B. Evidence Regarding Facebook's Overall Financial Condition and Net Worth Should Also Be Excluded Under Federal Rule of Evidence 403.

Federal Rule of Evidence 403 provides that even relevant evidence should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, wasting time, and misleading and inflaming the jury. FED. R. EVID. 403. *See also Empire Gas Corp. v. American Bakeries Co.*, 646 F.Supp. 269, 276 (N.D. Ill 1986) (citing Fed. R. Evid. 403) (courts are empowered to exclude even relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues, or ...wasting time...."). The Supreme Court has cautioned that "the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 423 (1994).

Evidence, testimony, and argument relating to Facebook's overall financial condition and net worth should be excluded from this case under Federal Rule of Evidence 403. *See Rebolledo v. Herr-Voss Corp.*, 101 F.Supp.2d 1034, 1037 (N.D. Ill. 2000) (excluding evidence relating to the defendant's financial position under Fed. R. Evid. 403 because it only would appeal to the sympathy of the jury). Information regarding Facebook's financial condition and overall net worth would only encourage the jury to take money from a large, non-local corporate defendant and award it to Plaintiff – even though Plaintiff cannot prove any wrongdoing by Facebook or that Plaintiff is entitled to any monetary recovery. Federal Rule of Evidence 403 is meant to

protect against this type of unfair prejudice. FED. R. EVID. 403, Advisory Committee Notes (unfair prejudice “means an undue tendency to suggest decision on an improper basis”). Further, this evidence will unnecessarily waste the Court's time as it has no bearing on the merits of the dispute.

IV. CONCLUSION

Based on the foregoing, Facebook respectfully requests that the Court exclude any evidence, testimony, or argument relating to Facebook’s financial condition and overall net worth, specifically including the valuation of the company as a whole, the ability of Facebook to pay damages, proceeds and any other facts related to Facebook’s initial public offering, revenues and profits from anything other than advertising on users’ “profile/timeline” pages, and other indicators of the size and value of Facebook’s entire business.

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 **FACEBOOK, INC.'S MOTION *IN LIMINE* NO. 5: TO EXCLUDE EVIDENCE, ARGUMENT, AND TESTIMONY RELATING TO FACEBOOK, INC.'S FINANCIAL CONDITION AND OVERALL NET WORTH** 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

/s/ Brendan J. Hughes

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