

**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 MEMORANDUM IN SUPPORT OF MOTION *IN LIMINE* NO. 7:
TO EXCLUDE EVIDENCE, ARGUMENT, AND TESTIMONY REGARDING
ALLEGATIONS OF FACEBOOK’S GENERAL DISRESPECT
FOR THE RIGHTS OF OTHERS**

Defendant Facebook, Inc. (“Facebook”) respectfully moves this Court *in limine* for an order excluding any evidence, argument, and testimony suggesting that Facebook has a general disrespect for the rights of others, including but not limited to evidence, argument or testimony that Facebook or any of its employees are computer software “hackers” or supposedly steal the intellectual property or other assets of third parties.

As discussed in Facebook’s Motion *In Limine* No. 6, Plaintiff Timelines, Inc. (“Plaintiff”) intends to introduce an irrelevant non-public statement attributed to Mr. Mark Zuckerberg, Facebook’s founder and CEO, presumably to argue that Facebook does not respect others’ rights, including trademark rights allegedly held by Plaintiff. Based on this proposed evidence, Facebook anticipates that Plaintiff may introduce other evidence or argument in an attempt to tarnish the image of Facebook or Mr. Zuckerberg as relating to a purported lack of respect for the rights of others. Facebook therefore requested that Plaintiff stipulate that it would not introduce such character evidence. Because Plaintiff refused to so stipulate, Facebook requests that the Court preclude the Plaintiff from introducing any such evidence at trial.

I. BACKGROUND

Facebook has been the subject of a number of unsupported allegations directly impugning its corporate integrity, such as having a purported “hacker” culture and not honoring certain alleged business commitments. To the extent Plaintiff intends to use any such evidence to suggest to the jury that Facebook or Mr. Zuckerberg are “bad actors” that do not respect the rights of others, it should be excluded as wholly irrelevant to the issues in this case and as classic examples of inadmissible character evidence.

II. 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. Any testimony or exhibits seeking to impugn Facebook’s corporate culture, Mr. Zuckerberg or any other Facebook employees are entirely irrelevant to the issues of alleged trademark usage and infringement at issue in this case. On the basis of relevance alone, the Court should not allow Plaintiff to introduce any defamatory character allegation as evidence during trial.

Moreover, Federal Rule of Evidence 403 provides that even if the Court concludes that such character evidence might have some relevance to the issues in this case, “[t]he 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 with no probative value is simply submitted to elicit an emotional response from the jury, the Court should exclude the evidence:

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); *see also Thompson v. City of Chicago*, 472 F.3d 444, 456-57 (7th Cir. 2006) (citation omitted) (“Rule 403 provides a district court with discretion to exclude evidence where ‘its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.’”).

Any evidence related to an alleged “hacker” culture at Facebook, or concerning Mr. Zuckerberg or other Facebook employees in regards to a supposed disrespect for the rights of others, constitutes classic inadmissible character evidence intended only to confuse the jury into holding Facebook liable for its allegedly “bad general record and deny [it] a fair opportunity to defend against a particular charge.” *Michelson v. United States*, 335 U.S. 469, 475-76 (1948) (holding character evidence leads to “confusion of issues, unfair surprise and undue prejudice”). Plaintiff would like to convince the jury that Facebook and Mr. Zuckerberg show little respect for the rights of others generally and that, therefore, Facebook must have infringed Plaintiff’s purported trademark rights in “Timelines” rather than respect those rights. This theory is not only wrong, but its potential “to so overpersuade [the jury],” *id.*, is precisely why “[e]vidence of a person’s character or character trait is not admissible.” FED. R. EVID. 404(a); *see United States v. Booker*, 334 F.3d 406, 411 (5th Cir. 2003) (“To be admissible under Rule 404(b), evidence must be relevant to an issue other than the defendant’s character and must possess probative value not substantially outweighed by the danger of unfair prejudice.”) The Court should therefore deny Plaintiff’s attempt to introduce evidence of this type at trial.

III. CONCLUSION

Based on the foregoing, Facebook respectfully requests that the Court exclude any evidence, argument, and testimony containing allegations regarding Facebook’s or Mr. Zuckerberg’s character or their respect for the rights of others.

/ / /

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. 7: TO EXCLUDE EVIDENCE, ARGUMENT, AND TESTIMONY REGARDING ALLEGATIONS OF FACEBOOK'S GENERAL DISRESPECT FOR THE RIGHTS OF OTHERS** 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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