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.	)	

DEFENDANT FACEBOOK, INC.'S MEMORANDUM IN SUPPORT OF MOTION TO STRIKE PLAINTIFF'S JURY DEMAND

Pursuant to Federal Rule of Civil Procedure 39(a), Defendant Facebook, Inc. ("Facebook") respectfully moves to strike Plaintiff's jury demand and requests that the case proceed to trial as scheduled before the Court and not before a jury.

I. INTRODUCTION

For the first one and a half years of this litigation, Plaintiff repeatedly represented to Facebook and the Court that it was seeking actual damages for Facebook's alleged infringement of the "Timelines" mark. In a hearing last week, in order to bolster its motion *in limine* seeking to preclude evidence of its lack of any actual harm, Plaintiff abruptly changed its position. As this case now stands, Plaintiff "is not seeking to recover actual damages." Pl.'s Mtn. *in Limine* No. 3 at 2 [Dkt. # 128]. Indeed, Plaintiff has informed the Court that proof of actual damages "has no bearing on any matter that will be put to the jury" and that "Timelines' actual damages are neither in dispute nor related to any element in any of the claims in this case." *Id*. at 2-3. Based on those representations, the Court recently "preclude[d] Facebook from referring to Timelines' actual damages at the time of trial." Pretrial Conference 28:17-18 (Apr. 17, 2013). As a result, Plaintiff is left with a single non-injunctive request for relief: an award of the "wrongful profits" that Facebook purportedly received from its allegedly infringing use of the "Timelines" mark. Pl.'s Mtn. *in Limine* No. 3 at 4. But as this Court and others have held, a claim for an accused infringer's unjust profits is an equitable claim that is not properly presented to the jury. *See SPSS, Inc. v. Nie*, 2009 WL 2579232 (N.D. Ill. Apr. 19, 2009) (Darrah, J.)

(attached hereto as Exhibit A). Because Plaintiff is now requesting only equitable relief, Plaintiff's jury demand should be stricken and the case should proceed to trial before the Court.

II. ARGUMENT

The Seventh Amendment entitles a plaintiff to a jury trial "[i]n suits at common law, where the value in controversy … exceed[s] twenty dollars." As the Supreme Court has explained, the phrase "suits at common law" refers to "suits in which legal rights are to be ascertained and determined, in contradistinction to those where equitable rights alone are recognized, and equitable remedies are administered." *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564 (1990) (quotations omitted). Whether Plaintiff has a right to a jury trial, therefore, turns on whether its request for relief against Facebook is legal or equitable.

In a trademark infringement case, a claim for the accused infringer's profits constitutes an equitable claim that is not properly tried to a jury. This Court has already recognized as much. In *SPSS, Inc. v. Nie*, 2009 WL 2579232 (N.D. Ill. Apr. 19, 2009) (Darrah, J.), this Court squarely addressed whether a claim for disgorgement of the accused infringer's profits under the Lanham Act was legal or equitable. In finding that such claims were equitable in nature, the Court explained that the trademark holder's "entire demand for monetary relief boil[ed] down to the theory that the Company was profiting unjustly from its unauthorized use of [the] trademarks." *Id*. at *2. Such an "unjust enrichment" claim for an infringer's profits, the Court held, was an equitable (not a legal) claim. *Id*. at *2-*3. This Court thus granted the accused infringer's motion to strike the trademark holder's jury demand. *Id*. at *3.

As this court noted in *Nie*, "[o]ther courts facing similar facts have concluded that a party claiming unjust enrichment in a trademark infringement case is not entitled to a jury trial." *Id*. at *3 (citing *Emmpresa Cubana Del Tabaco v. Culbro Corporation and General Cigar Co., Inc.,*

123 F. Supp. 2d 203, 211 (S.D.N.Y. 2000); *American Cyanamid Co. v. Sterling Drug, Inc.*, 649 F. Supp. 784 (D.N.J. 1986); *Gibson Guitar Corp. v. Paul Reed Smith, LP*, 325 F. Supp. 2d 841 (M.D. Tenn. 2004); *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Division of Travel Development*, 955 F. Supp. 598, 605 (E.D. Va. 1997)); *see also G.A. Modefine S.A. v. Burlington Coat Factory Warehouse Corp.*, 888 F. Supp. 44, 45-46 (S.D.N.Y. 1995).

In briefing the motions *in limine* and most emphatically at the hearing held on Wednesday, April 17, 2013—just three business days before trial—Plaintiff made clear for the first time that is was abandoning any claim for actual damages, and that its entire case now seeks *only* equitable relief in the form of "Facebook's wrongful profits." Pl.'s Mtn. *in Limine* No. 3 at 4; *see also* Pretrial Conference at 25-28. In response, the Court held that it would "preclude Facebook from referring to Timelines' actual damages at the time of trial." Pretrial Conference 28:15-18. Plaintiff itself acknowledges that a claim for a defendant's profits is an "equitable claim" and that the "Seventh Circuit has made … clear" that actual damages are irrelevant to such a claim. Pl.'s Mtn. *in Limine* No. 3 at 2 (citing *Web Printing Controls Co., Inc. v. Oxy-Dry Corp.*, 906 F.2d 1202, 1204 (7th Cir. 1990)).

By its own admission, therefore, Plaintiff's only remaining claim for relief in this case is an "equitable claim," which must be tried to the Court, not a jury. *Id*. There being no claim for "actual damages" remaining in the case, and there being only the question of equitable relief sought in the form of Facebook's profits, Timelines' demand for a jury trial is no longer justified under the Seventh Amendment. Under this Court's prior decision in *SPSS, Inc. v. Nie*, the jury demand should be stricken, and this case should proceed to trial as scheduled—though tried to the bench and not to a jury.

Facebook understands that this motion is brought on the eve of trial. But the need for this motion did not become clear until after Plaintiff changed its theory of the case at the eleventh-

hour in a strategic move to prevail on a motion *in limine* at a hearing held just three business days before trial was set to begin. In any event, there is no prejudice to Plaintiff to proceeding in a bench trial: all the witnesses on both sides are prepared to testify this week and, if anything, proceeding in a bench trial without the need to empanel a jury and address evidentiary issues outside the presence of the jury, will allow the case to be tried more efficiently. In the end, as the Third Circuit has recognized, "[s]ince 'a court has the power to act sua sponte at any time' under Rule 39, 'it follows that a court has the discretion to permit a motion to strike a jury demand at any time, even on the eve of trial.'" *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 226-27 (3d Cir. 2007) (quoting Moore's Federal Practice ¶ 8-39.13).

III. CONCLUSION

For the reasons stated above, Facebook respectfully requests that the Court strike Plaintiff's demand for a jury trial.

Dated: April 21, 2013

Respectfully submitted,

By: */s/ Peter J. Willsey*

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he served the foregoing **DEFENDANT FACEBOOK, INC.'S MEMORANDUM IN SUPPORT OF MOTION TO STRIKE PLAINTIFF'S JURY DEMAND** 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 21, 2013.

Dated: April 21, 2013

/s/ Brendan J. Hughes

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