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15 FACEBOOK, INC.

16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 SAN JOSE DIVISION

19 In re: Facebook Internet Tracking Litigation

20 Case No. 5:12-md-02314 EJD

21 **DEFENDANT FACEBOOK, INC.'S**
22 **OBJECTION, PURSUANT TO CIVIL LOCAL**
23 **RULE 7-3(D)(1), TO EVIDENCE**
24 **SUBMITTED BY PLAINTIFFS IN THEIR**
25 **MOTION TO COMPEL REPLY BRIEF**

26 Date: April 28, 2016
27 Time: 9:00 a.m.
28 Courtroom: 4
Judge: Hon. Edward J. Davila
Trial Date: None Set

1 **I. INTRODUCTION**

2 Pursuant to Civil Local Rule 7-3(d)(1), Defendant Facebook, Inc. (“Facebook”) objects to
3 certain new evidence submitted by Plaintiffs for the first time with their Reply Brief in support of
4 their Motion to Compel. (Doc. No. 115 (“Reply”)). Among other evidence, Plaintiffs submitted
5 two articles authored by online publications that are inadmissible because they contain double
6 hearsay and are irrelevant to Plaintiffs’ Motion to Compel. (Supplemental Declaration of David
7 A. Straite in support of Plaintiffs’ Motion to Compel (“Straite Decl.”) Ex. 4; *id.* Ex. 6.) Facebook
8 respectfully requests that these exhibits be struck and any quotes or references to them in the
9 Reply be disregarded.

10 **II. RELEVANT LEGAL STANDARDS**

11 Hearsay evidence is not admissible unless an exception to the hearsay rule applies. Fed.
12 R. Evid. 802 (“Hearsay is not admissible unless any of the following provides otherwise: a federal
13 statute; these rules; or other rules prescribed by the Supreme Court.”). Courts routinely grant
14 motions to strike evidence that fails to comply with evidentiary rules prohibiting hearsay. *See,*
15 *e.g., Doe v. Texaco, Inc.*, No. C06-02820 WHA, 2006 WL 2850035, at *2 (N.D. Cal. Oct. 5,
16 2006) (striking newspaper articles and related portions of declarations as constituting
17 inadmissible hearsay evidence); *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs.*, No. C-
18 95-20091 RMW, 1997 U.S. Dist. LEXIS 23572, at *27 (N.D. Cal. Jan. 3, 1997) (striking portions
19 of declaration submitted in support of motion for expansion of preliminary injunction as
20 inadmissible hearsay). Where a newspaper article quotes statements made by other individuals
21 and those portions of the article are offered for the truth of the matter asserted, they constitute
22 double hearsay and are only admissible if each hearsay statement falls within an exception. *See*
23 *Green v. Baca*, 226 F.R.D. 624, 638 (C.D. Cal. 2005) (excluding newspapers articles from
24 evidence because they constituted double hearsay that did not fall under any exception to the
25 hearsay rule).

26 Irrelevant evidence also is inadmissible. Fed. R. Evid. 402. Where a court determines
27 that evidence does not have “any tendency to make a fact more or less probable than it would be
28 without the evidence,” Fed. R. Evid. 401, a motion to strike such evidence is properly granted.

1 See, e.g., *Luna v. Household Fin. Corp.* III, 236 F. Supp. 2d 1166, 1170 n.1 (W.D. Wash. 2002)
2 (striking report submitted in connection with motion to compel as irrelevant). Such evidentiary
3 objections to reply briefs are appropriately made by objecting under Civil Local Rule 7-3(d)(1).
4 See *Tech. & Intellectual Prop. Strategies Grp. PC v. Insperity, Inc.*, No. 12-CV-03163-LHK,
5 2012 U.S. Dist. LEXIS 170714, at *43-44 n.6 (N.D. Cal. Nov. 29, 2012) (granting party's
6 objection under Civil Local Rule 7-3(d)(1) and striking evidence submitted in connection with a
7 reply brief where the evidence was not relevant to plaintiffs' motion and thus violated Rule 402).

8 III. OBJECTIONS

9 **Straite Decl. Exhibit 4.** Exhibit 4 is an article entitled "How one law student is making
10 Facebook get serious about privacy" from the online publication ArsTechnica.com. Plaintiffs cite
11 this article in support of their statement that "Facebook produced similar documents (more than
12 1,000 pages of them) to Max Schrems" (Reply at 7.) Exhibit 4 suggests that Facebook
13 provided Mr. Schrems, an individual who filed complaints against Facebook with the Irish Office
14 of the Data Protection Commissioner, a CD containing more than "1,000 pages of raw private
15 data." (Straite Decl. Ex. 4 at 6.) The author of Exhibit 4 does not explicitly state where he got
16 this information, but implies that it came from Mr. Schrems. Plaintiffs offer Exhibit 4 to prove
17 the truth of the matter asserted, which makes their reliance on this article and Mr. Schrem's
18 supposed representation of Facebook's production of 1,000 pages of documents double hearsay.
19 Fed. R. Evid. 801. See *Green*, 226 F.R.D. at 638 ("[T]o the extent the articles quote statements
20 by other individuals, and those statements are offered for the truth of the matter asserted, they
21 constitute double hearsay."). Thus, Plaintiffs' evidence is inadmissible and should be struck or
22 otherwise disregarded. *Doe*, 2006 WL 2850035, at *2.

23 Exhibit 4 should also be struck for the independent reason that it is not relevant to
24 Plaintiffs' Motion to Compel. Plaintiffs offer Exhibit 4 to support their contention that
25 production of all information that Facebook possesses about the named Plaintiffs is not
26 burdensome. But Exhibit 4 says nothing about what actual information was received by Mr.
27 Schrems, including whether the alleged production to Mr. Schrems encompassed the type of
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1 information requested by Plaintiffs here.¹ All that can be inferred from Exhibit 4 is that Facebook
2 is capable of making a 1,000 page production in response to a different Facebook user, with
3 different complaints about Facebook, involved in a different proceeding in a different country—
4 none of which aids the Court here in resolving the issues raised by the Motion to Compel,
5 including how burdensome it is to produce the specific information requested here or whether the
6 cost of the production Plaintiffs seek is outweighed by the likely benefit to Plaintiffs.

7 **Straite Decl. Exhibit 6.** Exhibit 6 is an article entitled “Facebook Can Track Web
8 Browsing Without Cookies” from an online publication called “death + taxes.” Plaintiffs offer no
9 URL or any other indication of where they found this article. Plaintiffs cite Exhibit 6 in support
10 of their contention that their Request For Production number 24, seeking all information about a
11 2011 Facebook patent, is relevant to their claims. (Reply at 7-8.) Exhibit 6 contains statements
12 made by third parties. Plaintiffs directly quote from Exhibit 6 in their Reply and offer the exhibit
13 as support for their assertion that Facebook associates data from cross-domain tracking. Because
14 Plaintiffs are offering the third-party statements contained in Exhibit 6 to prove the truth of the
15 matter asserted, it is double hearsay, and thus inadmissible. *See Doe*, 2006 WL 2850035, at *2.

16 Exhibit 6 should also be struck for the independent reason that it is not relevant to
17 Plaintiffs’ Motion to Compel. Plaintiffs use Exhibit 6 to support their argument that Facebook’s
18 2011 patent, which discusses tracking pixels, is relevant to their claims. Plaintiffs claim that the
19 Electronic Frontier Foundation “explicitly linked tracking pixels and tracking cookies” and noted
20 that “tracking pixels might be used to associate the same data at issue in this case” during an
21 October 2011 interview. (Reply at 7.) However, Exhibit 6 does not support Plaintiffs’
22 characterization of it. The article contains not a single reference to tracking pixels, nor does it
23 mention Facebook’s 2011 patent. Thus, Exhibit 6 has no bearing on whether Facebook’s patent is
24 relevant to Plaintiffs’ claims or defenses. *Tech. & Intellectual Prop. Strategies Grp. PC*, 2012
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26 ¹ While Plaintiffs relate Exhibit 4 to allegations in their Second Amended Complaint describing
27 Mr. Schrems’ involvement in a case in Austria (Reply at 7 (citing SAC ¶¶ 146-53)), Exhibit 4
28 was published nearly two years before that case was filed and has no apparent relevance to the
cited paragraphs of the Second Amended Complaint.

1 U.S. Dist. LEXIS 170714, at *43-44 n.6.

2 **IV. CONCLUSION**

3 For the foregoing reasons, Facebook respectfully requests that this Court strike the
4 documents attached as Exhibits 4 and 6 to the Supplemental Declaration of David A. Straite
5 submitted in conjunction with Plaintiffs' Reply in Further Support of Motion to Compel and
6 disregard any quotes or references to them contained in the Reply.

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8 Dated: April 13, 2016

COOLEY LLP

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/s/ Matthew D. Brown

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Matthew D. Brown

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Attorneys for Defendant FACEBOOK, INC.

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