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13
 14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16 OAKLAND DIVISION

17 MATTHEW CAMPBELL and MICHAEL
 HURLEY,

18 Plaintiffs,

19 v.

20 FACEBOOK, INC.,

21 Defendant.

Case No. C 13-05996 PJH

**DEFENDANT FACEBOOK, INC.'S
 OBJECTION TO AND REQUEST TO
 STRIKE NEW EVIDENCE AND
 MISSTATEMENTS OF FACT
 CONTAINED IN PLAINTIFFS' REPLY IN
 SUPPORT OF THEIR MOTION FOR
 CLASS CERTIFICATION**

HEARING:

Date: March 16, 2016

Time: 9:00 a.m.

Location: Courtroom 3, Third Floor
 The Honorable Phyllis J. Hamilton

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 26 REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED
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1 Recognizing that their moving papers fall well short of establishing that this case falls within
2 the narrow “exception to the usual rule that litigation is conducted by and on behalf of the individual
3 named parties only,” *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013), Plaintiffs improperly
4 submitted brand new evidence and argument in their Reply brief, including an unauthorized expert
5 report. Under well-settled law, the Court should not consider Plaintiffs’ new evidence (which fails to
6 satisfy their Rule 23 burden in any event), and Facebook respectfully requests that the Court strike it
7 pursuant to Local Rule 7-3(d)(1). Alternatively, if the Court does not strike Plaintiffs’ new evidence,
8 Facebook asks the Court to consider the attached declarations of Facebook employees Alex Himel
9 and Dale Harrison responding to certain aspects of Plaintiffs’ new evidence.

10 I. THE COURT SHOULD STRIKE PLAINTIFFS’ NEW REPLY EVIDENCE

11 It is well-settled that courts should not consider arguments and evidence raised for the first
12 time on reply. *See Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (“The district court need not
13 consider arguments raised for the first time in a reply brief.”); *Roe v. Doe*, No. 09-0682-PJH, 2009
14 WL 1883752, at *5 (N.D. Cal. June 30, 2009) (“It is well accepted that raising of new issues and
15 submission of new facts in [a] reply brief is improper.”); *Harrold v. Experian Info. Solutions, Inc.*,
16 No. 12-02987-WHA, 2012 WL 4097708, at *4 n.2 (N.D. Cal. Sept. 17, 2012) (“Sandbagging with a
17 new legal theory in a reply brief will not be tolerated.”); *Rodan & Fields, LLC v. Estee Lauder Cos.*,
18 No. 10-02451-LHK, 2010 WL 3910178, at *4 n.2 (N.D. Cal. Oct. 5, 2010) (disregarding “new facts,
19 evidence, and argument [which] should not be submitted for the first time in a Reply”).

20 Here, Plaintiffs have submitted an entirely new and unauthorized “Rebuttal” expert report of
21 Dr. Jennifer Golbeck (Dkt. 166-7 & Dkt. 167-1 Ex. 1). This report should be stricken in its entirety.
22 In the agreed-upon case schedule set forth in their Joint Case Management Statement that was the
23 basis for the Court’s Scheduling Order (Dkt. 62), the parties agreed that Plaintiffs would file “**all**
24 **supporting declarations, evidence, and other papers**” at the time they filed their Motion for Class
25 Certification, and Facebook, in turn, would file its “supporting declarations, evidence, and other
26 papers” when it filed its Opposition. (Dkt. 60 at 14 (emphasis added).) The parties did *not*
27 contemplate presenting, nor did this Court authorize the submission of, new declarations or other
28 evidence on reply, which is prohibited by well-settled case law and the local rules. *See supra* p. 1;

1 N.D. Cal. L.R. 7-3(d)(1).

2 In keeping with the procedure agreed to by the parties and authorized by the Court, Plaintiffs
3 submitted an expert report from Dr. Golbeck when they filed their Motion for Class Certification on
4 November 13, 2015 (Dkt. 138-4, Ex. 2), and Facebook submitted the rebuttal report of Dr. Benjamin
5 Goldberg with its Opposition papers on January 15, 2016 (Dkt. 149-4). But now, in connection with
6 their *Reply brief*, Plaintiffs have filed a second, and completely unauthorized, report from Dr.
7 Golbeck, which they characterize as a “rebuttal” report. In fact, it is not a “rebuttal” report at all—
8 Dr. Golbeck proposes an entirely new method for ascertaining the proposed class, from an entirely
9 new data source (which she refers to as the “██████████”), mentioned nowhere in her first report
10 or Plaintiffs’ Motion. This is indefensible.

11 Plaintiffs have no basis to contend that Dr. Golbeck is relying on “new” evidence that was
12 unavailable when they filed their Motion and Dr. Golbeck’s initial report. For instance, Dr. Golbeck’s
13 entirely new ascertainability query in her new report relies upon records—i.e., the “██████████”—
14 that were produced to Plaintiffs well before their Motion was due. Indeed, the key document upon
15 which they rely (Exhibit 7 to the Slade Declaration, Dkt. 166-15) is a ██████████ (highlighted by
16 Plaintiffs to illustrate Dr. Golbeck’s proposed new query) that was produced to Plaintiffs in early
17 September—*two and a half months before they filed their Motion*. Yet neither Plaintiffs nor Dr.
18 Golbeck said anything about this document in the Motion or initial expert report.

19 The same is true of several other portions of Dr. Golbeck’s new report. For example, in her
20 initial report, Dr. Golbeck claimed that Facebook ██████████
21 ██████████ (Dkt. 138-4, Ex. 2 ¶¶ 44-50.) Facebook submitted evidence in its Opposition
22 that this ██████████ was deleted *before* the beginning of the class period, and that
23 accordingly, ██████████.
24 (App. at 1523.) Now, in her new report, Dr. Golbeck concedes the point yet cites to a similarly-
25 named *but entirely different* ██████████—that she claims
26 (based on her review of three-year-old source code) shows that Facebook is “still intercepting and
27 ██████████ URLs sent in Private Messages.” (Dkt. 166-7 ¶ 28.) In support, she relies upon source code
28 that Plaintiffs had access to since late July 2015 and which they reviewed for a collective total of

1 more than **60 days** before they filed their Motion and Dr. Golbeck’s initial report. (*See, e.g., id.* at 11
2 n.24.)

3 In short, no second report by Dr. Golbeck—“rebuttal” or otherwise—was authorized by the
4 Court (and certainly not a report based on information Plaintiffs had when they filed their Motion),
5 and the new report should be stricken. *See, e.g., In re Wal-Mart Wage & Hour Litig.*, No. 06-00225,
6 2008 WL 3179315, at *11 (D. Nev. June 20, 2008) (striking new expert report accompanying
7 plaintiffs’ class certification reply because it “reflects a new analysis which was not part of [the
8 expert’s] initial report”); *DocuSign, Inc. v. Sertifi, Inc.*, 468 F. Supp. 2d 1305, 1307 (W.D. Wash.
9 2006) (striking supplemental expert declaration that was “inappropriate for Reply”); *Cotton v. City of*
10 *Eureka, Cal.*, 860 F. Supp. 2d 999, 1028 n.16 (N.D. Cal. 2012) (“It is improper [] to submit new
11 factual information in a reply brief,” including reply declarations that attempt “to rectify [certain]
12 evidentiary deficiencies”).¹

13 As a result, Facebook specifically requests that the Court strike (1) the new Golbeck report in
14 its entirety, (2) all portions of Plaintiffs’ Reply brief (Dkt. 167) that cite to or rely on the new
15 Golbeck report (specifically, pages 5:26-6:7; 6:10-13; 6 fns. 8-10; & 8:19-21 of the Reply brief), and
16 (3) Exhibits 7, 14, 15, 16, 17, 18, 19 & 20 to the David Slade Declaration (Dkt. 167-1), which are the
17 newly-filed “[REDACTED].”

18 If the Court declines to strike this information, Facebook should be permitted to respond via
19 the attached Declarations of Facebook Engineers Alex Himel and Dale Harrison.² As explained in

20 ¹ Notably, Plaintiffs sought to extend the class certification deadlines by three months (Dkt. 109),
21 but the Court granted only a one-month extension and ruled that “[n]o further extension of these dates
22 will be granted.” (Dkt. 117.) Plaintiffs then sought a *second* extension (Dkt. 134), which the Court
23 denied (Dkt. 136). By submitting additional evidence three months after the deadline, Plaintiffs are
24 circumventing the previous orders and taking for themselves the additional time they did not receive.

25 ² *See Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (holding that the district court erred
26 by failing to consider a party’s supplemental declaration rebutting new evidence raised in the reply
27 brief because “[s]uch a result would be unfair” and “the district court should not consider the new
28 evidence without giving the [non-]movant an opportunity to respond”); *Perez v. Saks & Co.*, No. 14-
2512-PJH, 2014 WL 4060306, at *4 (N.D. Cal. Aug. 14, 2014) (granting defendant’s motion to file a
sur-reply to respond to new arguments in plaintiffs’ reply brief); *U.S. v. Cathcart*, No. 07-4762-PJH,
2009 WL 1817006, at *2 (N.D. Cal. June 24, 2009) (“[T]o the extent that new evidence is submitted
by any party in a reply brief, the court is mindful that such evidence should not be considered without
affording the opposing party an opportunity to respond.”); *Banga v. Experian Info. Sols., Inc.*,
No. 09-04867-SBA, 2013 WL 5539690, at *3 (N.D. Cal. Sept. 30, 2013) (“If a party raises a new
[Footnote continued on next page]

1 those declarations, Dr. Golbeck’s new proposed query for ascertaining members of the proposed class
2 fares no better than her old query, and Dr. Golbeck is simply wrong that the brand new file identified
3 for the first time in her new report shows that Facebook was [REDACTED]
4 [REDACTED] during the proposed class period. (Himel Decl. ¶¶ 3-10; Harrison Decl. ¶¶ 3-
5 7.)³

6 **II. THE COURT SHOULD STRIKE MISREPRESENTATIONS CONTAINED IN** 7 **PLAINTIFFS’ REPLY BRIEF**

8 As they did in their Motion, and has been an unfortunate pattern in this case (*see, e.g.*,
9 Dkt. 114 at 3; Dkt. 149-1 ¶¶ 21-23), Plaintiffs also have included a number of troubling
10 misstatements of fact in their Reply that should be stricken.

11 Most glaringly, Plaintiffs’ Reply brief alters the earlier sworn testimony of Mr. Harrison, who
12 submitted a declaration in connection with a discovery dispute. For context, Mr. Harrison submitted
13 a declaration last fall in connection with a discovery dispute regarding whether Facebook should be
14 required to undertake the time and expense necessary to identify every potential “object” created
15 during the processing of a message (Plaintiffs’ position) or only those “objects” related to URLs sent
16 in messages (Facebook’s position, based on the allegations in Plaintiffs’ operative complaint and
17 proposed class). Mr. Harrison testified about the extensive work he had undertaken (more than 25
18 hours) just to identify the objects (if any) created in connection with the sharing of URLs in 19
19 specific messages Plaintiffs had identified for Facebook. (Dkt. 126-1 ¶¶ 13-18.)

20 In their Reply brief, in support of their knowingly false arguments that “[t]he full extent of
21 Facebook’s scanning practices is still unknown” and “Facebook admits that its redirection of
22 intercepted message content is limitless,” Plaintiffs claim that Mr. Harrison said that “identifying
23 *every use of message content* ‘would require consulting with engineers in every group who have

24 _____
[Footnote continued from previous page]

25 argument or presents new evidence in a reply brief, a court may consider these matters only if the
26 adverse party is given an opportunity to respond.”).

27 ³ Facebook does not respond at this time to all the new facts and arguments raised by Dr. Golbeck.
28 If the report is not stricken, however, Facebook may seek leave of Court to submit additional
evidence to rebut her contentions.

1 worked on every past or present product or feature at Facebook.” (Dkt. 167 at 10 (emphasis added).)
2 But Plaintiffs have *altered* Mr. Harrison’s actual words and *omitted* material portions of his testimony
3 to misrepresent what he said. As noted, the discovery dispute did not involve “message content,” nor
4 did Mr. Harrison testify about that subject. Here is what he actually said in his discovery declaration,
5 with the relevant portions that Plaintiffs have altered and omitted bolded for emphasis:

6 19. I understand that Plaintiffs also seek *all* other Objects related to each of the 16
7 messages that I was able to identify. This is likely impossible. If ordered to do so,
8 I would first have to attempt to ascertain the identity of every Object or
9 Association that could possibly be generated from a message, which may require
10 consulting with engineers in every group who have worked on every past or
11 present product or feature at Facebook **(thousands of individuals) to find out
what Objects each engineer believes can be generated as a result of their work
at Facebook, and whether any of those Objects could be generated from
sending a message.** This also would require consulting former employees who
12 would have this information. As a part of this exercise, I would also have to try to
13 ascertain where in the Facebook system each of these types of Object may exist.

14 (*Id.* ¶ 19.) In short, Mr. Harrison: (1) was addressing a discovery dispute regarding the burden of
15 collecting all “Objects” and “Associations” from the messages that Plaintiffs selected for further
16 discovery; (2) was *not* addressing “message content” at all; and (3) said that this exercise “may
17 require” (not “*would require*”) consultation with other engineers. The Court should strike the
18 misstatement in Plaintiffs’ Reply (specifically, page 10:19-22).

19 Facebook will be prepared to address the other misstatements in Plaintiffs’ Reply at the
20 March 16 hearing.

21 Dated: February 26, 2016

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: _____
Christopher Chorba

Attorneys for Defendant FACEBOOK, INC.