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FACEBOOK, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

MATTHEW CAMPBELL and MICHAEL HURLEY,

Plaintiffs,

v.

FACEBOOK, INC.,

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

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

I. THE COURT SHOULD STRIKE PLAINTIFFS' NEW REPLY EVIDENCE

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

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

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

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

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

The same is true of several other portions of Dr. Golbeck's new report. For example, in her initial report, Dr. Golbeck claimed that Facebook was "logging" URLs shared in messages in a table called "share_stats." (Dkt. 138-4, Ex. 2 ¶¶ 44-50.) Facebook submitted evidence in its Opposition that this "share_stats" table was deleted *before* the beginning of the class period, and that accordingly, URLs shared in messages were never "logged" to such a table during the class period. (App. at 1523.) Now, in her new report, Dr. Golbeck concedes the point yet cites to a similarly-named ***but entirely different*** file—"scribeh_share_stats" (which is not a table at all)—that she claims (based on her review of three-year-old source code) shows that Facebook is "still intercepting and logging URLs sent in Private Messages." (Dkt. 166-7 ¶ 28.) In support, she relies upon source code that Plaintiffs had access to since late July 2015 and which they reviewed for a collective total of

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

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

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

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

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

[2] *See Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (holding that the district court erred by failing to consider a party's supplemental declaration rebutting new evidence raised in the reply brief because "[s]uch a result would be unfair" and "the district court should not consider the new 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

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those declarations, Dr. Golbeck's new proposed query for ascertaining members of the proposed class fares no better than her old query, and Dr. Golbeck is simply wrong that the brand new file identified for the first time in her new report shows that Facebook was "logging" URLs shared in messages in the "share_stats" table during the proposed class period. (Himel Decl. ¶¶ 3-10; Harrison Decl. ¶¶ 3-7.)[3]

II. THE COURT SHOULD STRIKE MISREPRESENTATIONS CONTAINED IN PLAINTIFFS' REPLY BRIEF

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

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

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

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[Footnote continued from previous page]

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

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

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

> 19. I understand that Plaintiffs also seek ***all*** other Objects related to each of the 16 messages that I was able to identify. This is likely impossible. If ordered to do so, I would first have to attempt to ascertain the identity of every Object or Association that could possibly be generated from a message, which **may** require consulting with engineers in every group who have worked on every past or 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 would have this information. As a part of this exercise, I would also have to try to ascertain where in the Facebook system each of these types of Object may exist.

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

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

Dated: February 26, 2016

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: /s/
Christopher Chorba

Attorneys for Defendant FACEBOOK, INC.