UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

FACEBOOK, INC, Plaintiff, v. PHOENIX MEDIA/COMMUNICATIONS GROUP, INC., PEOPLE2PEOPLE GROUP, INC., TELE-PUBLISHING, INC., AND FNX BROADCASTING LLC, Defendants.	C.A. No. 1:10-cv-11917-DPW

PLAINTIFF FACEBOOK, INC.'S
OPPOSITION TO TELE-PUBLISHING INC.'S MOTION TO STRIKE

I. INTRODUCTION

Facebook's opposition to TPI's motion to dismiss made clear that the Complaint, on its face, met and exceeded the requirements of the Federal Rules of Civil Procedure. The factual information provided in Facebook's opposition, along with the support provided in the declaration included with it, was necessitated by TPI's allegations in its opening brief. In particular, TPI's opening brief requested that Facebook be sanctioned, repeatedly stating that "Facebook does not and cannot offer evidentiary support for its claims against TPI." Such groundless accusations by TPI required Facebook to submit a detailed response demonstrating otherwise, which Facebook has done. There is no justification to deny Facebook the opportunity to defend itself against TPI's baseless motion and accusations through the extreme measure of striking from the record the very information that TPI demanded. Doing so while allowing TPI to make its own allegations based on self-serving and uncorroborated extraneous information (which is refuted by publicly available facts) would be prejudicial in the extreme. TPI's motion to strike, for which it can cite no supporting authority, should therefore be denied.

II. ARGUMENT

A. TPI's Citation to Materials Extrinsic to the Complaint Necessitated Facebook's Response in Kind

As Facebook has already argued, the Complaint is well-pleaded and sufficient. (*See* Facebook's Opp'n to TPI's Mot. to Dismiss (Dkt. No. 25) at 3-8.) In seeking to avoid Facebook's complaint for patent infringement, TPI resorted to self-serving extrinsic declarations and uncorroborated factual allegations, which have already been refuted by Facebook's opposition. (*See id*. at 8-17.) The Court, of course, need not (and should not) consider any of TPI's extraneous material when judging the sufficiency of Facebook's pleading. *See, e.g. Reynolds v. E-Loan, Inc.*, Civ. No. 07-11862, 2008 WL 4939320, at *2-3 (D. Mass. Nov. 14, 2008) (Woodlock, J.) (refusing to consider materials outside the pleadings on motion to dismiss).

Yet now, in its motion to strike, TPI hypocritically contends that Facebook should not be allowed to respond to TPI's uncorroborated factual allegations, even though TPI's motion to dismiss relies entirely on the premise that factual support does not exist for Facebook's claims. But TPI cannot have it both ways. If TPI intends to rely on self-serving affidavits outside the pleadings, it cannot be heard to complain that Facebook sought to respond with citation of its own to the public record. This is all the more critical when the public record so clearly undermines TPI's allegations.

Indeed, one of the three specific facts that TPI wishes was not in the record is that "TPI owns … people2people.com." (TPI's Mot. to Strike (Dkt. No. 29) at 1.) Public information proffered by Facebook provides evidence establishing just that. (*See* Facebook's Opp'n to TPI's Mot. to Dismiss (Dkt. No. 25) at 9-10; Chen Decl. in Supp. of Facebook's Opp'n to TPI's Mot. to Dismiss (Dkt No. 26) ("Chen Decl.") at Exs. A-F; *see also* Facebook's Proposed Sur-Reply to TPI's Motion to Dismiss (Dkt. No. 31) Ex. A.) In its motion to dismiss, TPI itself urged that "the Court can rely upon public information." (TPI's Memo. in Supp. of Mot. to Dismiss (Dkt. No. 17) at 5; *see also id.* at 6 n. 4.) TPI cannot now ask the Court to strike from the record the same kind of public information it urges the Court to accept in its own motion simply because it disproves TPI's arguments.

B. TPI's Baseless Request for Sanctions Required Facebook to Defend Itself

In both its motion to strike and its motion to dismiss seeking sanctions, TPI unsupportedly crowed that "Facebook Does Not And Cannot Offer Evidentiary Support For Its Claims." (TPI's Mot. to Strike (Dkt No. 29) at ¶ 3; TPI's Mot. to Dismiss (Dkt. No. 17) at 5.) Facebook thus had to respond by showing its support, though none is required to be cited in the Complaint itself. Striking Facebook's defenses against TPI's baseless Rule 11 sanctions allegations would be extraordinarily prejudicial to Facebook. Denying TPI's motion to strike, however, presents no prejudice to TPI: The Court is free in its discretion to consider or not consider the materials outside the pleadings to the extent necessary to dispense with TPI's frivolous claims. TPI's motion to strike should therefore also be denied on these grounds.

C. TPI's Purported Authorities Do Not Support the Extreme Remedy TPI Seeks

At bottom, TPI's motion to strike appears to be an attempt to avoid, by the most severe measure possible, unpleasant public facts that rebut TPI's arguments. Importantly, none of the authorities relied upon by TPI support the extreme remedy it seeks from this Court. Rather, to the contrary, each and every case stands for the non-controversial notion that a complaint is to be judged within the four-corners of the pleading itself.[1]

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[1] *See* TPI's Mot. to Strike (Dkt. No. 29) at 2-3, which improperly cites *Klein v. MHM Corr. Servs., Inc.*, Civ. No. 08-11814, 2010 WL 3245291, at * 2 (D. Mass Aug. 16, 2010) (inapposite because defendants sought only to exclude from consideration (not to strike) certain new facts alleged in a *pro se* plaintiff's sur-reply to a motion to dismiss); *Keane v. Navarro*, 345 F.Supp.2d. 9, 12 (D. Mass. 2004) (inapposite because the defendants moved to dismiss (not to strike) on the grounds that no counts were asserted against them in the complaint); *Miller v. Suffolk Cnty. House of Corr.*, Civ. No. 01-11331, 2002 WL 31194866, at *2 n.1 (D. Mass. Sept. 27, 2002) (Woodlock, J.) (inapposite because the court held only that materials extraneous to the pleadings could not be considered in weighing the sufficiency of the complaint under Rule 12(b)(6) motion standards and not considering any motion to strike those materials from the record); *Bissessur v. Indiana Univ. Bd. of Trs.*, 581 F.3d 599, 603 (7th Cir. 2009) (inapposite because the court ruled on a motion to dismiss (not a motion to strike) that the sufficiency of a complaint may not be supplemented through briefing); *Frederico v. Home Depot*, 507 F.3d 188, 201-02 (3rd Cir. 2007) (inapposite for two reasons: 1) the court held that a complaint did not comply with the stringent pleading standards of Rule 9(b) (irrelevant here); and 2) defendants sought only to dismiss (not to strike) plaintiff's complaint); *Gristede's Foods, Inc. v. Poospatuck (Unkechauge Nation)*, Civ. No. 06-01260, 2009 WL 4547792, at * 12 n.5 (E.D.N.Y. Dec. 1, 2009) (inapposite because the court considered only a motion to dismiss, not a motion to strike).

In fact, authority on the question of motions to strike in the context of Rule 12 motions establishes that "such motions are narrow in scope, disfavored in practice, and not calculated readily to invoke the court's discretion." *Arista Records v. Does 1-27*, 584 F. Supp. 2d 240, 256 n.20 (D. Me. 2008) (quoting *Boreri v. Fiat S.p.A.*, 763 F.2d 17, 23 (1st Cir. 1985).)[2] Denying the motion to strike, the court in *Arista Records* further observed that motions to strike material that is neither part of a Rule 7 pleading nor "redundant, immaterial, impertinent, [or] scandalous" under Rule 12(f) "may not be on firm procedural footing." (*Id.*) The same result is proper here.

Courts have also held that motions to strike, in addition to being generally disfavored, *must* be supported by the movant's showing that prejudice would result if the material in question were not stricken. *See Fundi v. Citizens Bank of Rhode Island*, Civ No. 07-00078, 2007 WL 2407106, at *3 (D.R.I. Aug. 22, 2007) (internal citations omitted); *see also Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 182 F.R.D. 386, 298 (D.R.I. 1998). TPI, of course, did not (and could not) make such a showing, since the materials included in Facebook's opposition, necessitated by TPI's motion to dismiss and sanctions request, pose no prejudice to TPI whatsoever. Instead, the materials sought to be stricken here are plainly related to the controversy, and, as noted above, striking Facebook's sanctions defenses from the record would be extremely prejudicial to Facebook.

III. CONCLUSION

Based on the foregoing, Facebook respectfully requests that TPI's motion to strike be denied.

Thus, none of the cases cited by TPI in its motion to strike remotely support the remedy it seeks. Further, none of the foregoing cases dealt with factual submissions of a party in response to a request for sanctions.

[2] Additional First Circuit authority accords. *See, e.g., Schroeder v. Triton Reg'l Sch. Dist.*, Civ. No. 07-10367, 2008 WL 8170074, at *13 (D. Mass. Feb. 21, 2008) (noting further that motions to strike are often considered "time wasters"); *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 182 F.R.D. 386, 398 (D.R.I. 1998). *See also Catruch v. The Picture People*, Civ. No. 04-00118, 2004 WL 2370646, at *1 (D. Me. Sep. 7, 2004) (declaring motion to strike certain materials from a pleading based on inapposite authority a "bogus issue" and sanctioning the defendant for seeking the strike remedy).

Dated: January 18, 2011

By: /s/ *Daniel J. Knauss*
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CERTIFICATE OF SERVICE

I, Daniel J. Knauss, hereby certify that pursuant to Local Rule 5.4(C), this document has been filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF). For those parties indicated as non-registered participants, if any, a paper copy will be sent by facsimile and/or U.S. First Class Mail on January 18, 2011.

/s/ Daniel J. Knauss
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