The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STEVEN VANCE, *et al.*,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

2:20-cv-01082-JLR

PLAINTIFFS' MOTION TO STRIKE NEW ARGUMENTS RAISED IN DEFENDANT'S REPLY

Note on Motion Calendar:
August 19, 2022

Plaintiffs Steven Vance and Tim Janecyk, through their attorneys, respectfully request the Court strike new arguments by Defendant Microsoft Corporation. ("Defendant") for the first time in its Reply in Support of its Renewed Motion for Summary Judgment ("Reply").

FACTUAL BACKGROUND

On December 10, 2021, Defendant filed its motion for summary judgment, asserting it was entitled to summary judgment on its extraterritoriality and dormant Commerce Clause defenses and that it did not profit from the Diversity in Faces Dataset ("DiF Dataset"). Dkt. 84. After the Parties briefed Plaintiffs' Fed. R. Civ. P. 56(d) motion (Dkts. 107-08, 110-112) that identified, *inter alia*, additional discovery required for Plaintiffs' response to the summary judgment motion, the Court ordered additional discovery with respect to the summary judgment motion, including additional document production and depositions of all declarants whose declarations Defendant relied on in moving for summary judgment. Dkt. 118. After the Parties' completed the additional discovery, Defendant filed a renewed motion for summary judgment on May 19, 2022 (Dkt. 127), which renewed motion is now fully briefed (Dkts. 135, 138).

In its Reply, Defendant improperly raises two new arguments for the first time via footnote. First, Defendant contends that "Illinois courts would not even have personal jurisdiction over Microsoft in a suit asserting these claims, as 'the litigation does not arise from contacts that [Microsoft] created with Illinois or actions purposefully directed at residents of Illinois.'" Dkt. 138, ECF 11, n.3. Second, Defendant contends that Plaintiffs filed suit in Washington *because* there was no personal jurisdiction over Defendant in Illinois, and that "it would be absurd if Plaintiffs could subject Microsoft to Illinois regulation in a Washington court when Illinois doesn't even have enough Illinois contacts to give rise to Illinois jurisdiction." *Id*. (emphasis added). Defendant cites caselaw in support of its new arguments. *Id*.

ARGUMENT

The Court should strike Defendant's new arguments raised in a footnotes in its Reply concerning personal jurisdiction. It is well-settled law in the Ninth Circuit and this District that issues raised for the first time via reply briefs should not be considered. *See Alliance Against IFQ*

v. Brown, 84 F.3d 343, 348, n.1 (9th Cir. 1996) ("Because parties cannot raise a new issue for the first time in their reply brief […], we do not consider these arguments." (*citing Thompson v. CIR*, 631 F.2d 642, 649 (9th Cir. 1980)); *Karpenski v. Am. General Life Co.,* LLC, 916 F. Supp. 2d 1188, 1190-91 (W.D. Wash. 2012) (striking new argument and corresponding declaration that were improperly made in reply); *Ngethpharat v. State Farm Mut. Auto. Ins. Co.*, 499 F. Supp. 3d 908, 920 (W.D. Wash. 2020) (striking declarations that raise new arguments for the first time on reply, and ruling on motion without considering new issues); *U.S. v. Washington*, 88 F. Supp. 3d 1203, 1217 (W.D. Wash. 2015) (striking portions of reply and declarations raising new issues); *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 250, fn. 1 (9th Cir. 1992) (declining to consider new argument raised in footnote of reply brief, which deprived opposing party of opportunity to address new argument); *Ohio Sec. Ins. Co. v. Garage Plus Storage Aviation LLC*, No. 3:21-cv-5579, 2022 WL 1213319, *5, fn. 3 (W.D. Wash. Apr. 25, 2022).

Here, the Court should strike Defendant's new arguments contained in footnote 3 pertaining to personal jurisdiction because that issue is not before the Court and, even if it were, Defendant should have raised it in its opening brief so that Plaintiffs could have addressed it. As Defendant appears to concede, questions of whether specific or general personal jurisdiction exist over Defendant in Illinois are necessarily different hypothetical questions involving different standards of law than whether BIPA's application to Defendant's acquisition, storage, and use of the DiF Dataset would violate the dormant Commerce Clause or extraterritoriality doctrine. Further, briefing this factual hypothetical question would be pointless as this case is in not pending in Illinois. Briefing this hypothetical question would require extensive fact discovery into Defendant's specific and general contacts with Illinois, which discovery would be much broader than the investigation into some of Defendant's DiF-related conduct that has occurred so far.

Most importantly— regardless of whether Defendant's new argument is stricken— it is wrong. Plaintiffs did *not* file in Washington because they believed there was no personal jurisdiction in Illinois. Plaintiffs filed in Washington to avoid the many months of unnecessary and protracted jurisdictional discovery and motion practice required to resolve questions of

personal jurisdictional. Defendant's new argument is also wrong because it fails to consider any basis for jurisdiction in Illinois beyond facts related to Plaintiffs' presence in Illinois. Further, Defendant's analysis of personal jurisdiction only contemplates specific jurisdiction, as the Parties have not engaged in discovery into Defendant's broader contacts with Illinois.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiff's motion and strike footnote 3 from Defendant's Reply.

DATED: August 11, 2022

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