

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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PAUL D. CEGLIA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 1:10-cv-00569-
	:	RJA
MARK ELLIOT ZUCKERBERG and	:	
FACEBOOK, INC.,	:	
	:	
Defendants.	:	
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**PLAINTIFF’S SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO STAY DISCOVERY**

I.

INTRODUCTION

On August 18, 2011, Magistrate Judge Foschio entered an Order (Doc. No. 117) (August 18, 2011 Order) directing Plaintiff to submit a supplemental declaration, on or before August 29, 2011, identifying:

- (A) the electronic copies or images of the purported contract attached to any complaint in this action;
- (B) all electronic versions or purported versions of any contract by and among Defendant Zuckerberg, Plaintiff and/or other persons associated with StreetFax (“Contract”), including the electronic copies or images of any Contract in the possession, custody, or control of Plaintiff’s attorneys, experts, or other agents;
- (C) all electronic versions of any emails or purported emails by and among Defendant Zuckerberg, Plaintiff and/or other persons associated with StreetFax (“Emails”);
- (D) the forms described in paragraph 8 of the Declaration of Paul D. Ceglia, dated June 12, 2011 (Doc. No. 65);
- (E) the removable storage devices described in paragraph 6 of the Declaration of Alexander H. Southwell, dated August 15, 2011 (Doc. No. 111);
- (F) all computers and electronic media in Plaintiff’s possession custody, or control, excluding Plaintiff’s attorneys and experts’ computers, since June 30, 2010; and
- (G) all computers and electronic media no longer in Plaintiff’s possession, custody, or control that contain or contained information relevant to any Contract, any Emails, or this action.

(August 18, 2011 Order at 1-2, ¶ 2.)

The August 18, 2011 Order further directs, “On or before August 29, 2011, Plaintiff shall produce all files, computers, or electronic media identified in the Supplemental Declaration, except for the items identified that are no longer in Plaintiff’s possession, custody, or control. All files shall be produced in their native format.” (*Id.* at 2, ¶ 3.)

Furthermore, by August 29, 2011, “Plaintiff shall also identify all email accounts accessible through web-based interfaces that Plaintiff has used since 2003, including but not limited to his gmail.com, msn.com, tmail.com, and Adelphia.net accounts. Plaintiff shall consent to the acquisition and inspection by Stroz Friedberg of the contents of all such accounts.” (*Id.* at 3, ¶ 5.)

As to the original contract, the August 18, 2011 Order states, “On or before August 29, 2011, Plaintiff shall produce the Hard-Copy Documents, as defined in this Court’s July 1, 2011 Order, at the offices of Harris Beach PLLC in Buffalo, New York. Plaintiff shall permit Defendants’ experts to conduct the ink sampling described in paragraph 8 of the Declaration of Dr. Albert Lyter III, dated August 15, 2011.” (*Id.* at 3, ¶ 6.)

Finally, the August 18, 2011 Order provides, “Defendants are authorized to issue a subpoena under Federal Rule of Civil Procedure 45 on Sidley Austin LLP.” (*Id.* at 4, ¶ 8.)

II.

LEGAL STANDARD

A court may stay discovery for good cause shown. *Ellington Credit Fund, Ltd. v. Select Portfolio Servs., Inc.* (No. 08 Civ. 2437, S.D.N.Y. Feb. 3, 2009) at 1. In evaluating whether a

party has shown good cause, the court considers “potential prejudice to the party opposing the stay, the breadth of discovery sought, and the burden that would be imposed on the part[y] responding to the proposed discovery.” (*Id.* at 1-2.)

III.

ARGUMENT

A. Plaintiff Will Suffer Undue Hardship and Prejudice If the Court Does Not Stay the Broad Discovery that Magistrate Judge Foschio Ordered

The August 18, 2011 Order requires Plaintiff to engage in enormous efforts if Plaintiff is to comply by August 29, 2011—merely eleven (11) days after the Court issued the August 18, 2011 Order. To identify and produce categories (A)-(D) (*see* August 18, 2011 Order at 1-2, ¶ 2.), Plaintiff’s counsel have contacted all of Plaintiff’s former attorneys and Plaintiff’s experts to obtain all responsive documents in their possession, custody, or control and in their native format. (*See* Shaman Decl. at 2, ¶ 6.) So far only some of these individuals have responded, and one expert has informed Plaintiff’s counsel that he will be out of town until August 29, 2011, the date by which the August 18, 2011 Order requires compliance. (*See id.* at 2, ¶¶ 7-8.) Additionally, all of the attorneys and experts Plaintiff’s contacted are likely to provide Plaintiff’s counsel with extensive electronic documents that Plaintiff’s counsel will need to comb through carefully (*see id.* at 2, ¶ 9), especially given that Plaintiff must provide all responsive, non-privileged documents directly to Defendants. (*See* August 18, 2011 Order at 2-3, ¶ 3.)

The August 18, 2011 Order also requires Plaintiff to identify and provide access to *every email account he has used since 2003*. (*See id.* at 3, ¶ 5.) To comply, Plaintiff must engage in enormously time-consuming efforts to ensure that all email accounts are identified and that he can provide the necessary login information, which may need to be obtained by contacting

various email providers. Furthermore, the Order grants Defendants carte blanche to read through and inspect Plaintiff's private emails dating all the way back until 2003. (*See* August 18, 2011 Order at 3, ¶ 5.) This is a serious invasion of Plaintiff's privacy. As such, Plaintiff needs a meaningful opportunity to brief his concerns thoroughly and adequately and have them addressed by Judge Arcara before the time for compliance runs.

Magistrate Judge Foschio also granted Defendants the opportunity to take even more ink samples from the original contract. (*See id.* at 3, ¶ 6.) The Hard-copy Document Inspection Protocol, according to which Defendants' experts will sample the ink, allows Plaintiff's experts to observe the testing. However, at this point, Plaintiff does not know if his experts will be available to observe the testing on August 29, 2011.

B. Plaintiff Has Not Yet Obtained a Transcript of the August 17, 2011 or August 18, 2011 Hearings

In order to file objections to Magistrate Judge Foschio's August 18, 2011 Order, Plaintiff will need to review a copy of the court reporter's transcript for the hearings on August 17, 2011 and August 18, 2011 because Magistrate Judge Foschio made all factual and legal findings on the oral record. Although Plaintiff has requested that the court reporter expedite transcription and provide transcripts as soon as possible, Plaintiff has not yet received those transcripts, providing even less time to object before the August 29, 2011 deadline. (*See* Lake Decl. at 2, ¶ 4.)

C. Defendants Will Not Suffer Prejudice

Defendants' goal in requesting this expedited discovery was to obtain an order allowing them to investigate the authenticity of the original contract. (*See* Defendants' Memorandum of Law in Support of Their Motion for Expedited Discovery (Doc. No. 45).) In this case,

Defendants have already obtained extensive discovery pursuant to the Court's July 1, 2011 Order (July 1, 2011 Order). Plaintiff produced a large volume of electronic data for Defendants' inspection. (*See* Declaration of Jeffrey A. Lake, dated August 22, 2011, at 1, ¶ 2.) Plaintiff also produced the original contract for extensive, time-consuming ink and paper sampling. (*See* Lake Decl. at 1, ¶ 2.)

Plaintiff has made a concerted, good-faith effort to comply with the July 1, 2011 Order. Furthermore, Plaintiff's counsel has already engaged in diligent efforts to comply with the August 18, 2011 Order in the event Plaintiff's objections are overruled and/or a stay is not granted. (*See* Shaman Decl. at 2, ¶¶ 6-7.) Given that Plaintiff is doing everything possible to comply with the Court's discovery orders and the extensive discovery already provided to Defendants, there is no reason to believe that Defendants will suffer prejudice if the Court grants a stay.

IV.

CONCLUSION

Based on the foregoing arguments and those already submitted to the Court, Plaintiff respectfully requests that the Court find good cause and stay the discovery authorized by the August 18, 2011 Order pending resolution of Plaintiff's forthcoming objections to that Order.

Dated: August 22, 2011

s/ Jeffrey A. Lake
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Respectfully submitted,

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