

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 MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION
TO THE ISSUANCE OF SANCTIONS**

I.

CEGLIA SHOULD NOT PAY FOR DEFENDANTS’ MISDEEDS

F.R.C.P. 37(a) provides,

If the motion [to compel] is granted . . . the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant’s reasonable expenses incurred in making the motion, including attorney’s fees. But the court must not order this payment if:

- (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
- (ii) the opposing party’s nondisclosure, response, or objection was substantially justified; or
- (iii) *other circumstances make an award of expenses unjust.*

(Emphasis added). The Advisory Committee determined that an award of expenses would be unjust “where the prevailing party also acted unjustifiably.” F.R.C.P. 37 advisory committee’s note (1970).

As discussed in more detail in Plaintiff’s Motion to Set Delayed Briefing Schedule (Doc. No. 134) and the documents that accompanied it, Defendants blatantly violated Ceglia’s privacy, this Court’s orders, and applicable state and federal law by disclosing Ceglia’s email accounts

and passwords to the public. No award of damages to Ceglia or any other sanction against Defendants will ever be able to undue this irreparable harm. Eventually, Ceglia will ask this Court to repair some of the integrity lost to the legal system by preventing Defendants from relying on any of the emails. However, for now the Court can at least refuse to award expenses to Defendants for bringing the very motion that resulted in the violations of Ceglia's privacy. Hopefully, such a decision will deter Defendants from future malicious conduct like what has happened here with Ceglia's email accounts and in the past when Defendants "accidentally" published redacted material and discussed protected material in violation of the Joint Stipulated Protective Order. (*See* Doc. No. 95.)

II.

CEGLIA'S ATTORNEYS SHOULD NOT BE SANCTIONED BECAUSE THEY PLAYED NO PART IN VIOLATING THE COURT'S ORDER

Ceglia originally complied with the Order by providing his email accounts and passwords to Stroz Friedberg on August 29, 2011 as required by the August 18 Order. (Declaration of Nathan Shaman 2, ¶ 4.) However, Defendants and Stroz Friedberg rendered that information useless when they violated Ceglia's privacy. Absent their misconduct, Stroz Friedberg would have had access to Ceglia's email accounts immediately upon Judge Arcara's Order overruling Ceglia's objections (Doc. No. 145). However, Ceglia was forced to execute and deliver *new* consent forms with his recently changed passwords. (Shaman Decl. 2-3, ¶¶ 10-12.) Therefore, a substantial portion of the delay was a result of Defendants' unsavory and inexcusable tactics.

Both of the attorneys with the primary responsibility for assisting Ceglia in complying with the Court's August 18, 2011 Order (Doc. No. 117) (August 18 Order)

repeatedly contacted Ceglia throughout August and September to remind him of his continuing obligations to comply with the August 18 Order. (*See* Declaration of Jeffrey A. Lake & Shaman Decl.) Initially, Ceglia refused to comply with the August 18 Order. (Lake Decl. 1, ¶ 2.) As such, Ceglia's attorneys moved to stay the August 18 Order (Doc. No. 118) pending objections, but Judge Arcara denied the request. (Shaman Decl. 1, ¶ 3.) However, Ceglia eventually agreed to turn over his information on the condition that Stroz Friedberg would not have access until Judge Arcara ruled on the forthcoming objections. (Lake Decl. 1-2, ¶ 4.) Therefore, Ceglia complied as required on August 29, 2011. (Shaman Decl. 2, ¶ 4.) However, pursuant to Ceglia's wishes, that same day, Ceglia's attorneys again moved to stay the August 18 Order (Doc. No. 126). (*Id.* 2, ¶ 5.) The motion was denied. (*Id.*)

After Judge Arcara overruled Ceglia's objections (Doc. No. 145), Ceglia's attorneys asked him to turn over his email accounts along with his new passwords, on the forms provided by Stroz Friedberg. (*Id.* 2, ¶¶ 7-11.) Ceglia sent out the forms via DHL Express on September 23, 2011. (*Id.* 3, ¶ 12.) Immediately after receiving them on September 28, 2011, Ceglia's attorneys emailed copies of the consent forms and mailed the original consent forms to Stroz Friedberg. (*Id.* 3, ¶ 13.)

III.

CONCLUSION

For the foregoing reasons, Plaintiff Paul D. Ceglia respectfully requests that the Court refuse to award attorney's fees to Defendants because of their misconduct and his efforts to comply with the August 18 Order.

Dated: October 7, 2011

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Respectfully submitted,

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