

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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PAUL D. CEGLIA,

Civil Action No. : 1:10-cv-00569-RJA

Plaintiff,

v.

**PLAINTIFF'S RESPONSE TO  
DEFENDANTS' THIRD MOTION  
TO COMPEL**

MARK ELLIOT ZUCKERBERG, Individually, and  
FACEBOOK, INC.

Defendants.

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**MEMORANDUM**

The Facebook contract involved in this case is the subject of most of the Defendants' Third Motion to Compel. Numerous witnesses and experts have captured images of the Facebook contract from a time just before the complaint was filed and throughout this matter. Experts for both sides have had the opportunity to examine the Facebook contract. Mr. Ceglia has provided reports from two experts about their analysis of the Facebook contract. Facebook has provided zero reports from their experts and no rebuttal to Mr. Ceglia's two experts' analysis.

**THE UNAUTHENTICATED DIGITAL IMAGE APPEARS**

Facebook's Third Motion to Compel is also focused on unauthenticated digital images of a two page document that Facebook claims to have "found" somewhere during its computer analysis. This unauthenticated digital image is more commonly referred to in the media by Facebook's counsel as the "[smoking gun](#)."

Well, it is now obvious, months after Facebook's experts have evaluated it, that the smoke has cleared, it is eerily quiet and that smoking gun is pointing the wrong way for Facebook. The silence, as they say, is deafening.

### **DEFENDANTS' LAST MINUTE LACK OF SATISFACTION**

Facebook's Third Motion to Compel was a choice they made. They wrote a letter to Mr. Ceglia's counsel on late Friday October 7, 2011. They gave him until Tuesday of the following week to respond in full. When he was unable to do so, given the intervening weekend and the late Friday letter, they filed their Third Motion to Compel.

Facebook's repeated motions have, for the time being, diverted Plaintiff's energy to responding to an ever-widening list of demands. Mr. Ceglia has now filed nearly 40 pages of declarations providing a breadth and depth of information that is unusual for expedited discovery as this court has intimated. Facebook hears the clock ticking and the repeated Motions to Compel, instead of working out their issues with Plaintiffs without court intervention, mark a frantic search for something, anything, about their unauthenticated digital image in order to authenticate it, one would assume.

### **THE ENVIRONMENT SURROUNDING FACEBOOK'S "DISCOVERIES"**

What this unauthenticated digital image is or is not, its contents, the veracity of the tale of how Facebook's experts "found" it are yet to be disclosed by Facebook. Facebook has one of the foremost technology teams on the planet. As of its last public declarations, it has 30,000 servers under its control. "Today we have

somewhere in the neighborhood of 30,000 servers.” That number comes from Jeff Rothschild, the vice president of technology at Facebook, who discussed the company’s infrastructure in a [presentation](#) at UC San Diego *in October 2009*. Rothschild said during the Q&A session following his talk, that the number ”will be different today than it was yesterday” because Facebook is adding capacity on a daily basis.

With access to the personal data, friend lists, likes, photos, messages and opinions of more than 500 million people and counting, a behemoth spidering server farm under Facebook and Mr. Zuckerberg’s control, one can be excused for being wary about the authenticity of information flowing from such a source into this case. Diversion is the strategy of triviality perfectly designed to build tigers out of paper. Facebook’s ethic, it’s very motto, spray painted *inside* its world headquarters, glorifies hacking.



As the court may well know, hacking is a pejorative term defining the unauthorized access to a computer system. Mr. Zuckerberg acknowledges being punished at Harvard University for hacking Harvard's servers. <http://www.cbsnews.com/video/watch/?id=3697403n>.

Facebook hosts, promotes and bestows awards on the best hackers in its annual Facebook Hacker Cup. On the Facebook page for this hacking celebration, it is billed as "an annual worldwide programming competition where hackers compete against each other for fame, fortune, glory and a shot at the coveted Hacker Cup." <http://www.facebook.com/hackercup>.

An unrepentant hacker, glorifying hacking, sitting atop one of the world's largest server farms stocked with the personal data of more than 500 million people is something Mr. Ceglia would be foolish to ignore. Plaintiff evaluates Facebook's participation in this case aware of that underlying philosophy coupled with its unparalleled capability.



### **PLAINTIFF'S FIRST SUPPLEMENTAL DECLARATION**

On August 29, 2011, Plaintiff submitted a 30 page supplemental declaration to Defendants. Exhibit A. The creation of this declaration consumed more than 100 hours of attorney time and Plaintiff's own time to prepare it. This time estimate does not include Plaintiff's time spent exhaustively searching, at Defendants' request, to confirm no other electronic storage devices were in Plaintiff's possession, custody or control. Exhibit C at ¶7(a)-(k).

Following receipt of that supplemental declaration, Defendants, gave Plaintiffs approximately 1½ working days to respond to satisfy their demands, presuming Plaintiff nor Plaintiff's counsel had any personal or professional weekend plans besides responding to Defendant's late Friday demands. Exhibit B.

By the following Friday, Defendants filed their Third Motion to Compel listing six items and additional requests relating to Plaintiff's supplemental declaration.

### **PLAINTIFF'S PROVIDE SECOND SUPPLEMENTAL DECLARATION**

In response to Facebook's counsel's multi page demand list, and its Third Motion to Compel, Plaintiff has submitted a second supplemental declaration to Defendants just today. Exhibit C. Whether the items requested or tasks requested of Plaintiff were beyond the court's order, Plaintiff has still responded completely to Defendants except for a single document that is under review by this court on Plaintiff's good faith assertion of attorney client privilege. *Id.*

Along with the submission of the second supplemental declaration, Plaintiff's counsel has corresponded with Mr. Snyder, et al. asking for Defendants to list any additional items or concerns about this second supplemental declaration.

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**Mr. Ceglia's second supplemental declaration is attached**

1 message

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**Dean Boland <dean@bolandlegal.com>****Mon, Oct 24, 2011 at 10:05 PM**

To: "Aycock, Amanda M." <AAycock@gibsondunn.com>

Cc: "paul.argentieri@gmail.com" <paul.argentieri@gmail.com>, "jlake@lakeapc.com" <jlake@lakeapc.com>, "Nathan Shaman Esq. (nshaman@lakeapc.com)" <nshaman@lakeapc.com>, "Snyder, Orin" <OSnyder@gibsondunn.com>, "Southwell, Alexander" <ASouthwell@gibsondunn.com>, "Dupree Jr., Thomas" <TDupree@gibsondunn.com>, "Benjamin, Matthew J." <MBenjamin@gibsondunn.com>  
Bcc: Paul Ceglia <paulceglia@gmail.com>

See attached.

Mr. Snyder:

After reading this declaration, if there is anything additional that you feel Mr. Ceglia is required to provide to you per the court's order, please advise promptly and we will work diligently to provide whatever it is you seek that is not privileged.

As of today, I have been counsel for Mr. Ceglia for four days. I believe our rapid response given that fact has been remarkable and a credit to a load of work by my client and other counsel on his behalf.

I look forward to addressing any concerns you have to avoid us having any substantive issues to argue with the court on November 2, 2011 which I can only assume would be good news for the judge.

Dean Boland.

Plaintiff counsel's goal, as summarized in that correspondence, is to "not burden the court with motion practice" as Mr. Snyder stated was also his goal during the June 30, 2011 hearing. Transcript of June 30, 2011 hearing at p. 126. In that sense, both parties are now working cooperatively to address any lingering issues Defendants have with these two supplemental declarations by Plaintiff. Defendant has not indicated any prejudice to Facebook or Mr. Zuckerberg at this point and given Mr. Ceglia's voluminous responses, it is anticipated that no prejudice will occur from this point forward either.

Plaintiff's counsel and defense counsel have established a good working relationship with at least one phone call and several email exchanges in the short

time that Plaintiff's current counsel has been involved in this matter. I fully expect that cooperation to continue.

Finally, Mr. Ceglia and his counsel will continue to abide by the protective order restricting public comment on the results of the experts' testing of the Facebook contract to date. Mr. Ceglia has no interest in trying his case in the media. He has a contract. He has a case. No smoke needed.

### **CONCLUSION**

For the foregoing reasons, Mr. Ceglia respectfully requests this court deny the Defendants' Third Motion to Compel and award Plaintiff's all other relief, including attorneys' fees, to which they may be entitled.

Respectfully submitted,

/s/Dean Boland

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### **CERTIFICATE OF SERVICE**

A copy of the foregoing shall be served on October 24, 2011 on all parties by operation of the court's electronic case filing system.

/s/ Dean Boland  
Dean Boland