

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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PAUL D. CEGLIA,	:	
	:	
Plaintiff,	:	Civil Action No. 1:10-cv-00569-RJA
	:	
v.	:	
	:	DECLARATION OF
MARK ELLIOT ZUCKERBERG and	:	ALEXANDER H. SOUTHWELL
FACEBOOK, INC.,	:	
	:	
Defendants.	:	
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I, ALEXANDER H. SOUTHWELL, hereby declare under penalty of perjury that the following is true and correct:

1. I am an attorney licensed to practice law in the State of New York and admitted to practice before this Court. I am a partner in the law firm of Gibson, Dunn & Crutcher LLP (“Gibson Dunn”), counsel of record for Mark Elliot Zuckerberg and Facebook, Inc. (“Facebook”) in the above-captioned matter. I make this declaration, based on personal knowledge, in support of Defendants’ Fourth Motion to Compel and for Other Relief.

2. This declaration describes Defendants’ good-faith efforts to resolve disputes regarding Plaintiff’s failure to comply with this Court’s Orders dated July 1, 2011, and August 18, 2011 (Doc. No. 117), before filing Defendants’ Fourth Motion to Compel, in compliance with Western District of New York Local Rule 7(d)(4).

3. Plaintiff was required by this Court’s July 1, 2011 Order (the “July 1 Order”) to produce “all electronic copies of the purported emails described in the Amended Complaint.” Doc. No. 83 at 2.

4. Plaintiff was required by this Court’s August 18, 2011 Order (the “August 18 Order”) to identify, by name and location, “all electronic versions of any emails or purported

emails by and among Defendant Zuckerberg, Plaintiff, and/or persons associated with StreetFax.” Doc. No. 117, ¶ 2. On August 29, Plaintiff filed a Supplemental Declaration as required by the August 18 Order. *See* Doc. No. 176-1. That Declaration purports to identify the locations of all electronic versions of any purported emails between Zuckerberg and Ceglia. *See id.* at 23–25.

5. On November 17, 2011, Plaintiff filed a motion regarding several purported emails between Zuckerberg and Ceglia. *See* Doc. Nos. 223, 224. Attached to that motion were two sworn declarations – one by Ceglia, and one by Jerry Grant, a computer forensic expert. *See* Doc. Nos. 225, 226.

6. The declarations of Ceglia and Grant both describe 41 floppy disks that Ceglia apparently gave to Grant in late March or early April 2011. According to Ceglia’s attestations, those floppy disks contain electronic copies of emails between Zuckerberg and Ceglia. *See* Doc. No. 225, ¶¶ 7–12. And according to Grant’s attestations, he “created forensically sound” copies of all 41 floppy disks. *See* Doc. No. 226, ¶ 9.

7. Because those floppy disks contain emails between Zuckerberg and Ceglia, they fell squarely within the July 1 Order requiring Ceglia to produce all electronic copies by July 15, 2011, Doc. 83 at 2, and the August 18 Order requiring Ceglia to describe and identify by location these electronic files in his August 29 Supplemental Declaration. *See* Doc. No. 117, ¶ 2(C).

8. Ceglia’s August 29 Supplemental Declaration does not identify Grant as a custodian of electronic versions of emails between Zuckerberg and Ceglia. *See* Doc. No. 176-1, at 23–25.

9. Thus, on the evening of November 25, 2011, I sent counsel for Plaintiff, Dean Boland, a letter informing Plaintiff that his August 29 production and Supplemental Declaration

were not compliant with the August 18 Order. I indicated that Plaintiff should address, in his imminent December 2 Supplemental Declaration, his failure to list Grant as a custodian of electronic evidence in his August 29 Supplemental Declaration. I further indicated that Plaintiff should produce for inspection, and certify production of, the electronic items in Grant's possession. I also noted that Defendants reserved the right to seek appropriate sanctions for Plaintiff's ongoing willful non-compliance with the Order. A true and correct copy of that letter is attached hereto as Exhibit A.


10. Plaintiff responded to my letter by email on November 26, 2011, at 1:06 AM. He implied that the 41 disks mentioned in Grant's declaration were among the "at least 50 floppy disks" that Stroz Friedberg collected from Project Leadership Associates. He also suggested that Defendants ask Stroz to verify that the 41 disks were among those Stroz collected from Project Leadership Associates, and that if they were not, Project Leadership Associates could send them to Stroz. A true and correct copy of that email is attached hereto as Exhibit B.

11. I responded by email to Plaintiff on November 28, 2011, at 10:17 PM. I explained to Plaintiff that it was impossible to determine whether Stroz had already acquired the 41 disks mentioned in Grant's declaration because Grant never identified them in any detail. I also asked Plaintiff to provide identifying information – "hash values" – for those disks, so that Stroz could attempt to determine whether they had already acquired them from Project Leadership Associates. I further explained to Plaintiff why, even if Stroz Friedberg had already acquired those disks, Plaintiff's failure to identify Grant and the 41 floppy disks and copies in his August 29 Supplemental Declaration constituted a violation of this Court's July 1, 2011, and August 18 Orders. A true and correct copy of that email is attached hereto as Exhibit B.

12. Plaintiff replied to my email on November 28, 2011, at 11:18 PM. His response states: "After Stroz searches their floppies if they cannot find the information in our filings, let me know. I am not doing your job and Stroz's job. Get one of the thousand lawyers at your disposal to sit and think. PLA provided all floppies to Stroz. If none of those are the ones Grant viewed, that is news to me. Confirm Stroz has evaluated all of those and get back to me." A true and correct copy of that email is attached hereto as Exhibit B.

13. Defendants respectfully seek an expedited hearing on this narrow request. In the interests of judicial economy, Defendants submit that this straightforward issue of Plaintiff's ongoing non-compliance with the Court's expedited discovery orders should be resolved during the hearing already scheduled for December 13, 2011. To allow Plaintiff to withhold any longer the outstanding items would be to reward his ongoing contumacious defiance of the Court's orders.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 1st day of December, 2011 at New York, New York.



Alexander H. Southwell