

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA,

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

Plaintiff,

v.

**REPLY TO RESPONSE TO OUR
MOTION REGARDING
SPOILIATION OF CONTRACT
REGARDING MISHANDLING**

MARK ELLIOT ZUCKERBERG, Individually, and
FACEBOOK, INC.

Defendants.

MEMORANDUM

Plaintiff's motion noting the recklessness bordering on intentional mishandling of the Facebook Contract without gloves was based on a limited review of the videotape of Facebook's experts examination of the Facebook Contract. A more thorough review of *just the first two days* of that examination reveals Facebook's so-called experts touching the face of the Facebook Contract on more than 40 occasions without wearing gloves. Exhibit A. This includes touching the face of the document with their fingertips, fingers, hands and palms without wearing gloves. Id.

Facebook's experts "roughly handled" the Facebook Contract with no concern for its evidentiary value. Declaration of Paul Argentieri at ¶19. Mr. Romano, Lesnevich and LaPorte would snatch the Facebook Contract when picking it up with no regard for its integrity. Id. at ¶21.

THE EXCUSES

Defendants and their experts make excuses for their mishandling of the Facebook Contract. Those two excuses are summarized as *you didn't tell us to wear gloves* (Doc. No. 237 at 15) and *Plaintiff's experts did it too*. Doc. No. 237 at ¶16. Defendants do not dispute that handling the Facebook Contract without gloves is spoliation.

ASTM STANDARDS VIOLATED

Facebook expert Lesnevich identifies the American Society for Testing and Materials as “[setting] the standards for Forensic Document Examiners....” Doc. No. 239 at ¶8. Defendants submitted the ASTM Standard Guide for Indentation Examinations. Doc. No. 239-2.

The ASTM standard tells experts that “Chemical processing for latent [finger]prints generally interferes with indentation examination results. Indentation examinations should be conducted prior to any chemical processing. Items should be handled appropriately to avoid compromising subsequent examinations (for example, with *clean cloth gloves*).” Doc. No. 239-2 at ¶5.4. Emphasis added. Obviously, no warning is necessary to experts following ASTM standards that they ought to wear gloves during document examinations. Facebook Expert Lesnevich provides us that guidance via the ASTM standards in Doc. No. 239-2. Defendants’ experts submitted multiple standards documents in their response. Those standards prove Plaintiff’s claim regarding spoliation by handling of the Facebook Contract without gloves.

In Defendants' own submission, Doc. No. 238-3 at ¶5.3 it reads as follows:

5.3 The results of prior storage, handling, testing, or chemical processing (for example, for latent prints) may interfere with the ability of the examiner to examine certain characteristics. Whenever possible, document examinations should be conducted prior to any chemical processing. Items should be handled appropriately to avoid compromising subsequent examinations.

In Defendants' Doc. No. 238-4 at ¶5.4 it reads as follows: "5.4 chemical processing for latent prints generally interferers with non-destructive paper examination. paper examinations should be conducted prior to any chemical processing."

Paragraph 5.5 of that same document reads: "5.5 Items should be handled as little as possible prior to and during paper examinations to prevent contamination such as the introduction of latent prints. The use of *clean cloth gloves* is recommended." Emphasis added.

Paragraph 5.4 of Defendants' Doc. No. 239-2 reads:

5.4 The results of prior storage, handling, testing, or processing may interfere with these procedures. Chemical processing for latent prints generally interferes with indentation examination results. Indentation examinations should be conducted prior to any chemical processing. Items should be handled appropriately to avoid compromising subsequent examinations (for example, with *clean cloth gloves*). Emphasis added.

Paragraph 5.5 of Doc. No. 239-2 reads:

5.5 Items should be handled as little as possible prior to EDD examination to prevent contamination (for example, the introduction of latent prints and additional indentations). Improper handling (*for example, rubbing the item surface with cloth gloves*) may also impede EDD examination results. Emphasis added.

“First and foremost, neither Ceglia nor his many lawyers and purported experts ever — at any point in this litigation — stated or even hinted that Plaintiff contemplated the possibility of testing the hard-copy documents for fingerprints, let alone that Plaintiff intended to do so.” Doc. No. 237 at 15. Again, the ASTM standard noted above tells experts that fingerprint examination comes *after* the examinations that Tytell and Lesnevich were performing. Doc. No. 239-2 at ¶5.4.

Defendants cite no case law or civil rule requiring Plaintiff’s experts or counsel to monitor and control their experts’ sloppy and borderline incompetent conduct handling a document underlying a potentially billion dollar claim. Defendants corollary claim that Plaintiff’s failed to insist on the glove wearing requirement within the Hard Copy Inspection Protocol is also meritless. It is as if the Defendants and their counsel believe that they are free to hide and destroy evidence unless Plaintiff details all the ways they should be restricted from doing so.

SLOPPY HANDLING OF THE FACEBOOK CONTRACT

During the so-called experts examination of the document in July of this year, their disrespect for the gravity of the evidence they were handling is evident. There are no ASTM standards detailing the proper protocol for casually balancing evidence on a computer tower during examination. Facebook’s hand contaminating expert Lesnevich’s is unqualified to perform whatever uncontrolled heat tests he details in his declaration. Doc. No. 239 at ¶18. He, like the rest of Defendants’ experts, are merely running to escape their own documented sloppiness and

borderline incompetence and perhaps financial liability at some point.

THE DEFLECTION

Defendants seek to deflect their contamination of the Facebook Contract by alleging that “they did it too” as if we were children on a schoolyard. Lesnevich was seen placing his *fingers, heel of his palm and palm* directly onto the face of the Facebook Contract. No expert or attorney for Plaintiff touched the Facebook Contract without gloves. Declaration of Paul Argentieri at ¶10. Plaintiff’s expert Jim Blanco touched the Software Specification Contract without gloves on one occasion, but did not touch the Facebook Contract without gloves. There is simply no comparison to the manhandling done by Facebook’s experts and any claimed touching of the Software Specification Contract by Plaintiff’s expert or counsel.

Both defense counsel present during the days of examination and Lesnevich are highly motivated to shrug off the spoliation of any fingerprint analysis of the Facebook Contract. It is undoubtedly the case that neither Gibson Dunn nor Lesnevich have business insurance coverage sufficient to satisfy a multi-billion dollar claim brought by Facebook or Zuckerberg stemming from the effects of their mishandling of the Facebook Contract. To say they have an interest in never admitting anything they did handling this document was a mistake is an understatement - their careers depend on it.

CONCLUSION

For the foregoing reasons, Mr. Ceglia respectfully requests this court grant his motion for spoliation and order that an adverse jury instruction will be provided

to the jury in this case stating that the jury can infer from Facebook's mishandling of the Facebook Contract in this way that Mr. Zuckerberg's fingerprints would have been recovered from both pages of the document.

Respectfully submitted,

/s/Dean Boland

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