

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
MOTION FOR SANCTIONS FOR
SPOILIATION OF EMAILS**

MARK ELLIOT ZUCKERBERG, Individually, and
FACEBOOK, INC.

Defendants.

MEMORANDUM

Defendants and Mr. Snyder continue their obfuscation with their response to this motion. Defendants and Mr. Snyder argue in bad faith in Doc. No. 237 that two emails that are different, are the same. Doc. No. 237 at 5-6. Just like Mr. Gianadda, Stroz Friedberg sinned against Defendants and Mr. Snyder in their Doc. No. 47 declaration by telling the truth. “Emails have been deleted” is not something that Defendants can accept. Id. Their response is to spring into action and obtain an altered declaration from Stroz attempting to explain away the “bad” truth of their expert’s first declaration. Doc. No. 73. The court has seen this movie before. It is the same approach used to pressure Mr. Gianadda to alter his declaration coloring it favorably toward Defendants.

Stroz first states in Doc. No. 47 that when examining the 2011 Zuckerberg Harvard email record, emails are missing compared to a 2010 copy of Zuckerberg’s

Harvard email record. Once Defense counsel alerts them to the harm such truth does to their case, Stroz alters their declaration to say that “no email from the October 2010 [version] has been deleted or lost.” Doc. No. 73 at ¶5-6.

Just like with Gianadda, Stroz responds to the Defendants’ needs by altering an original declaration which was unfavorable to Defendants, Doc. No. 47, with a new version that, not surprisingly, favors Defendants. Doc. No. 73.

Mr. Rose *did not*, in fact, confirm that “all 17 [emails] are present in the April 2011 version of the account.” Doc. No. 237 at ¶5. Mr. Rose confirms that there are emails in the 2011 version that have “minor formatting differences” and “technical issues. For example, some of the emails had extra white space in the Subject line.” Id.

FIRST SMOKE, THEN MIRRORS, THEN NOTHING

Lost in the assurances of Defense counsel is any assurance at all from Stroz. They provide no declaration explaining the undefined terms of “minor formatting differences” or “technical issues.” These are merely euphemisms for “we don’t know why the emails are altered or who did it.” Stroz does not declare the emails are identical, because, of course, they are not. They merely try to excuse the obvious electronic evidence differences with the above undefined terms and assurances that no emails were “lost.”

Now with the hindsight of Defendant Zuckerberg having suppressed evidence in this case, authorized his lawyers to make false arguments in reliance on that suppressed evidence and having his lawyers actively attempt to destroy evidence,

there is every reason to believe the alteration and deletion of his emails was his doing.

Stroz's inadequate explanation of why emails were missing is self-serving and in service of Defendants' and their counsel's ongoing fraud. Stroz is also the firm that mislead this court into a comprehensive analysis needed for Ceglia's email record and a superficial analysis for Zuckerberg's email record as if credible computer forensics experts regarded these two treatments as equivalent.

What is the basis for Stroz to say that emails with different characters or white space are the same? How did those "minor formatting differences" occur? What are "minor formatting differences"? No such term defined in the Sedona Principles that this court's rules rely on. Were the differences created manually by someone with access to the account? Did someone at Harvard cause these differences? We still do not know precisely how many emails are different now and how they are different? When did they become different, i.e. date and time? How often do these types of differences occur in email investigations? Stroz's declaration that "No email from the October 2010 [version] has been deleted or lost" is now an obvious fraud in which they participated or were unwitting dupes. We know now that Stroz cannot make that representation because they have not searched all relevant electronic assets, for example, the computers Defendants and Snyder suppressed throughout this case and are subject to upcoming fraud sanctions from this court.

The Sedona Glossary of Terms related to Electronically Stored Information

defines what it means for data to be verified.

“Data Verification: Assessment of data to ensure it has not been modified. The most common method of verification is hash coding by some method such as MD5.” *Sedona Glossary of Terms* at 13.

The “de-duplication” function that Stroz used relies on the hash value of a file to find duplicates.

File Level Binary Comparison: Method of de-duplication using the digital fingerprint (hash) of a file. File Level Binary comparison ignores metadata, and can determine that “SHOPPING LIST.DOC” and “TOP SECRET.DOC” are actually the same document. Id. at 21.

The creation of hash values of files, used to find duplicates and remove them as Stroz did here, is defined as follows:

Hash Coding: To create a digital fingerprint that represents the binary content of a file unique to every electronically-generated document; assists in subsequently ensuring that data has not been modified. Id. at 25.

A DIFFERENT EMAIL IS NOT THE SAME EMAIL

Stroz Friedberg is participating with Defendants and their counsel in misleading this court. They are attempting to lead this court to believe that no emails are missing from Defendant Zuckerberg’s 2011 email record that were once present in his 2010 email record. Doc. No. 73 at ¶6. This claim is false and Stroz Friedberg knows it to be false. Even using de-duplication functions, a file containing “extra white space” is not the same as an apparently similar file without such white space. Declaration of Jerry Grant at ¶8-9.

The field of computer forensics does not have terms comparing electronic files

as “mostly the same” or “nearly identical.” Id. at ¶10. Either a file is identical to another file or it is not. If it is not identical, it is not the same file. Stroz and Defendants want this court to believe that the “missing” emails have re-appeared as nearly identical emails, except for “minor formatting differences” and “technical issues.” This is akin to describing elephants as identical to giraffes except for “minor neck issues” and “technical issues with their noses.” It is garbage data in and now garbage data out.

A credible computer expert, when confronted with what should be identical files that are now different, would have posed and attempted to answer a variety of critical questions: What has changed in the now altered file? Id. at ¶11a. When did this change occur? Id. at ¶11b. What caused the change to occur? Id. at ¶11c. Is there a way to test the hypothesis of how the change occurred and re-create it? Id. at ¶11d. Who has had access to the original file that is now altered? Id. at ¶11e. The potential answer behind the curtain here is that Stroz’s own mistake inserted the “minor formatting differences” and “technical issues” into the data in this case. Given the sloppy work of Defendants’ other experts, it would be par for the course to have Defendants’ computer experts contaminate evidence.

Using undefined, unscientific terms such as “minor formatting differences” and “technical issues” to gloss over different files identifying them as the same is completely improper. Id. at ¶12. As noted above, all electronic files can have their hash values calculated. That value uniquely identifies that file allowing for a comparison with another file and a determination that the other file is identical (i.e.

the hash values match) or is not (i.e. the hash values differ). Stroz and Defendants here attempt to persuade this court that emails from Defendant Zuckerberg's email record at Harvard that do not have matching hash values (See Id. at ¶14) are still the same. It is a fraudulent argument that seeks to divert the court's attention from obviously tampered, incomplete, superficially analyzed data being used up to now in an attempt to dismiss Plaintiff's claims.

CONCLUSION

For the foregoing reasons, Mr. Ceglia respectfully requests this court sanction Defendants for spoliation of the email evidence from the Harvard server.

Respectfully submitted,

/s/Dean Boland

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