

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA,

Plaintiff,

v.

MARK ELLIOT ZUCKERBERG, Individually, and
FACEBOOK, INC.

Defendants.

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

**REPLY TO DEFENDANTS'
RESPONSE TO MOTION FOR
SANCTIONS FOR SPOILIATION
OF THE FACEBOOK CONTRACT**

MEMORANDUM

Defendants begin their defense of yellowing the Facebook Contract and fading the ink on the document with a fraud.

LEADING WITH A FALSE ARGUMENT

Recognizing their spoliation defense is dead, the Defendants attempt to show that the *ink* on the document was faded at the time their experts first received it for testing. “Lesnevich, and Gerald LaPorte also confirm that the Work for Hire agreement was already discolored and the *ink was already faded* when it was first presented to **them** by Mr. Argentieri, prior to any testing. See Tytell Decl. at ¶ 19-23; Lesnevich Decl. at ¶ 10; LaPorte Decl. at ¶ 8-9.” Doc. No. 237 at 13.

Emphasis added.

Neither Mr. Laporte or Mr. Lesnevich were present at *any* time during the July 14th 2011 testing. Mr. Lesnevich did not arrive until the morning of the

second day, July 15, 2011, *after a full day of testing was completed.* Doc. No. 239 at ¶9-10. Mr Laporte arrived on the morning of July 16, 2011 *after two full days of testing was completed.* Doc. No. 240 at ¶5. Again in violation of Rule 11, Snyder claims three Facebook experts confirm the “ink was already faded” on the Facebook Contract “prior to any testing” when he knows that claim to be false. Only Tytell captured an image of the Facebook Contract “prior to any testing.”

THE INK FADING HEAD FAKE

Finally, Defendants’ experts’ own images show that Tytell’s rendering of the ink is inaccurate. The two images in Exhibit B represent Tytell’s image of the ink on page one and the image of the ink on page one captured by Facebook’s expert LaPorte after two days of testing. If Tytell’s images are to be believed, then the ink on page one of the Facebook Contract got *darker* as Facebook’s experts testing wore on.

TYTELL’S YELLOWING IMAGES PROVE DEFENDANTS’ SPOILIATION

Defendants’ experts’ images of the Facebook Contract taken 24 hours apart prove Defendants spoiled it. The *left* side of the table in Exhibit A shows the first and second page of the Facebook Contract as it was captured by Facebook’s expert, Peter Tytell, the morning of its presentation to Facebook’s experts according to his declaration. Doc. No. 238-2. The *right* side of the table in Exhibit A shows the first and second page of the Facebook Contract as it was captured by Facebook’s expert, Gus Lesnevich, 24 hours *after* Facebook’s experts’ testing began. Doc. No. 239-1. There is nothing more to argue regarding who spoiled the document. Defendants’

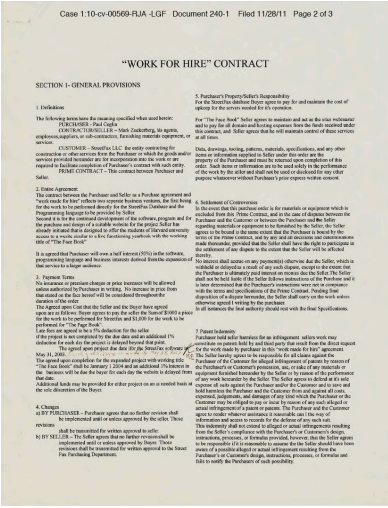
experts' images prove Defendants yellowed, and thereby spoiled, the Facebook Contract.

TYTELL'S IMAGES COMPARED TO PLAINTIFF'S EXPERTS' IMAGES

Tytell provides cropped images claiming they show the Facebook Contract was discolored compared to earlier images of it captured by Plaintiff's experts. Doc. No. 237 at 12.

However, Tytell and Defendants omit critical information necessary to make the Aginsky-Tytell image comparison. What device was used to capture Tytell's images? What were the device's settings? What software and version was embedded in the device? What software and version was resident on the computer capturing the image from the device? Was this the first image Tytell captured or one in a series cherry-picked to appear to be discolored? Was Aginsky's reference image captured with the same device under the same conditions or not? Defendants compare apples to bowling pins and declare it logically useful in another attempt to mislead this court.

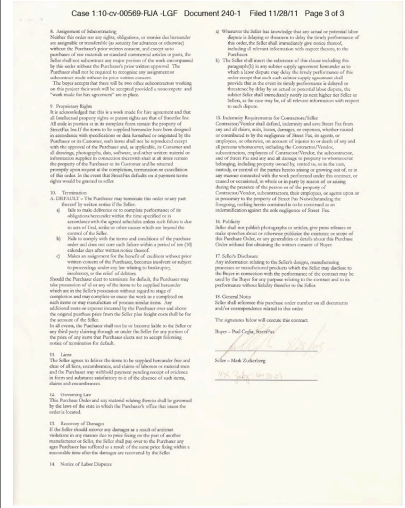
The final sign of image manipulation by Defendants are Tytell's image of the Facebook Contract's two pages. Doc. No. 240-1 purports to be Tytell's image of *both pages* of the Facebook Contract. It is Facebook's claim about the condition of the document at the beginning of their testing of it. Yet, look at the difference in color between the two pages themselves, captured at the same time by the same expert using the same device(s).



Facebook Expert Tytell's image of Facebook Contract on July 14, 2011 with colorations that have been manipulated

<Page 1

Page 2>



Even within their own expert, Defendants cannot confirm any particular coloration of the Facebook Contract. The ink on page 1 of Tytell's image above is darker than the ink on page 2. What is the cause for this dramatic color difference within these images of the two pages captured under identical conditions by Tytell? The court should disregard any comparison between images captured by Plaintiff's experts and Tytell's initial images.

THE YELLOWING IS FROM EXCESSIVE UV LIGHT, NOT BAKING

Sometime "later in [his] examinations" Tytell noted that the "front of each page had an off-white or ivory cast..." Doc. No. 238 at ¶23. He establishes that the document was not, when presented to Facebook's experts, yellowed or manila colored as it is now. His images on the morning of day one compared to Lesnevich's images captured 24 hours later confirm this change to the current yellowed condition while the Facebook Contract was in Defendants' experts' possession.

Exhibit A.

None of Defendants' experts dispute that *excessive* UV light exposure *does* cause paper to yellow. They cannot realistically do so with the large number of peer reviewed articles establishing the damage excessive UV light does to paper.¹ None of Defendants' experts declare that the amount of UV exposure they applied to the Facebook Contract, individually or in the aggregate, was appropriate.² Defendants simply chose not to respond to Plaintiff's evidence about excessive UV exposure.

Defendants' response omits how many hours each so-called expert subjected the Facebook Contract to any form of light. There is a door they do not want opened and the video evidence reveals why. Defendants do not contest that their experts over-exposed the document. Defendants' experts avoid the word overexposed which was used eight times in Plaintiff's spoliation motion. The answer to *who* damaged the document is answered by *how* it was damaged. Plaintiff has presented the only evidence of a mechanism by which the Facebook Contract was yellowed. Defendants present only *argument*, no evidence, and none of their experts offer support.

THE UNBAKED BAKING ARGUMENT

Defendants argue, without any expert support, that Ceglia "baked" the document. Doc. No. 237 at 3, 4, 10. The evidence on the Facebook Contract itself does not support it either.

Baking in an oven would leave marks or lines where the oven racks bars

¹ Exhibits D and E are examples of such articles.

² Exhibit F is only a partial record of the amount of light exposure suffered by the Facebook Contract

deflected some of the heat leaving portions of the document un-yellowed or less yellowed in a predictable oven rack pattern. Exhibit C. Secondly, and most tellingly not present in the Facebook Contract now, baking, i.e. heat exposure, would inevitably cause *both sides of the document* to be yellowed. Doc. No. 209 at ¶37-38. Mr. Snyder's insistence on Ceglia's baking of the document, it should be noted, is not supported by a single declaration of anyone. The "how" of the yellowing and ink damage (excessive UV exposure) has now answered the question of who did it - Facebook's experts. The pictures in Exhibit A further confirm the Facebook Contract was yellowed by Facebook's experts.

THE SILENT WITNESSES

Having revealed Snyder's misrepresentations above, it is important for the court to appreciate the list of people present during Facebook's experts' examination of the Facebook Contract that declined to submit a declaration attesting to the claimed yellowed condition or faded ink.

Facebook Experts Frank Romano and Albert Lyter, Mr. Zontini (Foster Freeman representative), Defense Counsel Aycock, Flynn and Southwell all decline to offer declarations supporting Defendant's position on anything. Their decision to remain silent on this most critical issue of spoliation is telling. Perhaps Mr. Southwell's declaration is omitted here because he "fully appreciate[s] the gravity of making a sworn statement under penalty of perjury." Doc. No. 11 at ¶3.

PICK A COLOR, ANY COLOR

Snyder continues to change his description of the coloration of the Facebook

Contract when first presented to Facebook’s experts. He describes the document in Defendants’ response as having “off white or ivory tinge.” Doc. No. 237 at 11. No expert declaration supports this and Mr. Snyder was not present to observe this color. Facts, however, do not impede his argument. On August 17 of this year, Mr. Snyder described the current hue of the Facebook Contract as “ecru.” Doc. No. 121 at 126. Ecrú is a specific, obscure term not chosen from part of every day conversation indicative of time taken to arrive at a precise word. Ecrú is defined as a greyish pale yellow. See <http://en.wikipedia.org/wiki/Ecrú>. *In that same sentence* on August 17th, Mr. Snyder described the hue of the Facebook Contract, post testing, as having “a faded goldish-brown” *Id.* Tytell produced images that cannot agree on the coloration or ink intensity between two pages captured within moments of each other. Later, in the Gianadda altered declaration obtained after intense meetings and conversation with defense counsel, Mr. Gianadda is asked to sign a document identifying the color of the Facebook Contract as a “whitish color” Doc. No. 218 at ¶3.

Finally, no reference image is provided this court to explain how an “ivory tinge” is distinct from the color of paper bought in an office supply store today, i.e. un-aged at all.

RULE 11 VIOLATIONS BY DEFENSE COUNSEL SNYDER

Snyder makes this misleading claim. “[T]here is *conclusive* and *indisputable* proof that Ceglia and/or others working in concert with him ‘baked’ the document, thereby fading the ink and giving the pages an odd discoloration, before it was

produced to Defendants' experts for inspection." Doc. No. 237 at 6. Emphasis added.

No Defendant expert supports this. No evidence supports this. It is only conclusive because Snyder concluded it. It is only indisputable because Snyder does not dispute himself. The use of the words "indisputable" and "conclusive" in this argument violates Fed.R.Civ.P. 11(b)(3) as Snyder's argument has no evidentiary support. To the contrary, Defendants' own experts produced images supporting Plaintiff's contract spoliation motion. Exhibit A. Snyder also made this unsupported claim: "[S]omeone [Ceglia or others working with him] attempted to artificially 'age' the document and prevent testing of the ink by 'baking' it." Doc. No. 237 at 11.

No Defense expert supports this. Snyder presented no evidence supporting this. A Rule 11 sanction is appropriate for this wasted space of a claim.

"This claim [by Ceglia that Facebook's experts yellowed the document] is *demonstrably false* and could not have been made in good faith." Doc. No. 237 at 11. No Defense expert even hints that Ceglia's claim is "demonstrably false." Snyder offers no evidence *demonstrating* its falsity and his accusations of Plaintiff's counsel's bad faith are sanctionable.

"In light of the *indisputable fact* that the appearance of the document has been altered while in [Ceglia's] possession...." Doc. No. 237 at 11. Emphasis added. Again, Snyder merely offers the word indisputable not demonstrating any understanding of what it means. This is a false statement evident by the fact that

motions filed in this case have this very issue *in dispute*. No Defense expert says that UV light *cannot* yellow a document. Common sense tells anyone that *excessive* UV light does yellow paper. Facebook's experts' own images demonstrate this fact is indisputable - that is, Defendant's spoiled the document resulting in its current yellowed condition.

THE VIDEO EVIDENCE

Defendants confront the video evidence via an unqualified witness, Tytell. In Doc. No. 238 at ¶34-¶38 Tytell opines about digital video. His unqualified comments on digital video are irrelevant. Suspiciously, the digital video expert in this case, Robert Gianadda offers no declaration supporting Defendants' argument to ignore the video evidence. Again, as is his pattern, Snyder makes digital video claims unsupported by *any* expert. "But the low-resolution video simply cannot capture the faded ink." Doc. No. 237 at 13. "Nor is the video capable of capturing precise shades of color, such as the difference between a 'white' document and a 'white' document with a yellowish or off-white tinge." Doc. No. 237 at 13. No expert declaration supports either contention.

Tytell claims that "[c]olors and brightness on video can fluctuate...." Doc. No. 238 at ¶34. Tytell fails to account for why when the video is viewed, nothing else colored yellow or manila in the scene (e.g. a manila envelope on the table adjacent to a box of yellow latex gloves) fluctuates.

THE GHOST IN THE MACHINE

During Facebook's experts' testing, two different document examination

machines (VSC machines) were used. Doc. No. 238 at ¶27. They were installed by a Mr. Zontini, a representative of the manufacturer who appeared to have *trained Tytell on how to use them* throughout two days. Declaration of Paul Argentieri at ¶13. The examination video shows Zontini apparently fixing or adjusting settings on the machine. Id. at ¶24. The trainer/installer remained in the room, assisting Tytell, throughout the two days the machine(s) were used to examine the Facebook Contract. Id. at ¶25.

BIAS

Typical expert witnesses have a recognized bias favoring the client who hired them. Here, given the spoliation claim falling in their lap, Facebook's experts have two additional biases. They have a professional bias to insure that their intentional damage to the Facebook Contract is not a stain on their future earning potential. Finally, and most seriously, it is doubtful any Defense expert has an Errors and Omissions policy with a limit that is in the billions sufficient to satisfy a potential claim by Facebook for the ultimate results of their spoliation. The statements of Facebook's experts must be regarded with suspicion for those reasons.

CONCLUSION

Plaintiff requests the court restore him to the position he would have been in before the spoliation. *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir.1998). An order prohibiting Defendants from disputing the Facebook Contract's authenticity is the only way to accomplish that. Such an order is not case-ending. Facebook can argue statute of limitations violations, a failure of consideration, an

unconscionable contract, breach by Ceglia and many other defenses in summary judgment and at trial.

Facebook cannot be rewarded for its spoliation by the gift of a silent recognition that merely showing the document to the jury in its current state causes authenticity questions to be raised in jurors' minds.

Respectfully submitted,

/s/Dean Boland

Paul A. Argentieri
188 Main Street
Hornell, NY 14843
607-324-3232 phone
607-324-6188
paul.argentieri@gmail.com

Dean Boland
18123 Sloane Avenue
Lakewood, Ohio 44107
216-236-8080 phone
866-455-1267 fax
dean@bolandlegal.com