

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

----- x
PAUL D. CEGLIA,

Plaintiff,

v.

MARK ELLIOT ZUCKERBERG and
FACEBOOK, INC.,

Defendants.
----- x

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

**DECLARATION OF
ALEXANDER H. SOUTHWELL**

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’ Fifth Motion to Compel.

2. This declaration describes Defendants’ good-faith efforts to resolve disputes regarding Plaintiff’s failure to comply with this Court’s Orders dated August 18, 2011 (Doc. No. 117) and November 3, 2011 (Doc. No. 208), before filing Defendants’ Fifth Motion to Compel, in compliance with Western District of New York Local Rule 7(d)(4).

3. Plaintiff was required by this Court’s August 18, 2011 Order (the “August 18 Order”) to “identify all email accounts accessible through web-based interfaces that Plaintiff has used since 2003” and to “consent to the acquisition and inspection by Stroz Friedberg of the contents of all such accounts.” *Id.* ¶ 5. On August 29, Plaintiff filed a Supplemental Declaration as required by the August 18 Order. *See* Doc. No. 176-1. That Declaration purported to comply

with the August 18 Order, and identified only two specific web-based email accounts — paulceglia@gmail.com and paulceglia@msn.com — as well as accounts at Adelphia and T-Mobile without specific addresses. *See id.*, ¶ 174-182.

4. Plaintiff was required by this Court’s November 3, 2011 Order (the “November 3 Order”) to provide consents for the inspection of “all email accounts accessible through web-based interfaces that [he] has used since 2003.” Doc. No. 208, ¶ 10 (emphasis added).

5. After the November 3 Order, Plaintiff provided executed consent forms for the following three email addresses: paulceglia@gmail.com, pauceglia@msn.com, and pceglia@tmail.com.

6. After Plaintiff’s consent forms were transmitted to the webmail providers, and this Court authorized the issuance of subpoenas to the webmail providers and ordered Google to produce the contents of the Gmail account as authorized by the consent (*see* Doc. No. 273), Stroz Friedberg acquired and inspected the contents of those webmail accounts to identify material relevant to this lawsuit.

7. On February 1, 2012, Stroz Friedberg produced to Plaintiff’s attorneys electronic material from Ceglia’s webmail accounts that it had identified as relevant.

8. On February 9, 2012, Plaintiff’s attorneys provided a privilege log to Stroz Friedberg designating fifty-one (51) documents as privileged. A true and correct copy of the entries on the privilege log pertaining to the eleven documents that are the subject of Defendants’ instant motion is attached hereto as Exhibit A. The entries that are not relevant to Defendants’ privilege challenge are not included in Exhibit A.

9. On February 9, 2012, Stroz Friedberg produced to Defendants the relevant electronic material that Plaintiff had not designated as privileged; it did not produce to Defendants the documents over which Plaintiff claimed privilege.

10. This production contained evidence of the existence of at least four webmail accounts that Plaintiff has used since 2003:

- a. landlubber39@yahoo.com
- b. paulc@hush.com
- c. alleganypellets@gmail.com
- d. getzuck@gmail.com

11. On February 9, 2012, after providing Defendants with the privilege log that revealed his client had failed to identify the aforementioned webmail accounts, Plaintiff's attorney Dean Boland sent me an email offering to provide signed consent forms for two of the four undisclosed accounts: landlubber39@yahoo.com and paulc@hush.com. Boland did not mention or offer Plaintiff's consent to the inspection of the alleganypellets@gmail.com or getzuck@gmail.com accounts. A true and correct copy of that email is attached hereto as Exhibit B.

12. On February 16, 2012, Defendants sent a letter to Boland, demanding that Plaintiff comply with his webmail and other obligations under the Court's expedited discovery orders, including that he provide a true and accurate revised sworn declaration fully complying with the Court's expedited discovery orders, and objecting to Plaintiff's improper or unsupported privilege designations. The letter set a deadline of 5:00 p.m. on February 20, 2012, for a compliant response. A true and correct copy of that letter is attached hereto as Exhibit C.

13. On February 17, 2012, Boland provided signed consent forms for the four webmail accounts listed in paragraph 10.

14. On February 17, 2012, Boland sent a separate email stating that Plaintiff “consent[s] to a subpoena/court order enabling Defendants to have their electronic discovery firm acquire data related to the” four webmail accounts listed in paragraph 10. A true and correct copy of that email is attached hereto as Exhibit D.

15. On February 17, 2012, in a separate email, Boland indicated that he was “working on a response” to Defendants’ objections regarding Plaintiff’s improper privilege designations, and that he would respond “next week.” A true and correct copy of that email is attached hereto as Exhibit E.

16. As of this filing, more than one full day after the deadline provided in the letter and five days after Defendants requested Plaintiff to review a mere eleven privilege claims, Defendants have not received a response regarding Plaintiff’s privilege designations. Given the past history of the case, and in the interest of expediency, Defendants are moving on these improper and unsupported privilege designations of eleven documents.

17. On November 2, 2011, the Court overruled Plaintiff’s privilege designations with respect to the file named “Lawsuit Overview.pdf” and ordered Plaintiff to produce this file and all copies directly to Defendants, as embodied in the Court’s November 3 Order. *See* Doc. No. 208, ¶ 14. The Court made this ruling despite the representation at the November 2, 2011 hearing by Boland that Argentieri was the author of the document. A true and correct copy of the relevant portion of the hearing transcript is attached hereto as Exhibit F.

18. On November 22, 2011, as part of the metadata acquisition authorized by this Court’s November 3 Order (¶ 11), Stroz Friedberg acquired electronic files with metadata intact

that Argentieri made available from his computers. Argentieri did not make available the “Lawsuit Overview.pdf” file, or any copies thereof, at the November 22 acquisition.

19. On November 25, 2011, Defendants wrote a letter to Argentieri, demanding that he produce the “Lawsuit Overview.pdf” file and any copies thereof, or provide a written account of its destruction or non-existence. A true and correct copy of that letter is attached hereto as Exhibit G.

20. On December 16, 2011, after delays caused by Argentieri’s not staffing his office, Argentieri’s information technology staff contact forwarded to Stroz Friedberg an email, which Argentieri claimed contained the only copy of the document in his possession. The original email was sent by Jason Holmberg to Paul Argentieri and Paul Ceglia on Sunday, March 6, 2011, at 11:03 p.m. That email attached the “Lawsuit Overview.pdf” document, and the text stated, “Paul, Attached is the dossier I put together to present the case to law firms. Let me know if you’d like to change it at all.” A true and correct copy of that email is attached hereto as Exhibit H.

21. This was the first time Plaintiff had ever revealed the existence of Holmberg.

22. Upon information and belief, Jason Holmberg is not an attorney; he is apparently the President and Owner of PA Pellets (LLC), a manufacturer of wood fuel pellets in Pennsylvania.

23. On January 26, 2012, Defendants sent a letter to Boland, describing the newfound deficiencies in Ceglia’s August 29 Declaration and the inconsistency between Holmberg’s and Argentieri’s claims of authorship. A true and correct copy of that letter is attached hereto as Exhibit I.

24. On February 2, 2012, Boland responded by email to Defendants' letter, stating that he had "communicated with Mr. Holmberg and he has indicated he has one electronic copy of the Lawsuit Overview.pdf document that he [Holmberg] retained after receiving it via email." Boland also stated that Holmberg had also "indicated he has one copy of a contract between my client and your client, the same contract we have provided you on numerous occasions," and that Holmberg would "burn those two items to a CD with all meta-data intact and send that CD directly to Bryan Rose at Stroz [Friedberg]." A true and correct copy of that email is attached hereto as Exhibit J.

25. Stroz Friedberg received a CD from Holmberg on February 7, 2012.

26. Plaintiff did not, and still has not, provided a supplemental declaration that corrected Ceglia's prior failure to identify Holmberg as a custodian of the purported Work for Hire contract.

27. On February 8, 2012, Defendants sent a letter pointing out that because Ceglia's August 29 Declaration did not identify Holmberg as a custodian of an electronic copy of the Work for Hire agreement, that declaration was false. Ceglia thus remained in non-compliance with the Court's August 18 Order, which requires him "to identify, by name and location, each" electronic copy of the purported the Work for Hire agreement (*see* Doc. No. 117 ¶ 2). This letter also explained that Boland's February 2 email was inconsistent with both Argentieri's and Holmberg's prior representations of authorship of the "Lawsuit Overview.pdf" document — Boland's February 2 email suggested that a third unidentified person had written the document and emailed it to Holmberg. A true and correct copy of that letter is attached hereto as Exhibit K.

28. On February 10, 2012, Boland responded to Defendants' letter, stating that Ceglia had "no personal knowledge regarding what files Jason Holmberg has retained or is retaining

regarding this matter,” and thus “could not produce a declaration ‘from personal knowledge.’” Boland did not address the discrepancy between his statements and Holmberg’s claim of authorship. A true and correct copy of that email is attached hereto as Exhibit L.

29. In a February 16, 2012 letter, as discussed in paragraph 12 above, Defendants reiterated their request for a supplemental declaration that identifies Holmberg as a custodian and otherwise complies with the Court’s August 18 Order, specifically describing Ceglia’s obligation to inform himself of facts sufficient to provide a supplemental declaration compliant with the Court’s orders. The February 16, 2012 letter set a deadline of February 20, 2012 for compliance with the Court’s orders, including this obligation to provide a supplemental declaration. *See* Exhibit C.

30. On February 16, 2012, Boland again responded via email asserting that Plaintiff lacked personal knowledge of the files in Mr. Holmberg’s possession. Boland did not acknowledge that Plaintiff must obtain such knowledge to comply with the Court’s order. A true and correct copy of that email is attached hereto as Exhibit M.

31. As of February 21, 2012 at 9:00 p.m. EST, Plaintiff has not yet provided an explanation of the authorship or custodians of the “Lawsuit Overview.pdf” document or provided a supplemental declaration compliant with the Court’s orders.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this
21st day of February, 2012 at New York, New York.



Alexander H. Southwell