

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

PAUL D. CEGLIA,

Plaintiff,

v.

MARK ELLIOT ZUCKERBERG and
FACEBOOK, INC.,

Defendants.

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

RESPONSE IN OPPOSITION TO
DEFENDANTS' FIFTH MOTION TO
COMPEL

INTRODUCTION

At 9:23 p.m. on Thursday, February 16, 2012, Defendants' counsel emailed Plaintiff's counsel raising the purported discovery deficiencies that are the subject of Defendants' motion to compel. In that email, Defendants' counsel demanded that Plaintiff's counsel cure the purported deficiencies two business days later -- by 5:00 p.m. on Monday, February 20, 2012, President's Day. Exhibit A at 2. Mr. Southwell characterized this demand as his "attempt to meet-and-confer about the discovery disputes described herein." *Id.* at 4. Plaintiff's counsel responded to Mr. Southwell's demand within an hour of receiving his email, at 10:09 PM on Thursday, February 16, 2012, rejecting the claims of concealment. Exhibit B. It was also noted that Mr. Southwell delayed for more than a week in his response to Plaintiff's counsel's invitation to have Mr. Ceglia sign all necessary consent forms.

On Friday, February 17, 2012 at 1:28 pm, Plaintiff's counsel offered to provide the requested information to Defendant's counsel and again refuted the claims of concealment. Exhibit C.

On Friday, February 17, 2012, at 10:19 p.m., Plaintiff's counsel notified Defendants' counsel via email that the purported discovery deficiencies would be addressed by "next week." Exhibit D. It was also suggested that a follow-up call be scheduled next week to more efficiently address any perceived lingering non-compliance issues.

I am working on a response to your complaints about our privilege designations. I will modify those privilege claims as appropriate following my review of those items and the applicable case law. I will have this response to you *next week*. Following your receipt of that information, I suggest a phone call to resolve any lingering matters more efficiently than the back and forth emails. Id. Emphasis added.

All the revised privileged designations, demanded supplemental declarations, etc. were, in fact, provided the following week. Nonetheless, Defendants filed their Fifth Motion to Compel on February 21, 2012. Doc. No. 295.

Defendants' Fifth Motion to Compel seeks various forms of relief, much of which Defendants have already been provided, and some of which is unjustified:

First, Defendants seek an order directing Mr. Ceglia to submit a supplemental declaration listing webmail accounts recently brought to Mr. Ceglia's attention via a privilege log from Stroz Friedberg. Mtn. at 1, 4-7. This declaration was already timely provided to Defendants on February 22, 2012. Exhibits E and F.

Southwell requested of Plaintiff's counsel consent to an order allowing subpoenas to the webmail providers listed in Mr. Ceglia's signed consent forms. See Mtn. at 3. That consent was promptly given. Southwell did not seek consent to the court's *in camera* review of the disputed documents regarding privilege designation.

Defendants seek an order compelling Mr. Ceglia to produce documents for which the attorney-client privilege and/or work product doctrine have been asserted. Mtn. at 1-2. Several of these items were de-designated as not privileged in a revised designation timely provided to Defendants. As to the remaining still-designated documents, they are indeed privileged, for the reasons explained below, but Plaintiff has no objection to the court reviewing the documents in camera for its determination as to Plaintiff's remaining privilege claims.

Third, Defendants seek a supplemental declaration "declaring all custodians of the 'Lawsuit Overview' document, including the original author and explaining his failure to disclose any custodians in his previous declarations." Mtn at 2; *see also* Mtn. at 10-15. This declaration was already timely provided to Defendants February 22, 2012. Defendants' claim of an as yet undisclosed possessor or author of the Lawsuit Overview.pdf document is unfounded.

Finally, Defendants also seek an order directing Mr. Ceglia to produce "all copies of the 'Lawsuit Overview' document, including the original document from its author." Mtn. at 2-3, 10-15. All copies of this document in Ceglia's custody and control were already provided to Defendants in previous productions pursuant to this court's orders long before they filed their Fifth Motion to Compel.

Defendants do not argue that the purported discovery deficiencies resulted in any prejudice, nor can Defendants make such a showing, given that Plaintiff cured the purported defects within one week of their discovery. As this point, Defendant's Fifth Motion to Compel is moot and their request for attorney's fees should be

denied. Plaintiff has met and conferred in good faith, timely provided all requested information, and is compliant with his ongoing discovery obligations.

ARGUMENT

Mr. Ceglia Has Provided Consent Forms for All of His Email Accounts and a Supplemental Declaration, and Does Not Oppose Defendants' Request for Subpoenas to Webmail Providers.

Stroz Friedberg recently provided a privilege log to Plaintiff's counsel. In reviewing that log, Plaintiff's counsel noticed additional email accounts not previously disclosed to Defendants. Mr. Ceglia had not recalled the existence of these accounts at the time of his previous declarations.

On February 9, 2012, Plaintiff's counsel sent the privilege log to Defendants' counsel. Exhibit G. In that same communication, Plaintiff's counsel promptly notified Defendants' counsel that the privilege log contained additional, newly-discovered email accounts and offered to have Mr. Ceglia execute all necessary consent forms enabling Defendants to obtain access to those accounts. *Id.* On February 16, 2012, just two business days before filing their Fifth Motion to Compel, Defendants finally sent consent forms providing for release of the email account records to Plaintiff's counsel. *Mtn.* at 6-7. Plaintiff returned the executed consent forms Defendants within 24 hours. *Mtn.* at 7.

Mr. Ceglia has now disclosed nearly ten separate email accounts to Defendants. As such, any purported discovery deficiency has been cured, and Mr. Ceglia does not oppose Defendants' request to issue subpoenas to the webmail

providers.

A. Mr. Ceglia Properly Asserted the Attorney-Client Privilege and/or Work Product Doctrine Protections Over the Documents Requested by Defendants, but Does Not Object to this Court's In Camera Review

Defendants seek a review of Plaintiff's privilege designations of eleven documents, Mtn. at 8-10, but these documents have either since been de-designated and produced or are protected by the attorney-client privilege and/or work product doctrine.

In an email to Southwell on February 24, 2012 (i.e. within the "next week" that Plaintiff's counsel promised to have these matters responded to) Plaintiff agree to produce Document 337 and detailed bases for privilege claims as to all other previously designated documents. Exhibit H. That communication also identified the previous disclosure of an email exchange involving Mr. Holmberg as inadvertent. That inadvertence has been verified by the person who, at the behest of Mr. Argentieri, sent the email and attachment errantly. Declaration of Ed Flaitz.

Documents 373, 400, 401, 402, 403, and 405, are emails that were sent to or received from David Grable, an attorney at Quinn Emanuel. Each of these communications discusses matters related to this litigation, and occurred while Mr. Ceglia was considering whether to formally retain Mr. Grable as counsel. The documents discuss confidential facts relating to this case, case strategy, and legal advice. Such communications are plainly protected by the attorney-client privilege. See *Newmarkets Partners, LLC v. Sal. Oppenheim Jr. & Cie. S.C.A.*, 258 F.R.D. 95,

100 (S.D.N.Y. 2009) (“An attorney-client relationship can arise prior to formal engagement. As a result, privilege may attach to a prospective client's ‘initial statements’ to an attorney who is not ultimately hired. See *United States v. Dennis*, 843 F.2d 652, 656 (2d Cir.1988). ‘The key, of course, to whether an attorney/client relationship existed is the intent of the client and whether he reasonably understood the conference to be confidential.’ *Id.* at 657.”); see also *Fierro v. Gallucci*, No. 06-CV-5189 (JFB)(WDW), 2007 WL 4287707, at *6 (E.D.N.Y. Dec. 04, 2007) (“whether or not employment occurs, preliminary discussions between an attorney and a prospective client are subject to the attorney client privilege”) (citing cases). Because Mr. Grable was “approach[ed] in a professional capacity with the intent to secure legal advice,” communications with him are protected. See *Diversified Group, Inc. v. Daugerdas*, 304 F.Supp.2d 507, 513 (S.D.N.Y. 2003) (citation omitted).

Document 334, which was previously described as concerning “a hushmail” account, is protected by the attorney-client privilege. It is a communication between Mr. Ceglia and his attorney, Mr. Argentieri; it was not addressed or disclosed to any third party; and it involves the provision of legal advice and discusses case strategy.

Documents 360 and 379 are communications to which Jason Holmberg was a party. Mr. Holmberg was retained as a consultant to Mr. Ceglia’s attorney, Paul Argentieri, and he has served as Mr. Argentieri’s consultant and agent on matters

pertaining to this litigation.¹ Documents 360 and 379 are communications that were prepared in the context of this position, at the behest of an attorney. Because they were prepared in anticipation of the litigation and for a party by his representative, they are protected by the attorney-client privilege and work product doctrine. N.Y. C.P.L.R. § 4503(a)(1) (absent waiver, a client cannot be compelled to disclose any “confidential communication made between the attorney or his or her employee and the client in the course of professional employment...”); See *United States v. Adlman* (“Adlman I”), 68 F.3d 1495, 1501 (2d Cir.1995) (noting that the work product doctrine “shields from disclosure materials ‘prepared in anticipation of litigation’ by a party or the party's representative, absent a showing of substantial need.”) (quoting Fed. R. Civ. P. 26(b)(3)); see also *GenOn Mid-Atlantic, LLC v. Stone & Webster, Inc.*, No. 11-cv-1299, 2011 WL 5439046, at *3 (S.D.N.Y. Nov. 10, 2011) (“because ‘attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial,’ the work product rule extends to ‘material prepared by agents for the attorney as well as those prepared by the attorney for himself.’ (quoting *United States v. Nobles*, 422 U.S. 225, 238, (1975)).

¹ Defendants apparently acknowledge this relationship, noting in their February 16, 2012, letter that “Ceglia has waived any potential claim of privilege over communications with Mr. Holmberg,” because “in an unrelated production, Mr. Argentieri provided to Defendants an email sent from Mr. Holmberg to Ceglia.” 2/16/12 Ltr. at 3 (emphasis in original). However, the email that Defendants were provided attached the “Lawsuit Overview.pdf” file, and it was provided pursuant to this Court’s November 3, 2011, order requiring that Plaintiff produce all copies of that file. 11/3/11 Order at ¶ 14. Plaintiff has subsequently requested on March 12, 2012 that Defendants retrieve and destroy all copies of the errantly provided, privileged material. See Fed. R. Evid. 502.

Document 348, is an email between James Kole, Paul Ceglia, and Amanda C. Wornhoff. Although Mr. Kole was Senior Assistant Attorney General of Illinois at the time of the email, he previously worked at Sidley Austin and, while in private practice, served as Mr. Ceglia's counsel in legal matters related to StreetFax and Facebook. Ms. Worhoff is a staff member at Sidley Austin. [was this produced?]

With regard to Document 337 Plaintiff has produced this document.

However, notwithstanding Plaintiff's valid privilege declarations, Mr. Ceglia does not oppose this Court's in camera review of these documents to evaluate such designations.

B. Mr. Ceglia Has Identified All Custodians and Produced All Copies of the "Lawsuit Overview" Document

Defendants demand all copies of the "Lawsuit Overview" document and a declaration regarding the authorship of that document. Mtn at 2-3, 10-15. Mr. Argentieri authored the Lawsuit Overview.pdf. See Declaration of Paul Argentieri.

CONCLUSION

For the foregoing reasons, Mr. Ceglia respectfully requests this court deny Defendants' Fifth Motion to Compel and any request for attorney's fees.

Respectfully submitted,

/s/Dean Boland

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