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

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO STAY DISCOVERY PENDING A RULING ON THEIR DISPOSITIVE MOTIONS

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PRELIMINARY STATEMENT

Defendants today have filed two motions seeking dismissal of this fraudulent lawsuit. In their motion to dismiss, Defendants demonstrated that Ceglia is perpetrating a massive fraud on the Court. The Work for Hire Document is a forgery; the purported emails are fabrications; and Ceglia's claim is nothing more than his latest scam. Defendants have moved this Court to dismiss the lawsuit because it is based on forged documents and because Ceglia has destroyed and tampered with evidence, and engaged in egregious litigation misconduct, in pursuit of his fraudulent claims. And in their motion for judgment on the pleadings, Defendants demonstrated that, even if Ceglia's fraudulent allegations are presumed to be true, his claims must be dismissed for the independent reasons that they are barred by the statute of limitations and by laches.

Defendants respectfully request that this Court stay discovery, and defer setting a discovery schedule, until it has ruled upon those pending motions. This request is amply supported by good cause. A stay will prevent Ceglia from further abusing the judicial process and harassing Defendants until this Court has determined whether this lawsuit may proceed. Permitting Ceglia to conduct discovery in furtherance of a fraudulent lawsuit (alleging untimely claims) would inflict considerable harm on Defendants and the judicial process itself. If the Court dismisses this lawsuit, Ceglia will have suffered no harm from a stay. But even if this Court were somehow to allow the lawsuit to proceed, Ceglia will not have been prejudiced by a short delay.

Defendants respectfully move for an expedited briefing schedule and hearing on this narrow request. In the interests of judicial economy, Defendants' request for a stay can be resolved during the hearing that is already calendared for April 4, 2012. This stay issue is sufficiently narrow that it can be fully briefed before that hearing. Defendants respectfully

propose the following expedited briefing schedule: Ceglia should file any opposition brief on or before Sunday, April 1, 2012, and Defendants should file any reply brief on or before Tuesday, April 3, 2012. That schedule allows the parties to fully present their views in time for the Court to address this issue at the outset of the April 4 hearing.

FACTS

The factual basis for this motion is set forth in the memorandum of law in support of Defendants' motion to dismiss. In particular, more than eight months ago this Court properly granted limited, targeted discovery into whether the purported Work for Hire contract referred to in Ceglia's Amended Complaint, and the purported emails excerpted therein, were forgeries that Ceglia was using to perpetrate a massive fraud on this Court. Doc. No. 83.

During expedited discovery on those issues, Defendants obtained (among other things) a file named "Lawsuit Overview." That file is a "pitch" document that Ceglia used to drum up interest in this case among the plaintiffs' bar, and that Ceglia tried to withhold based on the improper claim that it was protected by the attorney-client privilege. A true and correct copy of the "Lawsuit Overview" file is attached to the accompanying declaration of Alexander H. Southwell, sworn to on March 26, 2012 (the "Southwell Decl."), at Exhibit G. "Lawsuit Overview" describes Ceglia's strategy in this case before the Court granted Defendants' motion for expedited, targeted discovery: to "enter immediate settlement negotiations" with Defendants in the hopes that they would pay him off rather than risk the chance that his fraud would succeed. *See id.* at 3. To that end, one of Ceglia's former attorneys practically begged the Court to force the parties to mediate Ceglia's claims. Doc. No. 106, at 10–11.

Ceglia now threatens protracted discovery and litigation in the hopes that he might leverage his fraud by disrupting Facebook's highly publicized initial public offering ("IPO").

For example, in an email he sent to the *Daily Reporter* in Wellsville, New York, Ceglia stated: "You won't go public Mark [Zuckerberg], you won't IPO, you won't pass go . . . I won't let you sell this company out from under me not while I have the power to stop you." Southwell Decl., Ex. H. Ceglia further wrote, "This time though he [Mark Zuckerberg] isn't just going to get away with it and buy himself out, you will face a jury of our peers Mark, and your PR team won't be there to save you." *Id.*

Ceglia's current attorney, Dean Boland, has repeatedly threatened Defendants with prolonged, expensive discovery and litigation. *See* Southwell Decl., Ex. U ("While Defendants may want to linger in this netherworld of expanding non-compliance claims, we are preparing to engage in full discovery starting early April and setting a trial date in reasonable time thereafter. It's best if we all keep our eye on the ball here realizing we are going to trial, probably within the year."); *id.*, Ex. V ("Now that a trial in this matter is a certainty, it has finally created an environment where we can both pull in the same direction, *i.e.* reasonable discovery and then a trial. I don't know what your experience is, but I find it's always good to actually try cases on a regular basis to keep those skills sharp, get out of the office slogging away with paper and such."); *id.*, Ex. W ("Let me know if you need anything from us to help you work with your client about the realities here. I have no reason to think you're not a smart lawyer. You know how this is going to end at trial."). Still more lawyers have since entered appearances for Ceglia (Doc. No. 305); they have also publicly stated their intent to pursue protracted, expensive discovery. *See* Southwell Decl., Ex. T ("We look forward to examining records from computers that Mr. Zuckerberg used when he was a freshman at Harvard and other records that will help answer questions about the ownership of Facebook. . . . We look forward to a vigorous discovery process that will enable us to examine all of the relevant information available."). And during

recent meet-and-confer meetings pursuant to the Court's scheduling order (Doc. No. 293), Ceglia's counsel made clear that they are seeking overbroad and abusive discovery of Facebook: They want to make forensic copies of and to search every computer used by Zuckerberg — and by every employee of Facebook — since 2003. Southwell Decl. ¶ 46. They propose a discovery period spanning 16 months in which to pursue their harassing and improper requests. *Id.*

Ceglia has coupled his threats with a well-established history of blatant abuses of the judicial process. As this Court is well aware, Ceglia has flagrantly violated Court orders, forcing Defendants to file *five* motions to compel. Doc. Nos. 95, 128, 154, 243, 294. The Court has granted *each* of those five motions. Doc. Nos. 107, 117, 152, 208, 272, 317. The Court has even sanctioned Ceglia for his discovery abuses, ordering him to pay a $5,000 fine and to partially reimburse nearly $77,000 in Defendants' attorney's fees.[1] Doc. Nos. 283, 292.

ARGUMENT

The Court Should Stay Discovery Pending A Ruling On Defendants' Dispositive Motions.

This Court is familiar with its broad authority under Federal Rule of Civil Procedure 26(c) to stay discovery for good cause, and with the factors relevant to the good-cause determination: whether a dispositive motion is pending, the breadth of discovery sought and the burden on the responding party, and the potential prejudice to the party opposing the stay. *See Steuben Foods, Inc. v. Country Gourmet Foods, LLC*, No. 08-CV-561S(F), 2009 WL 3191464, at *3 (W.D.N.Y. Sept. 30, 2009) (Foschio, J.) (citing *Ellington Credit Fund, Ltd. v. Select*

[1] This Court has ordered Ceglia to pay $75,776.70 of Defendants' attorney's fees. *See* Doc. Nos. 283, 292. Ceglia has not done so. Defendants note that an order granting their motion to stay discovery would not absolve Ceglia of this court-ordered obligation. Defendants respectfully request that, in the course of adjudicating their outstanding Supplemental Fee Application (Doc. No. 299), this Court set a deadline by which Ceglia must pay the attorney's fees awarded by this Court to Defendants.

Portfolio Servs., Inc., 2009 WL 274483, *1 (S.D.N.Y. Feb. 3, 2009)). Each of those factors overwhelmingly supports a discovery stay here.

First, whether a dispositive motion is pending is a critical part of the good-cause determination because "the adjudication" of such a motion "may obviate the need for burdensome discovery." *Johnson v. N.Y. Univ. Sch. of Educ.*, 205 F.R.D. 433, 434 (S.D.N.Y. 2002). When a dispositive motion is pending, "courts examine . . . the strength of the dispositive motion." *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94-Civ.-2120, 1996 WL 101277, at *4 (S.D.N.Y. Mar. 7, 1996); *see also Steuben Foods*, 2009 WL 3191464, at *3 ("in order to decide Defendant's motion [to stay], it is necessary for the court to evaluate the merits of Defendant's summary judgment motion"). A finding that the pending dispositive motion "appears to have substantial grounds" or "does not appear to be without foundation in law" establishes good cause for a discovery stay. *Johnson*, 205 F.R.D. at 434 (internal quotation marks omitted).

Here, both of Defendants' pending dispositive motions have "substantial grounds" and a demonstrable "foundation in law." The motion to dismiss explains that Ceglia's claims are ripe for dismissal because he has perpetrated a fraud on Defendants and on this Court by forging the purported Work for Hire Document, submitting fake emails, deliberately and repeatedly disobeying Court orders, hiding and destroying relevant evidence, and submitting false declarations. It also explains that Ceglia's claims should be dismissed because he has repeatedly engaged in severe litigation misconduct. Defendants' arguments are based on indisputable, overwhelming evidence of repeated frauds, and are straightforward applications of legal principles entrenched in Supreme Court and Second Circuit precedent for decades.

Other courts have stayed discovery when dispositive motions have made a similarly overwhelming showing of fraud on the court and other litigation misconduct. For example, in

Vargas v. Peltz, 901 F. Supp. 1572 (S.D. Fla. 1995), the plaintiff sued her former employer and supervisor, alleging claims under Title VII for sexual harassment (hostile work environment) and retaliation, along with common-law tort claims. *See id.* at 1573. The plaintiff based her claims on an alleged encounter in her supervisor's suite in September 1992; she alleged that at that time her supervisor had handed her a pair of women's undergarments (which she produced at her deposition) and asked her to wear them while posing in a picture. *See id.* at 1574. But the defendants' subsequent investigation confirmed that the undergarments upon which she based her claim had not been manufactured until November 1993 — more than a year after the alleged encounter with her supervisor — establishing unequivocally that the plaintiff's claims were fraudulent. *See id.* at 1574–76. The defendants' motion also established that the plaintiff had "obstructed discovery through repeated lying at deposition" and engaged in other serious litigation misconduct. *See id.* at 1578–79. When the defendants presented that evidence of fraud, the court "stayed all substantive discovery pending resolution of the motions to dismiss and for sanctions for the very reason of determining if Plaintiff has abused the process of the Court which would subject her claims to dismissal." *Id.* at 1582 (emphasis added).[2] Here, the purported Work for Hire Document and the purported emails are like the undergarments in *Vargas* — indisputably manufactured after the fact — and Ceglia has repeatedly committed similarly severe litigation misconduct. *Vargas* thus plainly supports Defendants' request for a discovery stay pending the resolution of their motion to dismiss.

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[2] That *Vargas* "restrict[ed] all discovery to only those issues relating to the pending Motions to Dismiss and for Sanctions, and preclud[ed] discovery relating to the merits of the case," 901 F. Supp. at 1582 n. 14, is of no moment here. This Court's expedited discovery orders have already permitted the completion of "all discovery" necessary on "those issues relating to" Defendants' pending motion to dismiss. Like the *Vargas* court, this Court should now "preclud[e] discovery relating to the merits of the case."

Defendants' second dispositive motion — their motion for judgment on the pleadings — explains that even if this Court presumes that Ceglia's implausible, fraudulent allegations are true, his claims still must be dismissed because his allegations establish that each of Ceglia's claims accrued more than six years before June 30, 2010, the date he filed his original Complaint. Ceglia's claims are thus barred by New York's applicable six-year statute of limitations. And all of Ceglia's claims fail for the separate, independent reason that they are barred by laches, a doctrine that prevents plaintiffs from asserting claims after an unjustifiable and prejudicial delay. These arguments also are straightforward applications of well-established precedent.

Courts have repeatedly stayed discovery pending the resolution of dispositive motions raising statute of limitations and laches defenses. For example, in *Richards v. North Shore Long Island Jewish Health System*, No. CV-10-4544, 2011 WL 4407518 (E.D.N.Y. Sept. 21, 2011), the plaintiff sued for racial discrimination under Title VII, 42 U.S.C. § 1981, and New York law. *See id.* at *1. The court granted the defendants' motion to stay discovery that "raise[d] substantial issues regarding . . . the 90-day limitation period with respect to the right-to-sue letter issued by the Equal Opportunity Employment Commission ('EEOC') on June 16, 2010." *Id.* "Defendants have made an adequate showing that plaintiff's action is of questionable merit. It is undisputed that the action was filed on October 5, 2010, which is 111 days after the date of the June 16, 2010 right-to-sue letter. This indicates that the Title VII action is untimely." *Id.* at *2 (citations omitted). In *Chrysler Capital Corp. v. Century Power Corp.*, 137 F.R.D. 209, 210 (S.D.N.Y. 1991), the court stayed discovery pending a decision on motions to dismiss that invoked defenses based on the statute of limitations (among other things). Without precisely describing the defendants' arguments, the court concluded that they "appear to have substantial

grounds." *Id.* at 211; *see also, e.g.*, *Donald v. Arrowood Indemnity Co.*, No. 2:10-cv-277, 2011 WL 3294364, at *1 (S.D. Miss. Aug. 1, 2011) (granting a defendant's motion to stay discovery pending the resolution of its summary judgment motion, which argued that "Plaintiff's claims . . . are barred by the statute of limitations"). Additionally, in *Grayson v. Allen*, 499 F. Supp. 2d 1228 (M.D. Ala. 2007), the plaintiff sought a stay of execution, challenging the state of Alabama's lethal injection protocol. *See id.* at 1230–31. The court initially denied the defendants' motion to stay discovery pending the resolution of dispositive motions, but later stayed discovery and dismissed the case on laches grounds after agreeing with defendants' argument that the inmate had unreasonably delayed bringing his method-of-execution claim. *See id.* at 1233, 1235–43. Those discovery stays were proper because "[i]t would be wasteful to allow discovery on all issues raised in a broad complaint when, for example, the case will not reach trial because of the expiration of a limitations period." *Corwin v. Marney, Orton Investments*, 843 F.2d 194, 200 (5th Cir. 1988).

Numerous cases outside the fraud-on-the-court, statute of limitations, and laches contexts further support Defendants' request. In *Anti-Monopoly*, the court's "preliminary look at Hasbro's motion for judgment on the pleadings" disclosed that the defendants' motion to dismiss the plaintiffs' Robinson-Patman Act claims "is 'not unfounded in the law' and 'appears to have substantial grounds.'" No. 94-Civ.-2120, 1996 WL 101277, at *4. The defendants' motion relied on a Second Circuit case, and two district court cases, that dismissed Robinson-Patman Act claims in similar circumstances because the plaintiffs lacked antitrust standing. *See id.* In *Chesney v. Valley Stream Union Free School District No. 24*, 236 F.R.D. 113, 115 (E.D.N.Y. 2006), the court stayed discovery pending the resolution of defendants' motion to dismiss plaintiff's employment discrimination claims because the motion raised "glaring legal

deficiencies" in plaintiff's claims. Among others, those deficiencies included plaintiff's failure to file a complaint with the EEOC or a notice of claim with the State of New York to support his claims under Title VII, the Americans with Disabilities Act, and certain New York laws, as well as plaintiff's failure "to adequately set forth even minimal facts" to support his claims under 42 U.S.C. §§ 1981, 1983, and 1985. *See id.* at 115–16. *See also, e.g.*, *Johnson*, 205 F.R.D. at 434 (granting a motion to stay discovery when "defendant's motion to dismiss is potentially dispositive and does not appear to be unfounded in the law" without describing the defendant's arguments).

Here, the grounds for dismissal established in Defendants' motion to dismiss and motion for judgment on the pleadings are at least as "substantial" as those that justified the discovery stays in *Vargas*, *Richards*, *Chrysler Capital*, *Donald*, *Grayson*, *Anti-Monopoly*, *Chesney*, and *Johnson*. Indeed, by any objective measure, they are stronger. Thus, this factor supports Defendants' request for a stay.[3]

Second, Ceglia's lawyers have publicly expressed their intent to pursue extensive, costly discovery. *See, e.g.*, Southwell Decl., Ex. T (statement of Ceglia's lawyer that "[w]e look forward to examining *records from computers that Mr. Zuckerberg used when he was a freshman at Harvard* and other records that will help answer questions about the ownership of Facebook. . . . We look forward to a vigorous discovery process that will enable us to examine

[3] This Court's denial of a discovery stay in *Steuben Foods* does not counsel against granting Defendants' requested stay here. In *Steuben Foods*, this Court concluded that a summary judgment motion lacked a substantial basis because the defenses it raised to the alleged breach of (and alleged tortious interference with) a requirements contract turned on whether defendants had a particular subjective, good-faith belief. Because the available evidence on the defendants' subjective beliefs conflicted, summary judgment appeared to be inappropriate. *See* 2009 WL 3191464, at *4-*10. Here, in contrast, Defendants' motion to dismiss raises defenses based on objective and indisputable facts: fraud on the court and other serious litigation misconduct. These defenses do not turn on Defendants' state of mind, and the evidence supporting Defendants' motion is overwhelming.

all of the relevant information available.") (emphases added). Ceglia's lawyers have made clear that they are seeking overbroad and abusive discovery of Facebook — they want forensic copies of every computer used by Zuckerberg and every employee of Facebook since 2003. Southwell Decl. ¶ 46. The purpose of their overreaching discovery plan is equally clear: to harass and impose a substantial burden on Defendants. Ceglia is well aware of this fact and has openly stated his intent to use discovery to that end. *See, e.g.*, *id.*, Ex. H ("You won't go public Mark [Zuckerberg], you won't IPO, you won't pass go . . . I won't let you sell this company out from under me not while I have the power to stop you."). Courts have previously concluded that less burdensome discovery requests warranted a stay. *See, e.g.*, *Johnson*, 205 F.R.D. at 434 (granting a motion to stay "burdensome" discovery "consist[ing] of an extensive set of interrogatories . . . that asks for information covering a span of more than five years" pending the resolution of a motion to dismiss). This Court should likewise refuse to bless Ceglia's tactics by permitting him to invoke the judicial machinery of the United States to conduct discovery before it has determined whether Ceglia is perpetrating a fraud.[4]

Third, a discovery stay will not result in any prejudice to Ceglia. There is no legitimate argument that discovery must be taken before the motion to dismiss is resolved in order to preserve evidence. Defendants have honored, and will continue to honor, their preservation obligations. *See Chrysler Capital Corp.*, 137 F.R.D. at 211 ("Plaintiffs do not demonstrate extraordinary prejudice to them. Plaintiffs will not be damaged by the grant of a stay of discovery until the motions to dismiss are decided.") (citing *Transunion Corp. v. PepsiCo, Inc.*,

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[4] Ceglia's own conduct during expedited discovery also favors a discovery stay. He repeatedly and openly flouted the Court's orders, requiring Defendants to file five motions to compel, all at great expense. And Ceglia still has not reimbursed Defendants any of the $77,000 in attorney's fees he owes to them under this Court's order sanctioning him for misconduct. Nothing about his prior discovery conduct suggests that he will comply with his obligations during "regular" discovery, portending a particularly burdensome and expensive process for Defendants.

811 F.2d 127, 130 (2d Cir. 1987) (district court has discretion to halt discovery pending its decision on motion to dismiss).

CONCLUSION

Defendants respectfully move this Court to stay discovery in this case and to defer setting a discovery schedule. The stay should remain in place until the Court resolves the pending motion to dismiss for fraud on the court and severe litigation misconduct. In the interests of judicial economy, Defendants also respectfully request that this motion be heard on an expedited basis, at the outset of the April 4 hearing. Ceglia should be ordered to file any brief opposing this motion on or before April 1, 2012, and Defendants should be ordered to file any reply brief on or before April 3, 2012.

Dated: New York, New York
March 26, 2012

Respectfully submitted,

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