

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

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PAUL D. CEGLIA,

Plaintiff,

v.

MARK ELLIOT ZUCKERBERG and  
FACEBOOK, INC.

Defendants.

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**PLAINTIFF'S OPPOSITION TO  
DEFENDANTS' MOTION TO  
STAY DISCOVERY PENDING A  
RULING ON THEIR  
DISPOSITIVE MOTIONS**

1:10-cv-00569-RJA

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## I. PRELIMINARY STATEMENT

Defendants seek to stay discovery in this action, notwithstanding that: (1) their Motion to Dismiss and Motion for Judgment on the Pleadings (“Motions”) raise disputed issues of material fact and include matters outside the pleadings, including expert declarations; and (2) the authenticity of the Zuckerberg-Ceglia contract must be decided by the trier of fact. This request for a stay comes only after Defendants have engaged in -- and completed -- months of broad, one-sided discovery. They do not seek to limit or define the scope of Mr. Ceglia’s long-awaited reciprocal discovery, but instead seek to prohibit Mr. Ceglia from obtaining any discovery at all. Plaintiff’s claims cannot be dismissed on a dispositive motion based on the one-sided record established by Defendants.

Defendants’ Motion to Dismiss, based on alleged fraud on the Court, is in reality a motion for summary judgment, which raises numerous disputed factual issues on which Defendants have had discovery of Plaintiff, but on which Plaintiff has had *no discovery*.<sup>1</sup> For example, Defendants’ Motion to Dismiss relies upon Mr. Zuckerberg’s Declaration claiming that he “did not sign” the Work For Hire contract -- a disputed material fact if ever there was one. *See* Def. MTD Mem., ECF No. 319, at 1-2, 17. Remarkably, Defendants request that the Court resolve this critical fact, and others, against Plaintiff without providing Plaintiff any opportunity to conduct discovery.

While Defendants repeatedly characterize their evidence as “indisputable,” Plaintiff’s

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<sup>1</sup> Although Defendants’ Rule 12(c) Motion for Judgment on the Pleadings does not rely as heavily on facts outside the pleadings as their Rule 37 Motion to Dismiss, their artful briefing structure should not be the basis for a discovery stay. Indeed, the Southwell Declaration and its exhibits were filed in support of both the Rule 37 Motion to Dismiss *and* the Rule 12(c) Motion for Judgment on the Pleadings. *See* ECF No. 324. Moreover, the Rule 12(c) Motion for Judgment on the Pleadings raises a laches and statute of limitations argument involving matters outside the pleadings. *See* Fed. R. Civ. P. 12(d); Fed. R. Civ. P. 56(d).

experts have reached different conclusions; even some of Defendants' own experts make statements that conflict with one another. At an absolute minimum, Plaintiff must be allowed discovery relevant to the many fact and expert opinion issues raised by the Motions. Moreover, considerations of both party and judicial efficiency weigh strongly in favor of permitting Plaintiff full discovery, as the matters raised in Defendants' Motions are equivalent in scope to those that would be relevant to discovery on the merits.

## II. FACTS

### A. Defendants' Motion To Dismiss Raises Disputed Issues of Fact Outside the Pleadings

Defendants' Motion to Dismiss raises numerous issues of material fact. The Motion to Dismiss is predicated on Mark Zuckerberg's June 1, 2011, Declaration in which he asserts "I did not sign" the Work For Hire Contract. *See* Zuckerberg Declaration, ECF No. 46; Def. MTD Mem. at 1-2. Indeed, the Zuckerberg Declaration is the first piece of evidence Defendants cite in their Motion to Dismiss. *See* Def. MTD Mem. at 2. This action turns on the veracity of that statement.

The Motion to Dismiss raises numerous other material fact issues, many of which can only be resolved by obtaining evidence in Defendants' possession, custody, or control, including, but not limited to:

- The location, condition and terms of Zuckerberg's copy of the contract between the parties;
- Whether Defendants' expert opinions are sufficient to satisfy the *Daubert* standard;
- When Zuckerberg conceived of Facebook;
- Whether the contract involved any work for Facebook, i.e., whether work for StreetFax was used for both websites;
- When Facebook went live and how (and by whom) the website was viewed

during its development;

- What caused the contract to appear aged or degraded -- whether mishandling during testing, “baking,” or something else;
- What caused the alleged “clip marks” in the contract; and
- The authenticity of the emails that have been cited and quoted in the course of this litigation, including why Mr. Ceglia and Mr. Zuckerberg have differing email records, and discovery of the records and record retention practices of Harvard and Mr. Zuckerberg.

Defendants’ Motion to Dismiss raises critical expert issues as well. Defendants rely on *six* separate expert reports in support of their Motion to Dismiss. Plaintiff is entitled to discovery of those experts. *See* Fed. R. Civ. P. 26(a)(2). Likewise, Plaintiff is entitled to challenge their qualifications, methodology, conclusions, and overall admissibility of their testimony. *See* Fed. R. Evid. 702.

The Court previously suggested that resolution of “duelling expert” testimony would be a question for the jury. 6/30/11 Hr’g Transc. at 31 (“COURT: So what I’m getting at is, if it turns out that the plaintiff’s experts, after concomitant testing, using the same protocols, come to a completely different conclusion, even under inherent power, which is the first time I’ve heard that that’s your strategy here procedurally, how does the case terminate? The case seems to me to go forward to jury trial.”). Defendants responded that they expected that all the experts would agree the contract was a fraud, *id.*; but that is simply not the case.

For example, one of Defendants’ experts, Gerald LaPorte, asserts that some ink sampled from the Work For Hire contract is “less than two years old,” Southwell Decl. Ex. B at 15 (“LaPorte Report”), while another of Defendants’ experts disputes that conclusion, Southwell Decl. Ex. D at 8 (“Lyter Report”); *see also* § II.B. The experts address highly-technical issues using a variety of scientific procedures, which Plaintiff has a right to test. For example, Mr. LaPorte relies on a testing methodology that has never survived a *Daubert* challenge in any

federal or state court, and which government agencies (including the one for which Mr. LaPorte works) do not use because of its proven *unreliability*.

Additional fact issues raised by the expert reports include questions regarding the ink, handwriting, toner, paper type, indentations, and staple holes.

**B. The Motion to Dismiss Relies on Conclusions Contradicted by Plaintiff's Experts**

Defendants' Motion to Stay Discovery assumes that the Court will grant their Motion to Dismiss, such that it would be unfair and unnecessary to subject them to discovery. Given that Defendants have taken months to prepare the Motion to Dismiss, which involves hundreds of pages of submissions prepared after many months of one-sided discovery, it is not realistic to expect Plaintiff to respond to its merits (or lack thereof) without discovery and on the expedited schedule established for the Motion to Stay. Nonetheless, it should be noted that Plaintiff's experts' testimony already in the record supports the authenticity of the Work for Hire Contract, underscoring the disputed facts and expert testimony at issue in this case. Accordingly, Defendants' summary judgment motion masquerading as a motion to dismiss must be denied.

For example, Larry Stewart, a "Chief Forensic Scientist," provided "preliminary observations and findings" following his "physical examination of the Facebook Contract." 11/3/11 Declaration of Larry E. Stewart in Support of Motion for Sanctions Against Defendants for Spoliation Of Evidence, ECF No. 209, ¶¶ 3, 11, 30. Mr. Stewart "observed that the two pages are both 8 ½" X 11", non-watermarked, "bond-type" paper." *Id.* at ¶ 31. He "found that the two pages were consistent in coloration and surface texture." *Id.* at ¶ 32. He "conducted a chemical analysis of the toner found on the pages of the Facebook Contract," *id.* at ¶ 54, and "[p]reliminary test results indicate[d] that the toner found on page 1 matches that found on page 2," *id.* at ¶ 55, and was "consistent with toner," *id.* at ¶ 56 from printers that were manufactured



between 2000 and 2005, *id.* at ¶¶ 58, 59.

Jerry Grant a “Certified AccessData Forensic Examiner” examined the floppy disks containing the emails exchanged between Plaintiff and Defendant in 2003-2004 “for [various] forensically relevant items” and found no evidence of fraud. 11/16/11 Declaration of Jerry Grant (“Grant Decl.”), ECF No. 226, ¶ 11.

James A. Blanco, a “Forensic Document Examiner,” provided “preliminary filings . . . based upon [his] examinations and analysis of the original Facebook Contract.” 10/31/11 Declaration Of James A. Blanco In Support Of Motion For Sanctions Against Defendants For Spoliation Of Evidence, ECF No. 194, ¶¶ 2, 21. Mr. Blanco “confirmed . . . that the signature on page two of the Facebook Contract is Mr. Zuckerberg’s,” *id.* at ¶ 21(a), that the “staple holes on both pages align demonstrating that these two pages of the Facebook Contract have only been stapled one time wherein they were actually stapled together,” *id.* at ¶ 21(b), “that page one was over the top of page two at the time that the handwritten interlineation was made on page one,” ¶ 21(c), and that “both pages of the Facebook Contract and each page measured (‘micked’) at .011 thousands,” *id.* at ¶ 21(d).

### **C. The Court Previously Noted that Plaintiff Would Be Entitled to Discovery**

The Court has previously indicated that Plaintiff would be entitled to discovery. Indeed, in response to Defendants’ assertion that Plaintiff is not entitled to discovery to respond to a motion to dismiss, the Court asked for “binding Second Circuit authority to that effect.” 12/13/11 Hr’g Transc. at 193. Defendants have offered no such authority. The Court noted that “[Plaintiff] hasn’t had a chance to really confront...his accusers,” *id.* at 197, and found that “fairness considerations become to me even heightened” given this is a “substantial case,” *id.* at 202. Likewise, the Court noted that the authenticity of the contract will be a jury issue. *See* 12/16/11 Order, ECF No. 272, at ¶ 6 (“In anticipation of Defendants’ stated intention to file a

motion to dismiss, based on Defendants' position that the alleged contract at issue is fraudulent, the court requests that the parties consider the effect, if any, of the second sentence of Fed. R. Evid. 1008, on any such motion."); *see also* 6/30/11 Hr'g Transc. at 31 ("COURT: So what I'm getting at is, if it turns out that the plaintiff's experts, after concomitant testing, using the same protocols, come to a completely different conclusion, even under inherent power, which is the first time I've heard that that's your strategy here procedurally, how does the case terminate? The case seems to me to go forward to jury trial.").

### **III. ARGUMENT**

Defendants argue that the Court should stay discovery because: (1) some cases hold that a pending motion to dismiss warrants a discovery stay (Def. Mem. at 5-9); (2) any discovery sought by Plaintiff would purportedly be unduly burdensome, even though Plaintiff has not yet propounded any requests (Def. Mem. at 9-10); and (3) a discovery stay will purportedly cause no prejudice to Plaintiff. (Def. Mem. at 10-11). None of those arguments withstands scrutiny.

#### **A. Plaintiff Is Entitled to Discovery Necessary to Respond to Defendants' Motion to Dismiss**

When a Rule 12 motion relies on facts outside the four corners of the complaint, discovery must be provided to both sides. Specifically, Rule 12(d) provides that where a party supports a motion to dismiss with matters "outside the pleadings," "the motion must be treated as one for summary judgment," and "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d). Likewise, Rule 56(d) provides that on a motion for summary judgment, the non-moving party may be permitted time to take discovery to respond to the motion. Fed. R. Civ. P. 56(d).

Although Defendants style their Motion to Dismiss as being based on Rule 37 (which governs a failure to obey a discovery order, Fed. R. Civ. P. 37 – and Mr. Ceglia has complied

here) and the Court's inherent authority to sanction parties for misconduct (which, while broad, should not be the basis for a ruling when a "particular rule directly applies," *Southern New England Telephone Co. v. Global Naps Inc.*, 624 F.3d 123, 145 n.5 (2d Cir. 2010)), this structure does not justify excluding Mr. Ceglia from the discovery process. Defendants' "fraud on the court" argument is premised on the Court accepting Defendants' version of the facts, which Plaintiff vigorously disputes. Their Motion to Dismiss is essentially a motion for summary judgment that raises genuine issues of material fact and relies on an extensive factual record that extends beyond the four corners of the pleading. Accordingly, Mr. Ceglia should be permitted discovery before responding.

Numerous cases hold that a party may not be denied the discovery necessary to defend against a dispositive motion based on matters outside the pleadings. *See e.g., Novick v. Metropolitan Life Ins. Co.*, 764 F. Supp. 2d. 653, 655 (S.D.N.Y. 2011) (finding, on a motion to dismiss, "at the very least, a question of fact is raised warranting discovery."); *237 Park Investors LLC v. Royal and Son Alliance*, 03-cv-63024, 2004 WL 385067, at \*3 (S.D.N.Y. March 1, 2004) (the "arguments go to the merits of plaintiffs' action, which would be more properly evaluated in a motion for summary judgment . . . The text of Rule 12(b) permits motions to dismiss to be converted to motions for summary judgment, but since questions of fact appear to exist at this early stage, and discovery has not even commenced in this action, it would be futile to consider such a conversion in this case."); *Paymaster Corp. v. American Bankers Ins. Co. of Florida*, 91 F.3d 154, 1996 WL 368753, at \*3 (9th Cir. 1996) ("The questions of fraud raised by Paymaster are: 1) Did two lawyers lie to Judge Wilson on a material question of fact, 2) did the judge rely on those lies, and 3) did such reliance produce a fraud upon the court? Judge Marshall concluded that no material questions of fact remained

before the court, and granted summary judgment. . . On this record, however, summary judgment was not appropriate. Some trial judge must get the parties and their lawyers into court, gently knock some heads together, let the lawyers complete whatever discovery is necessary, and try any unresolved fact questions in the traditional manner.”).

On December 13, 2011, this Court warned Defendants that a continued delay in filing their motion to dismiss would lead the Court to advance the litigation and open the door for discovery: “[I]f I don’t see any motion somewhere along the way here, I -- I will feel obliged to schedule the Rule 16, get the case on track.” 12/13/11 Hr’g Transc. at 199. Two months later, on February 16, 2012, Defendants still had not filed their motion to dismiss and the Court issued an order scheduling the Rule 16 conference. Defendants’ Motions were ultimately filed on March 26, 2012, less than 10 days before the Rule 16 conference was scheduled.

Defendants filed their Motion to Dismiss after 9 months of one-sided discovery, waiting until after a meet-and-confer regarding Plaintiff’s long-awaited discovery, and less than 10 days prior to the discovery conference that would set a schedule for mutual, reciprocal discovery. Notably, their Motions rely on analyses of the contract and Plaintiffs’ computers, both of which they have had access to since July 2011. In fact, their Motions do not cite any discovery obtained from Mr. Ceglia since August or September of 2011. The Court will recall Defendants’ motions to compel relating to Mr. Ceglia’s various webmail accounts. Defendants’ Motion to Dismiss, however, makes no meaningful use of any of that material, much of it in their possession long before this Court set a date for a discovery conference.

In *Inland American (LIP) Sub, LLC, v. Lauth*, No. 09-00893, 2010 WL 670546 (S.D. Ind. Feb. 19, 2010), the court addressed an analogous situation. In *Inland*, the defendants moved for a partial stay of discovery pending resolution of their motion for partial summary judgment and

their motion for judgment on the pleadings. The parties had previously agreed to extend defendants' deadlines to respond to discovery, but rather than responding on the agreed-upon date, defendants moved to stay. The court stated:

Defendant's request for a stay of discovery smacks of the type of gamesmanship that has no place in litigation in federal court. . . . A request to extend time to respond to discovery implicitly indicates to opposing counsel that a response will, in fact, be forthcoming. Here, however, *Defendants essentially strung Plaintiff along* with their requests for an extension of time. If Defendants had no intention of responding to discovery about Counts III through VII, Defendants should have advised Plaintiff earlier than the filing of the Motion to Stay on the date the discovery responses were due. Had they done so, Plaintiff could have requested a discovery conference with the Magistrate Judge to bring the issue to a head in a more timely way. Instead, by waiting until the last possible second, *Defendants have simply delayed resolution of the discovery dispute, in effect granting themselves a mini-stay* . . .

*Id.* at \*2 (emphasis added).

Like Defendants here, the defendants in *Inland* sought a “one-sided discovery stay.” In denying the motion for a stay, the court noted that “Defendants want to be able to conduct discovery on their counterclaims, while denying Plaintiff the ability to conduct discovery on its claims,” which “would likely prejudice or tactically disadvantage Plaintiff.” *Id.* at \*2. Moreover, the defendants in *Inland*, like here, “ma[de] some reference to materials outside the pleadings in their brief” and the court held that “[w]hether the rule [transforming a motion to summary judgment] is directly applicable or not, the *policy affording parties a reasonable opportunity to present all pertinent [evidence] seems particularly appropriate here.*” *Id.* (emphasis added).

In *Steuben Foods, Inc. v. Country Gourmet Foods, LLC* (cited Def. Mem. at 4-5), this court *denied* a motion to stay discovery pending resolution of a motion for summary judgment, holding that “in order to decide Defendant’s motion, it is necessary for the court to evaluate the merits of Defendant’s summary judgment motion.” *Steuben Foods, Inc. v. Country Gourmet*

*Foods, LLC*, No. 08-561, 2009 U.S. Dist. LEXIS 91219, at \*9 (W.D.N.Y. Sept. 30, 2009) (Foschio, J.). Here, the Court cannot consider the merits of Defendants' Motions without affording Plaintiff the requisite discovery to respond to those Motions. In *Steuben*, the court also found that certain "fact-intensive issues" caused "Plaintiff's need for further discovery . . . [to] outweigh[] any serious prejudice to [defendant] when balanced against Plaintiff's interest in pursuing such evidence." *Id.* at \*12-13.

Defendants attempt to distinguish *Steuben* on the basis that the "available evidence" in *Steuben* "conflicted," while the evidence here is "objective and indisputable" and "overwhelming." Def. Mem at 9, n.8. But this ignores the conflicts among the duelling expert reports that have arisen in this litigation even before Plaintiff has been provided with any discovery. The Court cannot determine whether the evidence in this case is "objective, indisputable and scientific" on this motion and the Motion to Dismiss before Plaintiff even begins discovery. See *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 430-431 (S.D.N.Y. 2010) (citing *De Lage Landen Fin. Servs. v. Rasa Floors, LP*, Civ. No. 08-0533, 2009 WL 884114, at \*8-\*9 (E.D. Pa. Apr. 1, 2009) (applying New York law) ("[C]onflicting evidence" requires the "benefit of discovery and development of the factual record to aid in construing the contracts and discerning the parties' intent.")) (other citations omitted).

In determining whether a stay is appropriate, the underlying Motions need be more than non-frivolous; the Motions must be ripe for decision without additional discovery and it must be certain that the Motions will prevail. As described by one court:

[T]he [court] must take a "peek" at the merits in order to assess the validity of the stay of discovery motion. Moreover, merely a colorable defense usually will not qualify to stay discovery. Generally, *there must be no question in the undersigned's mind that the dispositive motion will prevail, and that therefore, discovery is a waste of effort.* Absent extraordinary circumstances . . . progress in a litigation should not be

delayed simply because a non-frivolous motion has been filed. Second, *the court must determine whether the pending dispositive motion can be decided absent additional discovery. . . . [I]f either prong of this test is negative, discovery proceeds.*

*California Sportfishing Protection Alliance v. Chico Scrap Metal, Inc.*, No. 10-1207, 2011 WL 130228, at \*3 (E.D. Cal. Jan. 14, 2011): (emphasis added). Defendants' Motions present a myriad of fact questions for which discovery is required, many of which have been contradicted by Plaintiff's experts in their filed declarations, which pre-date the Motion to Dismiss. There is no certainty that Defendants' motion will prevail, such that discovery would be futile.

Defendants' argument that Plaintiff would not be prejudiced by a discovery stay barely warrants consideration. Plaintiff would suffer the ultimate prejudice of being denied the discovery he needs to address Defendants' arguments -- arguments that are based on the one-sided discovery Plaintiff produced to Defendants. *See e.g., Pendergest-Holt v. Certain Underwriters at Lloyds of London and Arch Specialty Insurance Co.*, No. 09-3712, 2011 WL 3199355, at \*3 (S.D. Tex. Aug. 11, 2010) ("The stay of discovery Plaintiffs seek is one-sided and would impose an undue hardship on [defendants]. Plaintiffs seek to continue pursuing relief while depriving [defendants] of information that may be valuable to [defendants'] defense.").

#### **B. Defendants Have Not Established "Good Cause" For a Stay**

Defendants have not – and indeed cannot – demonstrate that there is "good cause" to stay discovery. *See* Fed. R. Civ. P. 26(c) (providing that courts may limit discovery for "good cause"). None of the cases cited by Defendant involved a situation where the pending motion that was the basis of the discovery stay request presented factual disputes that required discovery to address, as is the case here. *See Vargas v. Deltz*, 901 F. Supp. 1572, 1582 (S.D. Fla. 1995) (cited at Def. Mem. at 6) (involving sanctions based on "conclusive and *unrefuted* evidence" of the plaintiff's misconduct); *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94-2120,

1996 WL 101277, \*3 (S.D.N.Y. Mar. 7, 1996) (cited at Def. Mem. at 5) (partially staying discovery related to a limited claim “that may be dismissed as *legally* insufficient” and where the plaintiffs’ discovery requests were “quite extensive”). None of this authority addresses whether to stay discovery when a dispositive motion cites evidence, derived from one-sided discovery, that goes well beyond the four corners of the pleadings.

Likewise, while defendants repeatedly claim that they would be severely prejudiced by having to engage in discovery now, they have made no competent evidentiary showing – not even a single affidavit – of any such harm. *See* Fed. R. Civ. P. 26(b)(2)(C); *see also Burns v. Imagine Films Entertainment, Inc.*, 164 F.R.D. 589, 593 (W.D.N.Y. 1996) (holding that objections to discovery must be “sufficiently specific to allow the court to ascertain the claimed objectionable character” and the must be “supported by detailed explanation of why the [discovery is] objectionable.”). Indeed, Defendants cannot make such a showing, given that Plaintiff has not yet propounded any discovery requests.

Defendants’ counsel complain, without support, of “prolonged, expensive discovery and litigation,” citing comments by Plaintiff’s counsel indicating they are preparing for discovery and a trial. Def. Mem. at 3. Moreover, Defendants inaccurately state that Plaintiff proposes a 16-month discovery period, Def. Mem. at 4, conveniently forgetting that Plaintiff just submitted a proposed case management order to the Court requesting only 12 months for fact discovery.

Defendants’ failure to offer competent evidence of discovery burden is not surprising. The origin of Facebook -- the core issue here -- has already been aggressively litigated in at least two other actions. *See ConnectU, Inc. v. Facebook, Inc., et al.*, No. 07-10593 (D. Mass.) and *Facebook Inc., et al. v. Saverin*, No. 105-cv-039867 (Cal. Super. Ct.). Upon information and belief, Defendants have already produced in those actions related discovery regarding



Facebook's ownership.

Notably, the issues raised by the Motion to Dismiss overlap with the issues relevant to the merits of the claims and defenses and correspond to the broad and full discovery that Plaintiff has provided Defendants. As such, Defendants must produce to Plaintiff discovery that is reciprocal in scope. As the Court undoubtedly knows far too well, resolving disputes regarding the scope of discovery can be burdensome and time-consuming. Considerations of economy and efficiency thus require that Defendants' Motion to Dismiss be denied as premature or held in abeyance while the parties proceed with fact discovery.

**C. Defendants' Laches and Statute of Limitations Arguments Do Not Provide "Good Cause" For a Stay**

Defendants claim that courts have "repeatedly stayed discovery" pending dispositive motions raising statute of limitations and laches defenses. As a threshold matter, Defendants' laches defense fails because "[l]aches . . . does not serve to bar claims for damages." *Morris v. Zimmer*, No. 10-cv-4146, 2011 WL 5533339, at \*8 (S.D.N.Y. Nov. 10, 2011) (citing *Fade v. Pugliani/Fade*, 779 N.Y.S.2d 568, 570 (2d Dep't 2004) ("[L]aches is not applicable to an action at law, and thus may not bar . . . causes of action alleging breach of contract and fraud to the extent they seek money damages.")).

Even if laches was a viable defense, it must be clear on the face of the pleadings. *See Janese v. Fay*, 751 F. Supp. 2d 469, 477 (W.D.N.Y. 2010) ("[D]efendant bears the burden of proof . . . [W]hile a court may grant a motion to dismiss on statute of limitations grounds if the complaint, on its face, 'clearly shows the claim is out of time,' . . . survival of a Rule 12(b)(6) motion 'requires only allegations consistent with a claim that would not be time-barred.'"). Here, the pleadings do not address the key considerations necessary to resolve Defendants' timeliness arguments.

Here, the statutes of limitations on Plaintiff's claims were triggered based on facts not addressed in the pleadings. What event legally triggered Zuckerberg's duty to act under the contract? When did that event occur? Are Zuckerberg and Facebook engaged in a continuing breach defeating any statute of limitations argument? Was Ceglia properly notified of Zuckerberg's incorporation that triggered his duty to deliver Ceglia's 50% ownership in Facebook under the contract and started Ceglia's statute of limitations clock ticking? When did Zuckerberg distribute ownership shares to other early-stage investors like Mr. Ceglia? The pleadings do not resolve these questions.<sup>2</sup>

In addition, under New York law, "a defendant may be estopped to plead the Statute of Limitations where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action." *The Golden Budha Corp. v. Canadian Land Co. of Am.*, 931 F.2d 196, 200 (2d Cir. 1991) (quoting *Smcuski v. Saeli*, 44 N.Y.2d 442, 448-49 (1978)). In *Golden Budha*, the court found it "improper to dispose of the equitable defenses to the statute of limitation claim when there remained a factual issue as to just how long the critical information had been concealed." *Id.* at 201; accord *Smcuski*, 44 N.Y.2d at 451 ("It is not possible or appropriate, however, in the present motion addressed to the pleading, presenting us as it must with only a skeletal record, to determine whether [the equitable defense to the statute of limitations applies]."). Here, material fact questions remain regarding whether and how long Mr. Zuckerberg concealed information from Mr. Ceglia. The Amended Complaint alleges that Mr. Zuckerberg sent Mr. Ceglia an April 6, 2004, email stating that the Facebook was going nowhere and he was thinking about taking down the server. See Amended Complaint ¶ 51. Also along

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<sup>2</sup> In support of their statute of limitations and laches arguments, Defendants cite *Richards v. North Shore Long Island Jewish Health System*, No. 10-4544, 2011 WL 4407518 (E.D.N.Y. Sept. 21, 2011). *Richards*, however, involves a statutorily explicit start date to the statute of limitations clock.

these lines, on July 22, 2004, Mr. Zuckerberg sent Mr. Ceglia an email stating that he had no time to work on their site and that he wanted to return Ceglia's money. *See id.* at ¶ 55.

Defendants also argue that Facebook was organized as an LLC on April 13, 2004. Def. MTD Mem. at 6–11. But Defendants have not pointed to any facts that should have compelled Mr. Ceglia to search through Florida's public records to see if Mr. Zuckerberg organized a company there. New York does not impute knowledge of public records to a party unless there are some specific facts that suggest that that party should examine those records. *See St. Johns's Univ. v. Bolton*, 757 F. Supp. 2d 144, 192 (E.D.N.Y. 2010) (citing cases). Indeed, there is no "continuing duty to monitor a public record in the absence of any information which should trigger the person's interest in the record, on the off-chance that it might reveal evidence that he has been defrauded." *Id.* Absent these specific facts to monitor various public records, the filing of documents with a governmental body does not impute knowledge to a party and thus does not trigger the statute-of-limitations clock. *Id.* at 190–94.

#### IV. CONCLUSION

Defendants have filed two dispositive motions that present a myriad of disputed fact issues regarding elements that go to the core of this case. They have conducted broad, one-sided discovery over the course of months, consulted numerous experts, and have offered the Court an extensive record of facts and expert reports that go far beyond the scope of the pleadings. Defendants now hope to require that Plaintiff respond to their dispositive Motions – which cite an undoubtedly biased record as support – without obtaining any discovery at all.<sup>3</sup> Neither the

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<sup>3</sup> Moreover, discovery relevant to the Motions is so intertwined with general merits discovery that considerations of efficiency weigh heavily in favor of not bifurcating discovery into pre- and post-motion-to-dismiss phase. Such impractical bifurcation would impose an unnecessary burden on both the parties and the Court, which would be repeatedly called upon to determine what discovery belonged in which discovery phase.

law nor the facts support this inequitable request.

For these reasons, Plaintiff respectfully requests that the court deny Defendants' motion for a stay of discovery.

Dated: April 1, 2012

Respectfully submitted,

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