UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA,

Plaintiff,

v. 1:10-cv-00569-RJA

MARK ELLIOT ZUCKERBERG and
FACEBOOK, INC.,

Defendants.

PLAINTIFF'S REPLY IN SUPPORT OF DISCOVERY ON DEFENDANTS' RULE 12(c) MOTION

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Plaintiff Paul D. Ceglia respectfully submits this Reply in Support of Discovery on Defendants' Rule 12(c) Motion [Dkt. No. 349]. *See* Plaintiff's Memorandum in Support of Discovery on Defendants' Rule 12(c) Motion [Dkt. No. 349]; *see also* Local Rule 7(b)(2).

I. INTRODUCTION

Defendants argue that Plaintiff's claims, initially filed on June 30, 2010, are time-barred because the limitations period purportedly began to run when Mark Zuckerberg created a shell company called Thefacebook LLC, having nothing to do with the contract at issue, in April 2004. *See* Def. 12(c) MOL at 8-13 [Dkt. No. 321]. Notably, this purportedly key fact is omitted from Defendants' Answer, which instead describes that *Facebook, Inc.* and *Thefacebook, Inc.* were formed in July 2004, such that *on the face of the pleadings*, Plaintiff's claims are timely. *See* Answer at ¶¶ 4, 57 [Dkt. No. 40]. Defendants contend that the Court may take judicial notice of the date that Thefacebook LLC was formed, such that this fact is not "outside the pleadings" and thus does not warrant discovery. *See* Defendants' Opposition to Plaintiff's Memorandum in Support of Discovery on Defendants' Rule 12(c) Motion at 3 ("Def. Opp.") [Dkt. No. 353].

This argument fails because the formation of Thefacebook LLC raises numerous factual issues requiring discovery. On a Rule 12(c) motion, the court must construe "the allegations in the complaint . . . in the light most favorable to [Plaintiff] and draw[ing] all reasonable inferences in his favor . . . ." *Jackler v. Byrne*, 658 F.3d 225, 229 (2d Cir. 2011).[1]

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[1] Defendants also complain that Plaintiff's request for discovery is procedurally improper because "the proper time to raise this argument is when he files his opposition to Defendants' motion." Def. Opp. at 2. As Defendants well know, Plaintiff submitted argument on this issue pursuant to the Court's Order [Dkt. No. 348] and after a hearing on Defendants' Motion to Stay Discovery Pending a Ruling on Defendants' Dispositive Motions [Dkt. Nos. 322-23]. As such, arguments relating to the timing and scope of discovery are properly before the Court at this juncture.

II. ARGUMENT

A. The Documents Defendants Submit Regarding the Formation of Thefacebook LLC Raise Fact Issues Necessitating Discovery

Defendants contend that the formation of an entity called Thefacebook LLC in April 2004 is not a fact outside the pleadings because the Court may take judicial notice of the entity's articles of organization and other corporate formation documents Defendants submitted with their Rule 12(c) Motion. *See* Exhibits Q-R to the Declaration of Alexander H. Southwell [Dkt. No. 332].

As an initial point of clarification, nothing in the Ceglia-Zuckerberg Contract conditions Plaintiff's rights on the formation of any Facebook-related entity. Rather, the Ceglia-Zuckerberg Contract granted Plaintiff "a half interest (50%) in the software, programming language and business interests *derived from the expansion of [Facebook] to a larger audience*." Amended Complaint ¶ 23 (emphasis added). By Defendants' own admission, the number of Facebook's users has increased dramatically every year since its creation, triggering continuing obligations to Plaintiff well within the limitations period:

- February 2004: Thefacebook.com launches
- December 2004: 1 million active users
- December 2005: 6 million active users
- December 2006: 12 million active users
- December 2007: 58 million active users
- December 2008: 145 million active users
- December 2009: 360 million active users
- June 2010: 482 million active users

See Def. MTD MOL at 10 [Dkt. No. 319] (citing Facebook, Inc., Registration Statement 46-47 (Am. No. 2 to Form S-1) (Mar. 7, 2012)).

Thus, the documents that Defendants submit regarding the formation of Thefacebook LLC hardly provide Defendants a *prima facie* statute of limitations defense. However, because Defendants argue that they are somehow dispositive, they should not be considered in isolation.

Defendants have submitted no information regarding what property, if any, Thefacebook LLC owned, and at least one source describes that the entity was "more or less an empty shell." DAVID KIRKPATRICK, THE FACEBOOK EFFECT AT 62 (2010). Defendants do not explain how the creation of a shell corporation, having nothing to do with the Ceglia-Zuckerberg Contract, triggered the statute of limitations. Putting that aside, the documents submitted by Defendants state that Thefacebook, Inc. acquired Thefacebook LLC on October 31, 2004 and that all prior acts of Thefacebook LLC were ratified effective April 27, 2005. *See* Action By Written Consent (Ex. R to Southwell Declaration).

If the formation of Thefacebook LLC is purportedly relevant to the timeliness of Plaintiff's claims, then these subsequent activities are likely also relevant. Yet, Defendants provide no information regarding the reasons for these actions, what assets these entities held, or what revenue they generated. Moreover, a search of the public records indicates that there exists or existed several other Facebook-related entities regarding which Defendants provide no information. It appears that Defendants "cherry picked" the earliest-formed such entity without regard to whether such formation has any bearing on the allegations in this case. Without more information regarding Thefacebook LLC, such as why it was created and what assets it held, its legal significance to this case remains unknown.

Statute of limitations and laches[2] defenses that raise undeveloped fact issues beyond the pleadings are not properly resolved on a Rule 12(c) motion. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Accurate Med., P.C.*, No. 07-0051, 2007 U.S. Dist. LEXIS 74459, at *5 (E.D.N.Y. Oct. 4, 2007) ("[T]he moving defendants' argument that plaintiff's claims . . . are barred by the statute of limitations necessarily assumes facts that are beyond the pleadings and that have yet to be developed."); *Jacobs v. Baum*, No. 07-0167, 2008 U.S. Dist. LEXIS 22991, at *30-31 (N.D.N.Y Mar. 24, 2008) (rejecting statute of limitations argument at the pleading stage where "[d]efendants contend that the claim accrued when the [contract] terminated automatically," while Plaintiffs argue [that] this claim did not accrue until" they sustained injury); *State Farm Mut. Auto. Ins. Co. v. Kalika*, No. 04-4631, 2006 U.S. Dist. LEXIS 97454, at *23 (E.D.N.Y. Mar. 16, 2006) ("At this juncture, where discovery is not yet complete and where it is clear that plaintiff's unjust enrichment claim is well within the statute of limitations period, the Court finds that dismissal of these claims on the basis of laches is premature . . . ."); *see also Wagner v. Metro. Life Ins. Co*., No. 08-11284, 2011 U.S. Dist. LEXIS 74954, at *27 (S.D.N.Y. Feb. 28, 2011) (ruling on statute of limitations and laches defenses at the summary judgment stage); *Cohen v. Treuhold Capital Group, LLC (In re Cohen)*, 422 B.R. 350, 383 (E.D.N.Y. 2010) (ruling on laches defense at the summary judgment stage); *Sotheby's, Inc. v. Shene*, No. 04-10067, 2009 U.S. Dist. LEXIS 23596, at *11-13 (S.D.N.Y. Mar. 23, 2009) (same).

Accordingly, if the Court is to consider Defendants' argument at the pleading stage, Plaintiff must be afforded relevant discovery.

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[2] "Laches cannot be a defense to a legal action for damages if the action was commenced within the statute of limitations period." *Maxim Group LLC v. Life Partners Holdings, Inc*., 690 F. Supp. 2d 293, 310 (S.D.N.Y. 2010).

B. That the Court May Take Judicial Notice of Certain Facts Does Not Preclude Discovery Necessary to Assess Those Facts in Context

Defendants argue that if the Court takes judicial notice[3] of the formation date of Thefacebook LLC, then Defendants have not raised "matters outside the pleadings" necessitating a Rule 12(d) conversion. Def. Opp. at 5. Defendants' argument erroneously conflates the doctrine of judicial notice with Rule 12(d)'s conversion requirement. That the Court may take judicial notice of certain facts does not mean that those are the *only* facts that should be considered, and the cases cited by Defendants do not so hold.

For example, in *Staehr v. The Hartford Financial Services* (Def. Opp. at 3, 5), the district court took judicial notice of media reports, litigation, and public filings and ruled that plaintiff was on inquiry notice of his securities fraud claims such that they were time-barred. *See Staehr v. The Hartford Fin. Servs*,, 547 F.3d 406, 416-23 (2d Cir. 2008). The Second Circuit reversed, holding that while the district court was within its discretion to take judicial notice of certain publicly-available information, "the total mix of information was insufficient to rule, as a matter of law, that" those facts placed the plaintiff on inquiry notice. *Id*. at 426. The Second Circuit indicated that the district court could "revisit[] this issue at the summary judgment stage or at trial." *Id*. Here, even if the Court takes judicial notice of the formation date of Thefacebook LLC, that fact alone does not provide an adequate record on which to rule on Defendants' statute of limitations and laches defenses.

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[3] Federal Rule of Evidence 201(b) provides that judicial notice may be appropriate for a fact " that is not subject to reasonable dispute . . . because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); *see also* Advisory Committee Notes to Rule 201(b) ("With respect to judicial notice of adjudicative facts, the tradition has been one of caution in requiring that the matter be beyond reasonable controversy."). Here, the Thefacebook LLC formation documents raise more questions than they answer, and their legal significance to this case is disputed. As such, these documents should not be considered in isolation.

Defendants also cite *L-7 Designs, Inc. v. Old Navy, LLC* (Def. Opp. at 5) for the proposition that judicially-noticed facts can somehow "trump" allegations in the Amended Complaint. Yet, in *L-7 Designs*, the materials the Court considered were actually attached to the defendants' answer and counterclaims, such that resorting to judicial notice was unnecessary. *See L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011) (observing that the challenged documents were "attached to [the defendant's answer]" and were "integral" to the complaint). In contrast, Defendants do not attach to their Answer or even mention therein the purportedly dispositive fact of the formation of Thefacebook LLC, nor is this fact integral to Plaintiff's claims. *See* Answer [Dkt. No. 40].

Finally, *Holmes v. Air Line Pilots Ass'n, Int'l* (Def. Opp. at 5) is distinguishable in that there, the Court took judicial notice of a bankruptcy court's confirmation order and plan, and numerous documents relating thereto, that extinguished the plaintiffs' claims. *See Holmes v. Air Line Pilots Ass'n, Int'l*, 745 F. Supp. 2d 176, 200 (E.D.N.Y. 2010). In contrast, the formation date of Thefacebook LLC does not provide Defendants a *prima facie* defense, but merely raises additional questions of fact regarding which Defendants have provided no information.

C. Defendants' Repetition of Arguments Outside the Pleadings But Contained in Other Filings Should Be Stricken or Discovery Provided Thereon

Defendants make numerous inflammatory statements, outside the pleadings, attacking Plaintiff and his motives in bringing this lawsuit. *See* Def. 12(c) MOL at 1-2 [Dkt. No. 321]. These include arguments that Plaintiff is a "scam artist" and that this "entire lawsuit is a lie." *Id.* at 1-2.

Defendants now admit that those statements were merely rehash of arguments contained in their Motion to Dismiss [Dkt. Nos. 318-19], which is based on matters outside the pleadings. *See* Def. Opp. at 4 (acknowledging that the inflammatory statements describe purported

"evidence of fraud that Defendants presented in support of their motion to dismiss" but which "must be set aside" for purposes of Defendants' Rule 12(c) Motion).

Incorporating matters outside the pleadings contained in materials previously filed with the court will convert a Rule 12(c) motion into a motion for summary judgment. *See Macklin v. Butler*, 553 F.2d 525, 528-30 (7th Cir. 1977) (holding that district court should have converted motion to dismiss into motion for summary judgment where movant incorporated by reference matter outside the pleadings raised in an earlier filing). Accordingly, Plaintiff should be afforded discovery on these arguments or they should be stricken from Defendants' Rule 12(c) Motion.

D. Plaintiff Did Not Improperly Raise Facts Discussed in THE FACEBOOK EFFECT

Having opened the door to consideration of the formation of Thefacebook LLC, Defendants ironically complain that Plaintiff cites to THE FACEBOOK EFFECT, a book based on interviews with Defendant Zuckerberg and Facebook employees, which discusses this very topic. *See* Def. Opp. at 6.

As an initial, and perhaps obvious, clarification of Defendants' argument, Plaintiff cited this book in the context of a request for discovery. *See* Plaintiff's Memorandum in Support of Discovery on Defendants' Rule 12(c) Motion [Dkt. No. 349]. As such, Defendants' purported concern that Plaintiff is submitting matter outside the pleadings in opposition to Defendants' 12(c) Motion is unfounded. Moreover, Defendants' argument incorrectly assumes that the Court cannot take judicial notice of facts described in THE FACEBOOK EFFECT. *See Flood v. Kuhn*, 407 U.S. 258, 260-62 (1972) (taking judicial notice of various authoritative books on baseball); *Garb v. Republic of Poland*, 440 F.3d 579, 594 (2d Cir. 2006) ("We have previously taken judicial notice of 'authoritative texts,' such as a book setting forth the 'history of Lincoln Center.'").

III. CONCLUSION

For the reasons discussed herein and in Plaintiff's Memorandum in Support of Discovery on Defendants' Rule 12(c) Motion [Dkt. No. 349], Plaintiff respectfully requests that the Court issue an order providing Plaintiff discovery relevant to the matters Defendants raise outside the pleadings in their Motion for Judgment on the Pleadings [Dkt. No. 320-21].

Dated: April 25, 2012

Respectfully submitted,

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