

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

PAUL D. CEGLIA,

Plaintiff,

v.

MARK ELLIOT ZUCKERBERG and  
FACEBOOK, INC.,

Defendants.

**NOTICE OF MOTION AND  
INCORPORATED MOTION  
FOR A PARTIAL STAY  
OF THE MAGISTRATE'S  
APRIL 19, 2012 ORDER**

1:10-cv-00569-RJA

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PLEASE TAKE NOTICE that Plaintiff moves the Court for a partial stay of the Decision and Order ("Order") [Dkt. No. 357], entered on April 19, 2012, to which Plaintiff will be filing an objection pursuant to Federal Rule of Civil Procedure 72(a) on or before April 30, 2012.

PLEASE TAKE FURTHER NOTICE that, pursuant to Local Rule 7(d), Plaintiff respectfully requests expedited scheduling on this Motion so that Plaintiff may obtain a ruling on the relief requested herein prior to the expiration of the Order's April 30, 2012 deadline for producing the documents at issue.

PLEASE TAKE FURTHER NOTICE that, pursuant to Local Rule 7(a)(1), Plaintiff intends to submit a reply if this Motion is opposed.

**Request for a Partial Stay of the Order**

On April 19, 2012, Magistrate Judge Foschio issued the Order, granting in part Defendants' Fifth Motion to Compel [Dkt. No. 294], based on an *in camera* review of certain documents Plaintiff withheld from discovery on the basis of attorney-client privilege.

The Court ruled that Plaintiff must produce, by April 30, 2012, Privilege Log Item 334, in redacted form, and Privilege Log Items 348, 360, and 379 in their entirety. *See* Order at 20 (directing production within 10 days).

On or before April 30, 2012, Plaintiff will be filing an objection to the Order, as it pertains to Privilege Log Items 360 and 379, pursuant to Federal Rule of Civil Procedure 72(a). As such, Plaintiff respectfully requests a stay of the Order only as it pertains to those two documents.

Privilege Log Item 360 is an email, with two attachments, from Paul Ceglia to Jason Holmberg, an assistant to Paul Argentieri, one of Plaintiff's counsel. Magistrate Judge Foschio ruled that Privilege Log Item 360 is not privileged because Mr. Holmberg is not an attorney and the reason for his inclusion on the email is unclear. *See* Order at 8-11. Privilege Log Item 379 is a composite of numerous emails (with attachments), many of which are duplicates and are not in date order, that was forwarded by Aaron Marks, an attorney at Kasowitz, Benson, Torres & Friedman LLP, whom Plaintiff approached for representation, to attorneys at DLA Piper LLP, Plaintiff's prior counsel. Magistrate Judge Foschio ruled that, because Mr. Holmberg was included on a number of the emails, all of the emails contained in Privilege Log Item 379 must be produced. *Id.*

On April 23, 2012, Plaintiff filed a Motion for Clarification [Dkt. No. 358] of the Order as it pertained to Privilege Log Item 379. Specifically, Plaintiff urged that the inclusion of Mr. Holmberg on certain of the emails in the composite should not waive the attorney-client privilege as to those emails on which he was not included. *See* Motion for Clarification [Dkt. No. 358]. Magistrate Judge Foschio denied Plaintiff's Motion for Clarification, ruling that Privilege Log Item 379 must be produced in its entirety. *See* Decision and Order [Dkt. No. 361].

Plaintiff will file an objection to the Order, pursuant to Federal Rule of Civil Procedure 72(a), on or before April 30, 2012. Because objecting to a magistrate's order does not automatically stay the order, Plaintiff respectfully requests a stay of the Order as it pertains to Privilege Log Items 360 and 379. *See Litton Industries, Inc. v. Lehman Bros. Kuhn Loeb, Inc.*, 124 F.R.D. 75, 79 (S.D.N.Y. 1989) (“[T]he Court finds that . . . objecting to the magistrate’s orders did not stay [the] obligations under those orders.”).

“Under Rule 26(c) of the Federal Rules of Civil Procedure, a court may, in its discretion, stay discovery ‘for good cause.’ Factors relevant to a court’s determination of ‘good cause’ include: the pendency of dispositive motions, potential prejudice to the party opposing the stay, the breadth of discovery sought, and the burden that would be imposed on the parties responding to the proposed discovery.” *Ellington Credit Fund, Ltd. v. Select Portfolio Servs.*, No. 08-2437, 2009 U.S. Dist. LEXIS 7905, at \*3-4 (S.D.N.Y. Feb. 3, 2009).

If a stay is not granted, Plaintiff will be forced to produce Privilege Log Items 360 and 379, even though Plaintiff contends that they are privileged. Any such production would prejudice Plaintiff’s rights under Federal Rule of Civil Procedure 72(a), which permits Plaintiff to seek review of the Order. *See Fed. R. Civ. P. 72(a)*. Plaintiff requests a stay of the Order only as it pertains to Privilege Log Items 360 and 379; the request is not overbroad. A short partial stay of the Order will not prejudice Defendants. *See, e.g., Herbalife Int’l, Inc. v. St. Paul Fire & Marine Ins. Co.*, No. 05-0041, 2006 U.S. Dist. LEXIS 63821, \*13 (N.D. W. Va. Sept. 5, 2006) (granting limited “period of stay [to] provide this Court with the opportunity to review the record and the objections” to the magistrate judge’s ruling on potentially privileged documents); *Srebnik v. Dean*, No. 05-1086, 2006 U.S. Dist. LEXIS 28933, at \*4 (D. Colo. Apr. 19, 2006)

(granting motion to stay discovery order because “once the privilege is waived, their Objection to the Order on Motion to Compel will be rendered moot”).

Plaintiff is aware of the Court’s prior ruling that “the desire to file objections to a magistrate’s order does not, by itself, warrant a stay of that order.” Text Order [Dkt. No. 119]. Plaintiff files the instant Motion prior to filing his objection in order to give notice to the parties and the Court prior to the April 30, 2012 deadline provided in the Order. To allay any concerns that the instant Motion is premature, Plaintiff respectfully suggests that any stay could be contingent upon Plaintiff filing an objection on or before April 30, 2012.

Based on the foregoing, Plaintiff respectfully requests that the Court stay the Order [Dkt. No. 357] pending a ruling on Plaintiff’s objection thereto, which will be filed on or before April 30, 2012.

**Rule 26(c) Certification**

The undersigned certifies that Plaintiff’s counsel has conferred on the relief requested herein with Defendants’ counsel, who does not consent.

Dated: April 27, 2012

Respectfully submitted,

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