

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

PAUL D. CEGLIA,

Plaintiff,

v.

MARK ELLIOT ZUCKERBERG and
FACEBOOK, INC.,

Defendants.

**PLAINTIFF'S RESPONSE TO
DEFENDANTS' MOTION
FOR CLARIFICATION OF
THE COURT'S ORDER
REGARDING DISCOVERY
ON DEFENDANTS' RULE
12(C) MOTION**

1:10-cv-00569-RJA

PRELIMINARY STATEMENT

Defendants' Motion For Clarification of the Court's Order Regarding Discovery on Defendants' Rule 12(c) Motion ("Clarification Motion") improperly seeks not clarification but material amendment of the terms of this Court's April 30, 2012 Decision and Order ("Order"), to limit substantially the already narrow scope of discovery provided for by the Order. Defendants' Motion to Stay Discovery Pending a Ruling on Their Dispositive Motions ("Stay Motion") raised statute of limitations and laches defenses, presenting matters outside the pleadings, and this Court properly noted that Plaintiff is entitled to narrowly focused discovery regarding such matters. As discussed below, there is nothing vague about the Order that needs clarifying, and there are no grounds for further limiting the discovery granted the Plaintiff on this time bar issue.

Their clarification motion does not seek clarification of the current status of Defendants' motion. Their motion is a motion for summary judgment. Doc. No. 373. Motions for summary judgment are regularly proper motions for which courts grant full discovery. Here, the court has granted limited discovery. The Defendants' motion to clarify is a masquerade for a motion to limit discovery further. Plaintiff presumes that if the court wanted to limit discovery further, it would have so ordered.

Lacking proper support for the Clarification Motion, Defendants instead set forth a self-serving sample of hypothetical interrogatories and requests for documents as the basis for the "clarification" allegedly sought. Defendants' goal is self evident: They seek to script for the court how it should arrange and direct Plaintiff's discovery. They seek not clarification but rather to prevent Plaintiff from obtaining the narrow discovery,

already properly ordered by this Court, that is absolutely necessary to respond to Defendants' reliance on extrinsic facts and documents on their motion to dismiss this action as time barred. Finally, Defendants' position also serves to diminish this Court's analysis categorically limiting discovery.

The proposed order language that Defendants desire does not clarify anything. There is no more certainty of avoiding a conflict between the parties with Defendants' prepared language than with the court's language. One can presume that Defendants' proposed language is designed to fit into prepared arguments they have already generated to deny access to documents and refusals to answer legitimate interrogatories. Neither Plaintiff nor the court is privy to Defendants' strategy. But, the choice of words, some having no **apparent** difference in meaning from the court's own language, strike an ominous tone of a setup of the court and Plaintiff. It is a far better practice for Defendants to leave the drafting of court orders and the determination of disputed discovery questions/requests to the court.

ARGUMENT

I. The Order is Clear And Requires No Revision

Defendants' Clarification Motion argues on one hand that the provisions of the Order set "limitations [that] are evident from the face of the Court's Order and the context in which it was issued," Clarification Motion at 1, and on the other hand sets forth proposed language for the Court to substitute in its Order. Clarification Motion at 8. Throughout the Motion, Defendants accuse Plaintiff of "abusing the judicial process" and warn, with no basis whatsoever, that Plaintiff will "deliberately misconstrue the Court's April 30 Order" and will propound "vexatious and unduly burdensome discovery

requests that have nothing to do with the resolution of Defendants' dispositive motions." Clarification Motion at 1, 5-9. Such speculation about what discovery Plaintiff might propound is an obvious attempt to reargue the issues considered fully by the Court in reaching its decision and issuing its Order. Defendants cannot unilaterally narrow the scope of the Court's Order.

The court's Order granted discovery regarding the fundamental fact issues raised by Defendants' time bar motion: "(1) assuming, *arguendo*, the Work for Hire contract dated April 28, 2003 is authentic, what intellectual property rights and other ownership interests were created by the contract's language providing that Plaintiff, in exchange for helping fund Zuckerberg's development of FaceBook, would give Plaintiff "a half interest (50%) in the software, programming language and business interests derived from the expansion of that service to a larger audience," and (2) how the formation of the LLC necessarily divested Plaintiff of any and all interests in the partnership's assets, including intellectual property rights." Order at 5.

The Court's Order as worded is clear and narrowly tailored, while at the same time permitting Plaintiff an opportunity to respond to the significant issues raised by Defendants' Stay Motion that relied upon facts not alleged in the Amended Complaint and presented matters outside the pleadings.

FLORIDA LLC FORMATION AND CEGLIA'S LACK OF NOTICE

Defendants offer no case law that imputes breach knowledge to Ceglia by formation of the Florida LLC. No court has held that this LLC filing in a state in which Zuckerberg did not reside and leased no office space or equipment qualifies as legal notice to Ceglia of anything, much less repudiation of the parties' agreement. Moreover,

the public record of the LLC filing does not declare what, if any, assets were transferred to the LLC upon its formation.

Finally, the Florida, LLC was formed by Eduardo Saverin **not** either of the Defendants.

A. Intellectual Property Rights and Ownership Interests Created in the April 28, 2003 Work For Hire Contract

Discovery on this point is critical to respond to Defendants' arguments. We first have to know what they regard as the intellectual property rights that were granted to Ceglia under the agreement before analyzing what property or property rights were transferred by Zuckerberg to any subsequent person or entity.

The court's grant of discovery here is common sense that Defendants' dislike. Before a breach can be determined, Defendants must provide through discovery what rights/property they are arguing were granted to Ceglia in the agreement. Without their declaration on that point, their argued breach date cannot be verified.

B. TheFacebook, LLC's Divestment of Plaintiff's Interests

At the time of the formation of the Florida LLC, Facebook owned no hard assets of any substance. The only substantial assets that Zuckerberg **could have transferred** to that Florida LLC were intangible, intellectual property assets. Even if Zuckerberg had executed written agreements transferring **his** interest in all the intellectual property of the business into the Florida LLC, that is still not a breach event. Discovery, of course, will reveal precisely what documents Zuckerberg or others **did sign** reflecting asset transfers into the Florida LLC. For a breach to have occurred that Ceglia was deemed to have been notified of, Zuckerberg must have publicly declared that **he owned 100% of the**

business' intellectual property rights and assets and that he was transferring that 100% ownership into the Florida LLC. He could easily, without breaching the parties' agreement, transfer **his interest** in any jointly owned assets to whomever or whatever LLC he chose. Therefore, discovery is entirely appropriate regarding all such documents that reflect assets, intellectual property or otherwise, transferred by Zuckerberg into the Florida LLC.

The court's order was clear, but uncomfortable for Defendants. They continue in their obstructionist instinct against giving up any information even after this court orders it. The court appropriately captures the Defendants' argument and the correlating discovery to address those arguments in this way:

“(1) assuming, arguendo, the Work for Hire contract dated April 28, 2003 is authentic, what **intellectual property rights** and other ownership interests were created by the contract's language providing that Plaintiff, in exchange for helping fund Zuckerberg's development of FaceBook, would give Plaintiff “a half interest (50%) in the software, programming language and business interests derived from the expansion of that service to a larger audience,” and (2) how the formation of the LLC necessarily divested Plaintiff of any and all interest in the partnership's assets, **including intellectual property rights**. Depositions will not be permitted absent leave of the court.” Doc. No. 366 at 5. Emphasis added.

Plaintiff, as the court, has interpreted Defendants' statute of limitations argument in the same way. They have argued that the intellectual property that is the subject of the parties' agreement was transferred into the Florida LLC. The Florida LLC, therefore, not listing Ceglia as a member, publicly notified him of the breach of the agreement by

declaring he did **not** own what the parties' agreement promised that he did own as a result of his investment in Zuckerberg's nascent business. The Defendants' argument that the Florida LLC formation triggered the statute of limitations is inextricably linked to an argument that the LLC took possession of that which was promised to Plaintiff in the agreement. For Defendants to argue that the Florida LLC *did not* take possession of the intellectual property promised to Ceglia in the agreement, is nonsensical. If the Florida LLC did not take possession of Ceglia's promised intellectual property listed in the agreement, no breach of the agreement occurred from the formation of the Florida LLC.

Defendants have argued that their experts and attorney representations should be reflexively relied on by the court. No further discovery is needed to check their unquestionably honest and accurate representations. Defendants so treasure this duty of lawyers to be forthright to the court, Orin Snyder has issued multiple letters to Plaintiff's counsel cautioning them about their duties of honesty with the court under Rule 11.

In contrast to that, the Defendants have argued that the formation of the Florida LLC included the deposit by Zuckerberg of all intellectual property owned by him and that he owned it all at the time of the LLC's formation. That is the crux of their statute of limitations triggering argument. As noted above, if they are not arguing those events occurred, then the formation of the Florida LLC could not have been a breach by Zuckerberg and could not be a triggering event for the statute of limitations at all.

Thankfully for the court and Plaintiff, Defendants' counsel have clarified this issue in pleadings, filed in compliance with Rule 11, on behalf of these Defendants in other courts/proceedings.

In a dispute with Eduardo Saverin, a co-founder of Facebook, Facebook and Zuckerberg sued him. Zuckerberg and Facebook's Third Amended Complaint in that matter contained this statement at paragraph 10:

“10. On April 13, 2004, Saverin formed the LLC, which was organized as a limited liability company under Florida law. Zuckerberg, Moskovitz and Saverin are each listed as members and managers of the LLC in the Articles of Organization. **At no time were the intellectual property rights in the business ever assigned to the LLC. At no time did those rights ever belong to the LLC.**” Exhibit 1. Emphasis added.

In light of this statement by Defendants in the Eduardo Saverin case, the entirety of the motion to dismiss for statute of limitations violation is seen in its true light. Unless Defendants are now saying that this representation in the Saverin case is false, subjecting Defendants and perhaps their counsel to fraud allegations, it may well obviate the need for any discovery. This is only the case, of course, if Defendants continue to argue, as the court has interpreted, that the Florida LLC was accompanied by the transfer of all Facebook intellectual property rights to it.

At least to item (2) of the court's order, Defendants' admission in the Saverin case via their complaint moots discovery on that issue. It is axiomatic that the formation of the Florida, LLC did **not** divest Ceglia or anyone of anything related to intellectual property.

What the court is seeing in response to this motion to dismiss, and will see in a big way in response to Defendants' other motion to dismiss, is what the truth can do to the best defense money can buy.

Defendants have argued that the creation of the LLC in Florida in April 2004 divested Plaintiff of his ownership granted under the contract signed with Zuckerberg. The court recognized that argument in its order. “(1) assuming, arguendo, the Work for

In order to fully ascertain the timing of Plaintiff’s claims, Plaintiff is clearly entitled to discovery evidencing the formation and structure of Thefacebook, LLC. Necessarily, this discovery will include targeted requests in order for Plaintiff to properly rebut, for example, whether Thefacebook, LLC was merely a “shell corporation”; when and whether any ownership interests were transferred and to whom, and whether or not such transfer impacted Plaintiff’s interests along with the areas of inquiry in Plaintiff’s original brief on this issue which the court found persuasive. The relevance of such discovery can hardly be disputed as Defendants themselves, in arguing that Plaintiff’s claims are time-barred or barred by laches, significantly relied on such materials outside the pleadings.

Defendants’ proposed “clarifying language” (Clarification Motion at 8-9) would significantly hamper Plaintiff’s ability to rebut Defendants’ defenses as such language would deny Plaintiff access to discovery concerning “**how** the formation of the LLC necessarily divested Plaintiff of any and all interest in the partnership’s assets, including intellectual property rights.” Order at 5 (emphasis added).

As this Court correctly recognized, Plaintiff is entitled to discovery to ascertain the legal effect of the formation of Thefacebook, LLC on the rights and interests of Plaintiff as set forth in the Work for Hire contract dated April 28, 2003, and **how** the formation of Thefacebook, LLC divested Plaintiff of his interests in Thefacebook, LLC’s assets, including intellectual property rights, not merely the **effect** of such formation as

proposed by Defendants. Clarification Motion at 8. Indeed, to adequately address a number of these issues, Plaintiff requires discovery regarding what the formation of Thefacebook, LLC actually represented, how it functioned and what its assets were. In order to ascertain Plaintiff's interests in the partnership's assets, Plaintiff clearly needs to know what actual assets existed. Reducing discovery to the results thereof ("the effect" as suggested by Defendants) without context surrounding the formation of Thefacebook, LLC would foreclose Plaintiff from discovery of these critical documents. Yet again, however, Defendants make the same arguments they made prior to the entry of the Order.

The Defendants demanded swap of the phrase "were created by" for the word "under" (Doc. No. 373 fn. 1) seeks to limit discovery to the terms of the agreement itself while their argument travels outside the pleadings. Their argument so exceeded the bounds of the pleadings, this court converted their motion to a summary judgment motion. This particular language swap demand hints at a "four corners" argument related to the agreement which is clearly inapposite to the court's order.

The demanded swap in section (2) of footnote one of Doc. No. 373 previews their eventual admission that no intellectual property was ever transferred to the Florida LLC. "(2) ~~how the effect of the formation of the LLC necessarily divested Plaintiff of any and all on Plaintiff's~~ interest in the partnership's assets, including Plaintiff's intellectual property rights."

Defendants knew at the time of the filing of their motion to dismiss for statute of limitations violation that the Florida LLC received no transfer of any intellectual property assets. This proposed language change by Defendants, while seemingly subtle and non-substantive, limits discovery to the effect of the Florida LLC's formation versus how that

formation “necessarily divested Plaintiff of any and all interest...” The reason why the “necessarily divested” language is now being demanded stricken by Defendants is because they were aware at the time of their filing of the motion that the Florida LLC formation **did not** divest Ceglia nor any one else of any intellectual property rights.

The court would be right to regard all Defendants’ requested changes and suggested appropriate and inappropriate discovery requests with suspicion now that their attempt to mislead the court, yet again, has been thwarted.

CONCLUSION

The Court’s Order was clear and concise and does not require further clarification. Defendants’ Clarification Motion should be denied for the reasons set forth above.

Dated: May 16, 2012

Respectfully submitted,

s/Dean Boland

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