

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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PAUL D. CEGLIA,

Civil Action No. : 1:10-cv-00569-RJA

Plaintiff,

**FIRST MOTION TO COMPEL**

v.

MARK ELLIOT ZUCKERBERG, Individually, and  
FACEBOOK, INC.

Defendants.

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**MEMORANDUM**

Plaintiff respectfully moves this Court for an order compelling Defendants to provide information previously ordered by this court in Doc. No. 83. A list of that information is included in Exhibit A, a letter sent to Defendants on May 7, 2012. Defendants have refused to provide that information as of this writing.

This motion to compel involves two categories of information: One, the information this court ordered Defendants to provide in Doc. No. 83. Second, the information that Defendants' experts relied on in producing their reports. At the April 4, 2012 hearing, the Defendants led this court to believe that all such underlying information had been provided to Plaintiff. As is shown below, this is not the case.

**A. THE COURT'S ORDER**

The operative order related to this motion to compel is Doc. No. 83. In that

order, the court ordered Defendants to “complete the examination of the Hard-Copy Documents and Electronic Assets [and thereafter] Defendants shall provide to the Court and Plaintiff **all reports documenting the findings of that examination.**” Doc. No. 83 at 3. Emphasis added. The Defendants have not provide “all reports” as will be detailed below.

## **B. THE DATA UNDERLYING DEFENDANTS’ EXPERTS’ REPORTS**

At the most recent hearing in this matter, April 4, 2012, the court was asked if Defendants would be required to provide the following:

**[PLAINTIFF’S COUNSEL]: Do you also contemplate, your Honor, the exchange of document discovery that typically is done with expert discovery, like the documents that they based their opinions on? Because deviating from that –**

**THE COURT: That's already been revealed....**

**THE COURT: I thought it was fairly well understood that what the basis of the defendants' experts opinions were. Basically it is what it is as stated in this record, pretty definitively and under oath. Don't you think? Transcript of April 4, 2012 hearing at 203.**

The court held up the printed copies of the Defendants’ experts’ reports when saying “[b]asically it is what is stated in **this** record...under oath.” Id. Emphasis added. Defendants’ counsel, Snyder, remained silent as the court stated its belief that everything the Defendants’ experts’ had relied on had “already been revealed.” Id.

On April 4, 2012, Defendants knew their experts’ reports omitted information relied upon by their experts. While Snyder remained silent to the court’s assertion of facts he knew were inaccurate, Snyder added the following:

**MR. SNYDER: Everything they relied on we got from their**

**computers and --**

This statement by Mr. Snyder is false. Defendants' experts, including their computer experts, relied on much more than items they claimed to have obtained from Plaintiff's computers. Stroz Friedberg, of course, also remained wilfully blind to data that was available to them. (e.g. backup tapes of the Harvard email server, the so-called Parmet computers that were used by Zuckerberg for electronic communications while at Harvard). A full exploration of that apparently intentional (or incompetent) ignoring of relevant data is forthcoming from Plaintiff's experts.

The court then inquired if Plaintiff "want[ed] [some] sort of like a safety mechanism here just in case there was something that they relied on that they didn't reveal?" Id.

Plaintiff's counsel then respectfully deferred the issue until something arose that the court needed to address to which the court responded favorably. It is now indisputable that Defendants have withheld voluminous information, relied upon by their experts, that they did not reveal to the court on April 4, 2012.

In contrast, responsive to subpoenas, Defendants received from Plaintiff all native format images, scans etc from Plaintiff's experts in October of 2011. This request merely asks for the same quality and quantity of information Plaintiff has already been ordered to provide to Facebook and Zuckerberg.

**WHAT FACEBOOK AND ZUCKERBERG HAVE NOT PROVIDED AS ORDERED**

Following the hearing on April 4, 2012, Plaintiff, his experts and counsel began diligently examining the hundreds of pages of Facebook and Zuckerberg's expert reports. Along with the number of pages being examined, the sheer vagueness of some of the reporting formats further frustrated and slowed that review process. (e.g. Stroz Friedberg does not identify any of their media by owner, serial number or model number and consistently refers to media as "Ceglia media" despite it being media that Plaintiff did not own and never used, e.g. his parents' computers unplugged and unused for years by anyone before their analysis by Stroz).

On May 7, 2012 Plaintiff attempted to resolve the failure of Facebook and Zuckerberg to provide what the court's order required. See Exhibit A. Plaintiff's counsel detailed to Defendants' counsel, Orin Snyder, a list of items relied upon by Defendants' experts, but not provided to Plaintiff in discovery. *Id.*

On May 14, 2012 Orin Snyder replied that Defendants were still "considering" the matter. Exhibit B. As of this writing, it is nearly three weeks since Plaintiff's request for this information. Defendants have refused to provide the information ordered by the court and have refused to further respond to this issue requiring Plaintiff to seek court assistance.

In addition to the items detailed in Exhibit A, there are additional documents and other data Facebook and Zuckerberg are withholding despite this court's clear orders:

Defendant's witness Tytell and the other Facebook experts took hundreds of

photographs, scans and other images (with various equipment, e.g. VSC 400 document imaging machine). As required by the standards of experts in their field they would have created case notes, produced emails and corresponded at length regarding this case with each other and counsel. The court's order in Doc. No. 83 includes verbal reports as well as written reports.

Specifically, Plaintiff has not received:

1. Any of the defendant's experts' laboratory notes (handwritten or otherwise);  
or
2. Electronic scans of any document they examined; or
3. Digital Images captured with a digital camera; or
4. Images stored using laboratory instrumentation; or
5. Instrument printouts; or
6. Instrument calibration information (which affects the quality, color and clarity of scans among other things); or
7. Maintenance records for the devices they used to generate images; or
8. All metadata pertaining to any of the electronic data pursuant to this matter.

All of these matters, consistent with this court's prior orders binding Plaintiff, should be produced in native format for Plaintiff's experts' examination.

This information was relied upon by Defendants' experts and was previously ordered by this court to be provided. Doc. No. 83. Defendants have persisted in their defiance of the court's order by permitting the court to believe something it

knew was not true - that all information relied upon by Defendants' experts had been provided to Plaintiff.

The list of information Defendants refuse to produce cited above provide a window into the deep and troubling issues with Defendants' experts' reports and conclusions. The failure initially, and the refusal currently, of Defendants to provide this information is designed to further obscure their experts' spurious claims and conclusions. They are hiding results of tests we know they performed based upon the video evidence from Defendants' experts' July 2011 evaluation of the authentic Facebook Contract. They are declining to reveal the results of tests their experts should have performed if they were competent (e.g. handwriting analysis). The one-time avalanche has melted into nothing and Defendants do not want that known.

### **FACEBOOK AND ZUCKERBERG'S MANIPULATION OF THE SPIRIT OF THE COURT'S ORDER**

The court's order, Doc. No. 83, was clear. The order did not permit Defendants to withhold findings of examinations or reports that were unfavorable to their clients. There is no conclusion to draw from Defendants failure to provide the "all reports" of the results of their examinations or findings except to shield unfavorable information. This shielding is expected as any testing of the authentic Facebook Contract by Defendants' experts was bound to yield unfavorable results for them. Doc. No. 83 also did not say that Facebook and Zuckerberg only had to release **final** versions of their expert reports. Defendants obtained the order in Doc.

No. 83 promising they could overwhelmingly prove a fraud by agreement of both party's experts. They have failed to fulfill that promise already. But, that promise and the gravity of the pursuit of a dismissal at this stage, mandates that they provide "all reports" as the court ordered instead of merely the seemingly favorable<sup>1</sup> reports they chose to submit.

As Exhibit A reveals, there were numerous examinations conducted by Defendants' experts for which **no** findings were provided by Defendants. For example, the video of Defendants' examination of the hard copy documents reveals several ESDA tests being repeatedly performed by Defendants' experts. An ESDA test detects indentations in paper for matching to writing that may have occurred while the examined piece of paper was underneath the paper being written on. ESDA is an objective test resulting from the operation of a machine. It does not call for any subjective analysis. None of Defendants "findings of that examination" were provided. No images of that testing were provided. Discovery at any stage, but particularly at a stage where a potentially case-ending motion is pending, should not be a game of *Catch Me If You Can*.

At least two of Defendants' experts are qualified to examine handwriting to detect authentic or forged writing. Page one of the Facebook Contract has handwriting and the initials of both parties. Plaintiff and Zuckerberg's signatures

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<sup>1</sup> Plaintiff's document examination and computer forensics experts have generated an overwhelming amount of information completely refuting all the conclusions in Defendants' experts' reports. Those reports are forthcoming to the court and Defendants consistent with this Court's order in response to this motion.

appear on page two of the Facebook Contract.

Defendants have either conducted handwriting analysis testing on the two pages of the document or they have not. If they have performed such tests, they have failed to provide the “findings of that examination” as ordered by this Court. See Doc. No. 83. If they have not performed such tests, that borders on wilful blindness to evidence that is obviously harmful to Facebook and Zuckerberg’s defense. The court can easily infer that these tests and results from Defendants’ experts were concealed for a reason.

### **CONCLUSION**

The discovery related relief Plaintiff seeks here is clearly within the court’s order. It is within the court’s understanding of what Defendants had already provided. Plaintiff seeks merely the same information that Defendants sought and received via court order from Plaintiff’s experts. As Exhibit A also notes, Plaintiff is seeking access to everything this court ordered in Doc. No. 83 - “**all reports documenting the findings of [Defendants’ experts’] examination[s].**” Doc. No. 83. Emphasis added.

Respectfully submitted,

/s/Dean Boland

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